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Citizens United: Special Interest Spending in the 2010 Mid-Term Election

"Judges are like umpires. Umpires don't make the rules; they apply them. They make sure everybody plays by the rules. But it is a limited role." - Chief Justice John Roberts, speaking to the Senate Judiciary Committee in 2005.

What started as a 90 minute documentary about Presidential candidate, Hilary Clinton, ended in the Supreme Court with the reversal of more than 100 years of campaign finance legislation.

"Hillary: The Movie" was produced by Citizen United, a non-profit, conservative activists' organization that accepts corporate donations. Intended as a response to films made by Michael Moore, its producers hoped to air the film on cable, free of charge, but as an 'On Demand' or pay-per-view selection in 2008.

Because the movie was partially financed with corporate funds, it fell under restrictions of the 2002 McCain-Feingold law, that is, "any broadcast, cable or satellite communications" that refers to a candidate for federal office within a certain time frame before an election. The law's requirement that ads clearly state the name of the group paying for them made Citizens United's planned 10-second media ads unworkable.

Moreover, a District Court agreed with the government's case that the film was much like an 'infomercial,' sending a strong message that the electorate should not vote for Hilary Clinton.

An Unsolicited and Unexpected Ruling

When the case initially went to the Supreme Court, Citizens United's team of lawyers hoped the Court would rule in favor of their argument on the narrow issue that "video-on-demand" is different from the act's specified broadcasts.

Instead, after the Court heard oral argument on the narrower issues, it ordered re-argument on whether the existing series of campaign finance decisions needed reconsideration.

Then, on January 21, 2010, a divided Supreme Court swept aside decades of legislative restrictions on the role of corporations in political campaigns, ruling that companies can spend unlimited amounts to support or oppose individual candidates.

In the 5 to 4 decision, the majority cast its ruling as a defense of the First Amendment, concluding that corporations have the same rights as individuals when it comes to political speech.

"When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought," the court said in a decision written by Justice Anthony M. Kennedy. "This is unlawful. The First Amendment confirms the freedom to think for ourselves."

The decision upended the court's precedent that corporations may not use their profits to support or oppose candidates, and it rejected a large portion of the McCain-Feingold campaign finance act, which the justices declared constitutional just six years ago.

The decisions also overturned a 2003 decision in *McConnell v. FEC* which stated in part, "Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the office holder. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means to prevention is to identify and remove the temptation."

In his 90 page dissent of *Citizens United v FEC*, Justice John Paul Stevens called the decision "a radical change in the law" that ignores "the overwhelming majority of justices who have served on this court."

The ruling seemed to apply to labor unions as well, although they are not explicitly mentioned in the majority's opinion. The ruling does recommend that all donations should be disclosed.

An ABC-Washington Post poll in February 2010 reported that 80% of respondents opposed the decision. At the same time, hundreds of special interest groups began organizing and fundraising, including the newly allowed acceptance of unlimited and anonymous donations. Their goal was to spend millions of dollars in advertising to ensure the election of their favored Senate and House candidates across the nation.

Follow the Money.... and the Tax Codes

New York City's Public Advocate, [Bill de Blasio](#), began tracking reaction to *Citizens United* shortly after the decision in January 2010. He noted recently that there are more

figures yet to be released and more numbers to be crunched, but offered these observations in December 2010:

- Spending newly allowed by *Citizens United* represented 15 percent of total political spending.
- Spending newly allowed by *Citizens United* was responsible for over \$85 million in all U.S. Senate races
- New anonymous spending allowed by *Citizens United* represented 30 percent of all spending by outside groups.
- Anonymous donations funded over \$40 million in the 10 most costly U.S. Senate races.
- Anonymous spending groups created in response to *Citizens United* spent 20 percent more on negative advertisements than groups required to disclose.

According to the [Center for Public Integrity](#) these new spending groups, or 'Super PACs,' were made possible by a mix of various non-profit tax status options and a consortium of corporate interests. The corporate interests hailed chiefly from the financial, energy and health insurance sectors and were anxious to see changes in government regulation and taxation.

Most of the independent groups who took in the largest amount of money were set up under IRS rules as 501© organizations, named after a section of the tax code that covers a range of non-profit tax exempt organizations. Some can accept unlimited donations and are not required to make their donors' names public.

A Typical 'Super PAC'

In an analysis from [People for the American Way](#), the American Action Network/American Action Forum is representative of a typical top spending non-profit group.

Founded by former Republican US Senator Norm Coleman, the American Action Network is the 501 c4 political arm and the American Action Forum is a 501 c3 which is designed to be a conservative think tank. Board members include House GOP Whip Eric Cantor, Fred Malek, a longtime Republican fundraiser; Robert Steele of Goldman Sachs and Wachovia; tobacco heir C. Boyden Gray; and Home Depot founder Kenneth Langone. Other board members include former RNC head Ed Gillespie and several former GOP Senators and Governors.

Norm Coleman explicitly pointed to the *Citizens United* decision as a reason for the American Action Network's success, saying that it "greatly enhanced" the group's fundraising. The group does not disclose the identity of its donors to the public. While the American Action Network focused primarily on political advertisements attacking Democrats, the sister organization concentrated on the traditional conservative criticisms of health care and Wall Street reform, and the Obama administration's handling of the economy.

Its negative ads were centered on the issues of economic policy and spending. One premier ad featured Senator Patty Murray of Washington. In the ad, the narrator says Murray wore her “tennis shoes out on our backs” and shows a woman walk over a man, woman and child, claiming that she “raised taxes on small businesses” and “cost us jobs.” The ad does not cite any specific legislation. By November, the American Action Network spent \$15 million dollars on similar ads, running \$10 million short of their intended spending goal.

