



The Center for Media and Democracy

Reporting on spin and disinformation since 1993

PRWatch • SourceWatch • BanksterUSA • ALECexposed

**Super PACs and Beyond:
How Shadowy Front Groups
Are Influencing Elections and Distorting Our Democracy**

Statement of the Center for Media and Democracy*

Lisa Graves and Brendan Fischer**

Before the United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Human Rights

July 21, 2012

Thank you for holding this hearing on the accelerating crisis of how extraordinary sums of money are being raised and spent by CEOs and corporations to affect who wins political office and thus who wields power over people and policy. Our democracy *is* increasingly for sale.

These elections will by far be the most expensive elections in the history of the United States and, indeed, in the history of the world. And, that's based only on the spending that's disclosed.

Millions and millions of dollars will be raised and spent without any meaningful disclosure to the American people of the true identity of wealthy interests bankrolling influential ads and other activities. We may never know if they are individuals or corporations -- domestic or foreign.

* The **Center for Media and Democracy** (CMD) is a non-profit investigative reporting group founded in Madison, Wisconsin. We publish **PRWatch.org**, **ALECexposed.org**, **SourceWatch.org**, **BanksterUSA.org**, and the **FoodRightsNetwork.org**. Our national reporting and analysis focus on exposing corporate influence on democracy and media. Recent awards include an Izzy (from the Park Center for Independent Media, named for investigative journalist I.F. Stone), a Sidney (from the Sidney Hillman Foundation, for investigative reporting), and an award for Excellence in Wisconsin Journalism (for a report written by CMD's executive director: "Group Called 'Citizens for a Strong America' Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?"). We share our work on Facebook under "Center for Media and Democracy" and "tweet" via **PRWatch** and **#ALECexposed**.

** **Lisa Graves** is the Executive Director of CMD and Editor-in-Chief of CMD publications. She previously served as the Chief Nominations Counsel for the U.S. Senate Judiciary Committee for Chairman/Ranking Member Patrick Leahy, Deputy Assistant Attorney General in the Office of Legal Policy/Policy Development of the U.S. Department of Justice, Deputy Chief of the Article III Judges Division of the Administrative Office of the U.S. Courts, Senior Legislative Strategist on national security issues for the American Civil Liberties Union, Deputy Director of the Center for National Security Studies, and adjunct professor at the George Washington University College of Law. She graduated with honors from Cornell Law School, where she was Managing Editor of the Cornell Law Review. She has testified before Congress and her expertise has been cited in numerous television news programs, newspapers, magazines, and radio shows. Her short commentary is on Twitter via **@thelisagraves**.

Brendan Fischer is the Staff Counsel for the Center for Media and Democracy and a Reporter for its publications. He graduated with honors from the University of Wisconsin Law School, was a Peace Corp volunteer, and he clerked for the Inter-American Foundation and the Texas Civil Rights Project. He tweets via **@prwatch_brendan**.

Background. To understand what has changed, here is a thumbnail sketch of federal law in 2010 prior to the infamous Supreme Court decision known as *Citizens United* and the follow-on case named *SpeechNow*. If you had the money to spare, you could give a maximum of \$2,500 to each candidate, \$5,000 per PAC (which theoretically makes independent expenditures not coordinated with the candidate), and \$30,800 to a political party, for a combined total limit of \$117,000 per cycle. Donations to, and spending by, these entities would be disclosed for anyone to examine.

But, since 2010, there are no limits on how much money you can give to a PAC -- although the donors and spending will be disclosed. These “Super PACs,” which are often run by friends of the candidates, are raising enormous sums via \$500,000 or \$1,000,000 checks. Most Americans couldn’t afford to “max-out” under the previous campaign contribution limits, which well exceed the income of most voters. However, now a super-minority of people is limited only by their bank accounts in how much they can give to a PAC to try to alter the course of American history.

As a result, one recent analysis found that 80% of the tens of millions raised by SuperPACs, so far, came from only 196 individuals. They “represent” .0000006 of the country’s population, and they will have an exponentially disproportionate impact on who wins and who loses this election. The other 99.9999994% of the population is basically out of the equation, except for the effort to manipulate the vote through attack ads or pro-candidate marketing pitches in feel-good TV ads.

Although substantial majorities of Americans (Democratic, Republican, Green, or Independent) believe the *Citizens United* decision was wrong, that corporations are not entitled to all the same rights as people, and that corporations already have too much power in our democracy, the PAC donations so far show that it is primarily people, not corporations, fueling these SuperPACs.

