



Court Battles Over Campaign Disclosure Loom, Legal Experts Predict

By [Michael Beckel](#) on March 20, 2011 10:27 AM

CHARLOTTESVILLE, Va. -- A storm is brewing over political disclosure rules.

And Donald McGahn, a Republican commissioner on the Federal Election Commission, predicted Saturday a flurry of litigation, at the state and national level.

"Who doesn't have to disclose?" McGahn asked. "[This question] is where the action is going to be in the future."

His comments came as several campaign finance experts -- Republicans, Democrats and Libertarians -- gathered Saturday at the University of Virginia Law School to debate the future of transparency and the recent legal decisions that have cast the current disclosure system into tumult. Chief among those decisions: the Supreme Court's ruling in *Citizens United v. Federal Election Commission*.



Campaign finance reform advocates and foes both tout the power of the internet -- for making reporting of donors easier, on the one hand, and for making donors easier targets on harassment on the other.

Some donors have sought to avoid the limelight, and many organizations are legally allowed to engage in political activities anonymously. In fact, political spending from undisclosed sources swelled during the 2010 election cycle, often through nonprofit groups organized under section 501(c) of the U.S. tax code.

This increase in anonymous political spending came despite new freedom for individuals, corporations and unions to spend unlimited amounts of money touting their preferred candidates.

The controversial 5-4 decision from the U.S. Supreme Court last year in *Citizens United v. Federal Election Commission* overturned a prohibition on the use of corporate money to fund overt political messages.

But a separate portion of the ruling, which eight justices supported, went on to extol the virtues of transparency when it comes those funding political advertisements.

A later federal court decision called *SpeechNow.org v. Federal Election Commission* ruled political committees could also raise unlimited contributions -- from individuals, corporations or unions -- to fund political messages to aid their preferred candidates -- so long as they didn't use that money to directly donate to candidates' campaigns. These new groups became known as "super PACs."

According to research by the [Center for Responsive Politics](#), super PACs, which disclosed their donors to the FEC, [spent more than \\$65 million](#) combined on what's legally known as independent expenditures -- messages, often radio or television advertisements, that explicitly say whether to vote for or against a candidate.

Meanwhile, groups that aren't required to disclose their donors [spent more than twice that](#) -- about \$140 million, according to the Center's research, on all their political messages reported to the FEC.

And rarely did these groups voluntarily opt to detail the source of their money.

According to research by the consumer rights organization Public Citizen ([pdf file here](#)), 34 percent of all money spent by organizations on political messages legally known as electioneering communications -- broadcast advertisements that mention a candidate and an issue but don't expressly advocate for his or her election or defeat -- came from disclosed sources.

That's down from 98 percent during the 2004 election cycle.

NEW SPENDING RULES, FEW CHANGES?

During his talk at the symposium, John Samples, the director of the Center for Representative Government at the libertarian Cato Institute, argued that the effects of *Citizens United* might be more muted than many political watchers predicted.

Samples, pictured right, cited [research](#) by Bowdoin College professor Michael Franz that found party committees and candidates themselves spent more than outside groups, despite the new lax rules.



"While interest groups were major players in the 2010 elections, the form and rate of that involvement was not dramatically different from past participation," Frantz wrote in his [post-election study](#). "Candidates and parties in 2010 still sponsored 85 percent of all ads in Senate races and 88 percent of ads in House races."

Frantz additionally highlighted a trend that [OpenSecrets Blog](#) as also previously noted: incumbent politicians enjoy a [significant financial advantage](#).

Conservative-leaning outside groups helped Republicans close this gap.

"If anything, pro-Republican groups helped keep Republican challengers competitive with the incumbent Democratic class," he wrote.

Despite the new environment, Samples concluded, "It's not as if the system has been taken away from the party establishments."

This point was also argued by another panelist: Lee Goodman, an attorney at LeClairRyan and general counsel to the Republican Party of Virginia.

"The vast majority of speech is still going to be carried on by candidates and their campaigns and the political parties," Goodman told [OpenSecrets Blog](#).

"I do not think democracy's sky will fall after the *Citizens United* decision," Goodman added. "I don't think that the fear that large corporate expenditures are going to drown out the more populist voices in our democracy has ever been born out."

McGahn, the FEC commissioner, went so far as to suggest that political motivations might be the reason for Democrats' current push for increased disclosure and transparency.

"It seems that the right got to speak more this time so now folks want to slow that down," he said.

'ASSUME THERE'S GOING TO BE MORE'

Democratic lawyer Marc Elias was one symposium panelist who argued that *Citizens United* had – and will continue to have – a powerful effect on the way politics are waged across the nation.