Where Were the Democratic Party's Super PACs?

Clearly, Democratic groups were not complacent players in the mid-term election, but apparently they had not refined a strategy to take advantage of the new campaign finance regulations. By the end of September 2010, GOP affiliated groups had outspent Democratic groups \$24.8 million to \$4.9 million on ads, a ratio of 5 to 1.

Led by the American Federation of State, County and Municipal Employees, the AFL-CIO, and the Service Employees International Union, Democratic constituencies tried to respond by hiking up their budgets and polishing their famous “ground game” tactics. In the end Democrats would spend more money in the last weeks of the election, but given the election results, their last minute spending did not pay off in numerous races.

Rep. Raul M. Grijalva (D-Ariz.) narrowly won reelection after outside groups spent \$600,000 in his rural district on ads. He told the Los Angeles Times, "We got caught flat-footed. I was watching an ad every 10 minutes on TV, even during 'Monday Night Football.' At some point, I didn't even want to vote for myself."

Assessing the Ads

In all, about 2/3rds of money raised for the mid-term election was used to purchase ads on local television stations. Bill de Blasio's office reported that ads paid for by groups soliciting anonymous donors were more likely to be negative than those paid for by groups that disclose their donors. 75% of the ads paid for by anonymous donors were negative, as opposed to 54 % of ads by groups that name their donors.

The veracity and tenor of the ads were also called into question.

Greg Sargent wrote in *The Washington Post* in early October, “the sheer scale and dimension of dishonesty and distortion coming from the conservative” groups is both astonishing and irresponsible. [PolitiFact](#) declared that ads from “‘super PACs’ and other political groups targeting the 2010 midterm election are overwhelmingly spreading exaggerations and falsehoods.” Television stations in Pennsylvania, Illinois, and Kentucky refused to run attack ads which are patently false.

As to the tone of the ads, LWV US President Elizabeth MacNamara wrote in November 2010, "With the 2012 Presidential Election season having already begun on November 3, the League will continue to address the other major issue this election season — incivility. The tone of the 2010 campaign exhibited a disturbingly new low in American

politics. Not only was this evident in the expensive advertising, but we also saw it in candidate debates and forums and in the public discourse."

The New Reality

The 2010 election was just an experiment, the first opportunity to test the new law before the bigger and more hotly contested 2012 Presidential Election.

Rep. Barney Frank (D-MA) said, "Economic interests are over-whelming the principle of one man, one vote." Frank was outspent last fall by an unknown opponent and outside groups who ran ads attacking him. But, that doesn't mean he's taking the high road. His solution is to, "raise more money on our side," even if the funds come from anonymous donors.

In 2012, all issue oriented organizations will have a better understanding of how the new campaign finance game is played, and given some recent successes, one can be assured of more organizations flush with more campaign cash.

Money dominates modern political campaigns and history has taught us that large contributions can translate into better access and influence. Now, the mere threat of a special interest onslaught of funding for or against a candidate could be enough to win legislative favor and stall prospects for better regulation, consumer protection and fair tax policies.

LWV US President Elizabeth MacNamara wrote in November 2010, " How can individual voters compete with organizations that not only have vested interests in Washington, but millions of dollars to spend in secret to make sure those interests are protected?"

The Disclose Act

Ms. MacNamara was writing in favor of the Disclose Act, one step that could be renewed to lessen the impact of *Citizens United*. The Disclose Act would force corporations, unions and other groups to reveal the donors behind their political ads, prevent donations from foreign interests, and allow shareholders easy access to how their company's campaign money is being spent. The Disclose Act passed the House last year but was filibustered in the Senate and lost by three votes.

The Twenty-Eighth Amendment?

A more dramatic remedy would be a Constitutional amendment stating unequivocally that corporations are not people and do not have the right to buy elections. Rep. Donna Edwards (D-Md.) introduced such an amendment to counter *Citizens United* during the last session of Congress and views it as the only sure way to correct the Court's decision.

Advancing a Constitutional amendment initiated and driven by the people is a daunting task that requires a great deal of patience and tenacity. But it has worked before - it is how women won suffrage and secured the 19th Amendment.

A push for a Constitutional amendment could also provide a unique opportunity to educate the broader public on campaign spending and force elected officials to go on record as to where they stand. The campaign could create enormous pressure on state legislatures and Congress, prompting changes to campaign finance even before an amendment is ratified.

Clear the Playing Field

Proponents of public financing of national campaigns suggest it could produce even more sweeping reforms. Public financing refers to government programs that provide public money or other support to qualified candidates to run for public office. Advocates claim public financing is the best way to eliminate influence-peddling by special interest groups. Moreover, they suggest it frees candidates from the pressures of fundraising, reduces the public perception that special interests and wealthy private contributors have undue influence, and creates better opportunities for women and minorities to participate in the political process.

Citizens United

All three remedies may seem hard to realize, but there is one very positive set of numbers. A *New York Times*/CBS poll conducted in October 2010 found that 92 percent of Americans believe, "campaigns should be required to disclose how much money they raised, where the money came from and how they have spent the money." One would be hard pressed to find an issue with stronger bi-partisan citizen support.

For More Information

[Sunlight Foundation](#), [Center for Public Integrity](#), [Common Cause](#), [People for the American Way](#), [Center for Responsive Politics](#), or [Center for Governmental Studies](#)
These sites offer links to several other significant organizations.

Resources

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