The reality is that some CEOs and their families have amassed such a massive “treasury” of money from their corporate investments that their personal capacity to put money into elections exceeds the treasuries of most companies -- and even some countries. The staggering amounts of their political donations may advance the corporate agenda and profits of these individuals (and their investments), but most of the SuperPAC donations so far are not directly *from* corporations. (That is one of the reasons why requiring shareholder approval of corporate election spending is the right thing to do in a democracy, but it is not sufficient; additionally, such rules will have not affect very powerful privately-controlled companies, like Koch Industries and Peabody Coal.)

But that’s only the part of the spending to influence voters (mainly through ads) that *is* disclosed. Special interest groups that do *not* register as PACs have been emboldened -- by a number of judicial rulings, by the political deadlock at the Federal Election Commission, and by IRS rules that have not kept pace with the times. Some activities are advocacy and public education well within the rules, while others walk, talk, and spend like a PAC to influence elections.

Some act under the rubric of “issue ads” or partisan movies that purport to fall under the tax-exempt missions of non-profit groups. But it is no coincidence the ads or movies happen to be aired mainly before elections and are targeted mainly to battleground states and districts. That is precisely what the non-profit corporation calculatingly named “Citizens United” does. With the way the laws have been distorted, if a group does not “primarily” spend on ads with the magic words of “express advocacy” (vote for, vote against, or elect) and spends 51% annually on thinly-disguised “issue” ads under loosely-interpreted IRS rules, it can spend millions influencing voters or attacking candidates while insulating their donors from the public scrutiny that is now focused on SuperPAC donors. That is one of their perverse selling points.

Sunshine versus the Lure of Dark Money. Today's hearing shines a light on some of the big names who are openly spending money on Super PACs to help the candidate and agenda they want to win. Some of these billionaires or millionaires have long been public supporters of a particular political party or candidate. Notably, at least part of their spending in elections occurs in the light of day, although many people are rightly distressed by the influence of this money.

Though they may be vilified for trying to buy this election, some may be motivated to try to prevent the "other side" from buying the election and so attempting to fight fire with fire, as comedians Bill Maher and Stephen Colbert have suggested. Some may be quiet philanthropists who want to help make the world a better place. Others want to remake it in their own image and greedily grab more wealth through controlling the levers of power to privatize (profit-ize) and kill programs they ideologically hate, like Social Security or Medicare that they will never need.

Some "Super Donors" may relish the aura and reality of power that making such big political donations brings them among friends, colleagues, campaign workers, and others. The brands their wealth is associated with may be sufficiently enormous or popular or long gone that there is little risk of significant consumer reaction to their political agenda and much to gain if the horse they are betting on in the election wins the race. (Or they may believe they have much to lose if for example a candidate wins who believes that regulating their industry is in the public interest.) Long before there were Super PACs, many were already politically influential or were big-time "bundlers" whose connections or glamorous parties could generate many checks for campaigns.

In addition to the desire to shape public policy, such contributions can have socially competitive elements, a keeping-up-with-the-Jones' or an arms-race approach. Yet, there may still be some upper limit or outlier amount where such donations would provoke widespread public revulsion.

"Fortunately" for Super Donors and corporations that want to spend money secretly, nonprofit groups like Karl Rove's Crossroads GPS come to the rescue. Although their financial gifts to such groups are hidden from the rest of us, they need not fear their political beneficiaries won't know who's who. Informally, they can make sure everyone "who counts" will know them.

Efforts to address this have been thwarted. In sum, under provisions of Bipartisan Campaign Reform Act (BCRA, known as McCain-Feingold) that were *not* struck down in the *Citizens United* case, Congress sought to shed light on sham issue ads that were really "electioneering communications" by requiring that "all contributors who contributed" to the group running the ads be disclosed – if the donor gives \$1,000 or more and the group spends more than \$10,000.

But a group called "Wisconsin Right to Life" -- an instrument of James Bopp's agenda -- got the U.S. Supreme Court to strike BCRA's bar on corporations and unions spending from their general treasuries on electioneering communications if the ads did not contain the magic words of express advocacy or their "virtual equivalent," whatever that is. The FEC then decided donors only had to be disclosed if they *intended* the money be used in that way, although Congress avoided such a loophole. Rep. Chris Van Hollen challenged the FEC and won in district court.

Requiring disclosure only of those donors who say they are giving "for the purpose of furthering an independent expenditure" has resulted in more money being spent by nonprofit groups and a diminishing percent of donors disclosed. The rules operate like a "Don't Ask/Don't Tell" policy to keep the public in the dark. Meanwhile Senator McConnell is trying to use the First Amendment like a sword to prevent *any* disclosure, claiming disclosure chills speech (money).

Nonprofits Are Now the “Swiss Bank Accounts” of Spending on Ads to Influence Elections.

Perhaps one of the grand ironies of the current partisan divide is that the same party that is demanding in many states that voters prove their identity to vote is fighting tooth and nail to prevent the disclosure of the identity of donors to special interest groups running ads to influence voters. The proponents of new restrictive laws to make it harder for Americans to vote have filled the airwaves with baseless claims of “voter fraud” to impose new identification restrictions -- that track the model bill of the American Legislative Exchange Council that has been outed by ALECexposed.org -- but they (like ALEC) simultaneously seek to keep the identity of donors to special interest groups influencing the elections and thereby public policy hidden from view.

Unlike for direct contributions to candidates, there are no bars on foreign national or foreign corporations contributing to nonprofit groups that are not PACs. There are also no limits on how much money can be given, as with Super PACs but without disclosure of donors, big or small.

Nonprofits really are becoming the Swiss bank accounts of spending to influence elections.

With nonprofit spending on ads, the donors are kept secret from the American people, basically forever. And, the spending is not counted in mandatory reports to the FEC that were designed to keep the press and public more aware of who is behind such advertising. Instead, nonprofit groups file an annual form with the IRS, usually months after an election is over, that summarizes their revenue and spending (often described as “educational” activities). The forms provide no details about what kind of ads were purchased, where they ran, or what they said.

The Federal Communications Commission, with three commissioners and a current Democratic majority, recently required TV stations -- in the 50 biggest media markets affiliated with the four major commercial broadcast networks (NBC, ABC, CBS, and FOX) -- to post information about political ads that are purchased. The rule -- more than a decade in the making -- leaves out many cities (for example, all of Wisconsin except Milwaukee) and some whole states (such as Maine, Vermont, and New Hampshire) as well as major broadcast outlets like Univision. But it is a step in the right direction and an important interim measure while comprehensive reforms are pushed.

Meanwhile, Politico recently reported that Karl Rove’s Crossroads operations (the PAC called “American Crossroads” and the nonprofit called “Crossroads GPS”) plan to spend about \$300,000,000 in the 2012 elections -- in combination with about \$400,000,000 from entities connected with the Koch Brothers and another couple hundred million, for a grand total of one billion dollars. Only a small part of Rove’s part of this spending and donors will be disclosed, through the American Crossroads PAC, whose funders have been almost exclusively billionaires and corporations. Crossroads GPS is not registered as a PAC and is instead a 501(c)(4) nonprofit.

Just doing the math, Rove’s PAC received nearly \$6 million in funds last month and had \$31.5 million in the bank. That leaves a couple hundred million of his \$300 million spending pledge unaccounted for. Under current law, the public will not know the revenue of his nonprofit, Crossroads GPS, until mid-2013, and even then the American people will not know the identities of the corporations or individuals that bankrolled it, unless something dramatically changes.

Rove’s public PAC and his dark money operations are enormously powerful and troubling. The IRS has reportedly begun scrutinizing such nonprofits and the New York Attorney General has opened an investigation about how much of his nonprofit’s work is genuinely for the benefit of the general public as required by its tax exemption, versus for narrow or partisan gain. With only about 100 days before the election, neither of these will be resolved before that money is spent.

Conclusion. As case studies of nonprofit spending detailed in the appendix show, there are many types of groups besides candidates and SuperPACs whose spending influences elections. Some such groups fully comply with weak existing laws; some appear to exploit the lack of disclosure required about the corporations or individuals that are bankrolling their operations or their spending on ads. Some obscure even basic address information about who or what the group really is. In this Wild West environment, and with the impediments to enforcement of the current rules, it appears to be extremely easy for a nonprofit group to basically launder money to influence elections that a corporation or individual does not want connected to themselves.

There is no limit on the receipt of money from foreign corporations or individuals that is spent on such ads by 501(c)(3), (4), and (6) organizations. Despite misleading assertions that the Court has leveled the playing field between corporations and unions, the most closely regulated entities appear to be the (c)(5) unions, which constitute the only one of these major 501(c) categories that definitively represents an association of individual Americans and that is not a corporate-funded front group or fronting for some other hidden interests. They are also required to report their overall political spending to the Department of Labor in a way no other nonprofit category is.

That's why we know so much more about their spending in elections than other entities, which leads to many distortions in reporting on election spending since groups like Americans for Prosperity and Crossroads GPS are not counted. The other groups involved in elections, whether their listed name is "Citizens" or "Americans" "Coalition" "League" or some other such identifier, unlike unions, might have very few donors or members and their financial backers could be a mere handful of extremely wealthy individuals or closely held corporations.

In the current environment, this information is hidden from public view unless the group files as a PAC or independent expenditure group. Moreover, the definitions of an "independent expenditure" and the amount of political activity that would disqualify a 501(c) from tax-exemption need real clarification to drive as much fundraising and spending that influences elections into the sunshine and out of the darkness.

But, to be quite blunt, increased disclosure -- although very important -- is simply not enough.

As an organization that investigates front groups and the activities of shadowy nonprofits, the Center for Media and Democracy can attest that even full disclosure to the government of the real identities of the top few funders may not alert the audience to the financial or other interests behind such ads. And, as the CAVA example in the appendix shows, the funder disclosed may just be another unknown or secretive entity.

And, then you have the situation demonstrated by the SuperPACs themselves. People can learn who funds them but depending on the effectiveness of the ad, an audience provided with the names of the main funders may not know who they are or have time or capacity to look further.

In sum, the activist judges, abetted by partisan politicians, who have changed the law to turn our elections into a "marketplace of ideas" have actually transformed it into just a marketplace. In that marketplace, voters are sold goods they cannot return (un-elect) for years at a time by groups whose financial interests or ideological agenda are secret and with no accountability for whether the ads are truthful or deeply misleading. A candidate's "independent" allies can run attack ads they can disavow if the ads go too far, and they usually know who the major donors are.

Meanwhile, elected officials can be threatened by corporations or their front groups with the potential that they will be subject to potentially overwhelming (and indeed unlimited) spending if they vote the wrong way. That has certainly been one of the ways the NRA has wielded its financial heft even before *Citizens United*. The NRA does not always have to spend in each election to win its results; through its financial reserves it has Cold War-style deterrence powers.

And beyond all this, there is simply no rational denying that extraordinarily wealthy corporations and individuals now have more potential power over who wins elections than at almost any time in a century, since dating back to the era of the “robber barons.” The system really is broken.

Given the short-time before the election and the political reality in Congress, there appears to be no time or power to do anything legislatively in response to the coming tsunami of ads. In some ways, the question is what happens next, *after* the first post-*Citizens United* presidential election.

Numerous public interest groups – such as Public Citizen, People for the American Way, Move to Amend, Free Speech for People, Common Cause, and the Center for Media and Democracy, several major labor unions, and other organizations, plus socially responsible businesses and several state officials – are on record calling for *Citizens United* and related decisions to be overturned.² We know the laws must be changed to restore the proper role of citizens (not unelected judges) in setting rules for our elections and the role of corporations in our democracy.

The movement that is being built in cities, counties, and states across the country to reject what *Citizens United* has come to symbolize grows stronger by the day. It will grow stronger still as Rove and his allies unleash their funds in this election, come what may on election day. The people know something’s got to give. They know the laws must change because too many politicians are already too captured by the status quo of how they themselves must raise money to fund their elections and retention in office. We know that many laws must be changed to restore the proper place of We the People in our democracy: the Constitution and election, communications, corporation, and tax laws. It may seem daunting, but what is the alternative?

² Here is the full list of endorsers of the statement of principles of the united4thepeople.org constellation of groups: 350.org, The Berkshire Environmental Action Team, California Church Impact, Campaign for America's Future, Campus Progress, Center for Biological Diversity, Center for Corporate Policy, Center for Environmental Health, Center for Health, Environment Justice, Center for Media and Democracy, Center for Science in the Public Interest, CivicSponsor, Clean Water Action, Clean Water Network, Coalition of Immokalee Workers, Code Pink, Coffee Party USA, Common Cause, Communications Workers of America, Consumer Action, Consumer Watchdog, CREDO Action, Corporate Accountability International, Democrats.com, Democracy Unlimited, Demos, Drinking Liberally, Des Moines Chapter, Earthworks, Earth Day Network, EnviroJustice, Ethical Markets, Food and Water Watch, Food Empowerment Project, Franciscan Action, Free Speech for People, Friends of the Earth, Generation Waking Up, Get the Dough Out, Global Alliance for Incinerator Alternatives (GAIA), Global Community Monitor, Grassroots Recycling Network, Greenpeace, Hip Hop Caucus, Indiana Alliance for Democracy, Institute for Agriculture and Trade Policy, Institute for Policy Studies Global Economy Project, International Forum on Globalization, International Labor Rights Forum, Liberty Tree Foundation for the Democratic Revolution, Main Street Alliance, Maryknoll Office for Global Concerns, Money Out of Politics, MoveOn.org, Move to Amend, National Alliance of Latin American and Caribbean Communities, National Congress of Black Women, National Council of Jewish Women, National Council of Women's Organizations, National Education Association, National Women's Health Network, The New Bottom Line, New Progressive Alliance, Oil Change International, OMB Watch, The Other 98%, Pachamama Alliance, Pax Christi USA, People for the American Way, Pesticide Action Network North America, Physicians For A National Health Program, Program on Corporations Law & Democracy, Progressive Democrats of America, Public Campaign, Public Citizen, Rainbow-PUSH Coalition, Rainforest Action Network, Rebuild the Dream, Renew Democracy, Responsible Wealth Project, RootsAction, Sacramento for Democracy, Sea Turtle Restoration Project, Service Employees International Union, Sierra Club, SisterSong Women of Color Reproductive Justice Collective, Story of Stuff, Sum of Us, The American Institute for Progressive Democracy, The New Bottom Line, The Other 98%, The Pachamama Alliance, UAW, Unitarian Universalist Association of Congregations, United for a Fair Economy, United Republic, U.S. PIRG, U.S. Youth for Sustainable Development, Veterans for Peace, VPIRG, We the People Campaign, Where's Our Money, Wisconsin Democracy Campaign, Wisconsin Wave, A project of the Liberty Tree Foundation, Wolf-PAC, Working Families Party, Working Families Win, and the World Constitution and Parliament Association.

As this conversation moves forward in the months ahead, we must be clear about what proposed solutions might fix which identified problems, such as those identified by in our case studies and other investigative reporting. We must be mindful of both intended and unintended consequences of constitutional amendments to solve the vexing problems that are undermining the integrity of our elections and even what it means to be represented in this democracy.

To help work through these issues, Greg Colvin, who is a partner at the law firm of Adler & Colvin, who has studied and counseled on nonprofit political tax law issues for many years, has devised twelve questions he recommends that drafters and reformers answer, in addition to ensuring that the language of any amendment is as brief and clear as it can be:

Twelve Questions for Drafting a Constitutional Amendment on *Citizens United & Beyond*:

1. What is the main purpose? Is it to drive the big money, from all sources, out of elections? Or is it to abolish corporate personhood?
2. If none of the rights extended to corporations are still protected by the Constitution, what would the consequences be -- outside of the realm of elections?
3. What would happen the day after the amendment was adopted? Would corporate and business spending in elections stop or would legislation and litigation be required?
4. What kinds of legal entities does the amendment apply to?
 - a. business corporations
 - b. nonprofit corporations
 - c. labor unions
 - d. other forms of organization (associations, trusts, LLCs, partnerships)
 - e. all of the above
5. How should the campaign spending of individuals (including candidates) be regulated?
 - a. no limits on personal spending
 - b. authorize Congress and the states to set limits
 - c. set dollar limits in the Constitution
 - d. prohibit completely
6. Should all campaign contributions and expenditures be publicly disclosed? Or should Congress and the states allow small donations to be anonymous? In view of all that secret money that flows through nonprofit groups for political "issue ads," how do we force them to disclose their sources?
7. Should public financing of campaigns be required, permitted, or prohibited?
8. Does the amendment cover both candidate elections and public votes on ballot measures?
9. Are all levels of government covered: federal, state, city, town, and county?
10. Is any special wording needed to protect freedom of the press?
11. Should other subjects be covered in the amendment, such as making election day a holiday, shortening the campaign season, simplifying voter registration, requiring paper ballots, addressing voter disenfranchisement?
12. Should there be two or more amendments on different issues, or one unified proposal?

We believe these important questions need to be answered as part of any amendment strategy. In the view of the Center for Media and Democracy, the Supreme Court decision in *Citizens United* must be overturned because it allows the voices of real people to be drowned out by ventriloquists who throw their "voices" through money. The Court claims our democratic charter commands that we allow untrammelled amplification of those who have the money to fund the purchase of commercial TV ads over the rest of us who don't. We the People know it does not.