"For anyone who was looking at individual races, there's no doubt that *Citizens United* was important," said Elias, an attorney at Perkins Coie and the former general counsel of the 2004 presidential campaign of Sen. [John Kerry](#) (D-Mass.).

Elias said there was "nervousness" among both donors and political operatives during the 2006 cycle that spending by non-party organizations was "legally risky."

Citizens United erased that, he said, and strategists quickly mobilized.

For instance, top Republican operatives Karl Rove, a former senior aide to President George W. Bush, and Ed Gillespie, the former chairman of the National Republican Committee, pushed for new big outside spending groups.



Super PAC [American Crossroads](#) and its sister organization, [Crossroads Grassroots Policy Strategies](#), a 501(c)4 nonprofit, were creations of these efforts.

Together, the groups reportedly raised \$71 million, and they spent nearly \$40 million on electioneering communications and independent expenditures during 2010, according to research by the Center for Responsive Politics.

"Karl Rove didn't do this to waste his time," Elias said.

Just as "coattails" from candidates with big name recognition can aid lesser-known, down-ticket candidates, Elias argued that money can play a significant role in individual races, even if money alone wasn't the dominant factor.

"It might be the difference between, say, one thousand votes and four thousand votes," he said.

This margin could be meaningful at the end of the day, as Elias, who represented Sen. [Al Franken](#) (D-Minn.) during a lengthy recount process after the 2008 election, is well aware. Franken ultimately won by just 312 votes out of more than 2.9 million cast.

"*Citizens United* means we're going to have a lot more outside spending," Elias concluded. "That trend will continue. You should just assume there's going to be more of it."

Part and parcel with more outside spending, will be less disclosure. Such is the prediction of Trevor Potter, the founding [opensecrets.org/.../court-battles-over-c...](#)

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president and general counsel of the nonpartisan Campaign Legal Center, warned during the symposium, which was hosted by the University of Virginia Law School's *Journal of Law and Politics*.

Potter predicted that during the 2012 election cycle, "maybe 1 percent" of groups that run electioneering communications would voluntarily disclose such information.

Any general counsel "worth his weight in salt" is telling corporate clients not to donate to political committees that are required to disclose their donors, said Potter, a Republican who previously served as chief counsel for Sen. [John McCain](#) (R-Ariz.) during his presidential bids in 2000 and 2008.

Instead, corporations can donate to nonprofit groups organized under section 501(c) of U.S. tax law.

Thus, they can avoid the kind of public backlash that Target faced last year. The company donated money to a political committee in Minnesota that disclosed its donors -- and supported a Republican gubernatorial candidate who opposed gay rights, angering many gay rights activists.

Potter suggested this isn't at all what the Supreme Court envisioned.

Potter said he imagines that Supreme Court Justice Anthony Kennedy, who penned the court's majority opinion in *Citizens United*, frequently walks around and shakes his head saying, "Where did all this undisclosed spending come from?"

Potter also expressed skepticism that calls for the IRS to investigate the tax status of 501(c) organizations such as Crossroads GPS -- an approach embraced by some top Democrats and advocacy groups, as *OpenSecrets Blog* has [previously reported](#) -- would result in further transparency for such groups' funders.

"I think it is unlikely that the IRS is going to be the government agency that cuts through the Gordian knot of disclosure," Potter said, adding that any penalty might just be paying an excise tax, not additional disclosure.

WHAT TRIGGERS DISCLOSURE?

Already, the U.S. Supreme Court has heard one case about whether the identities of ballot-access petition signers ought to be disclosed, as [OpenSecrets Blog previously reported](#). The court ruled in this case, *Doe v. Reed*, that there was no blanket right to anonymity for all petition signers, but left room for challenges on a case by case basis.

Conservatives hope to win such an "as-applied" challenge. Activists who organized ballot measures against marriage rights for same-sex couples and donors to these efforts have argued they face intimidation and harassment.

The question will be what threshold the court says is necessary for special protection.

"What's the standard for non-disclosure?" McGahn, the FEC commissioner, asked during the symposium. "The standard cannot be bloody noses and broken bones."

Joseph Birkenstock -- an attorney at Caplin and Drysdale and former chief counsel of the Democratic National Committee -- was among those who argued at the symposium that exemptions for disclosure should be narrowly tailored.

He pointed out that the court has traditionally set a high bar in terms of harassment and violence -- such the members of the National Association for the Advancement of Colored People, at the start of the civil rights era, who feared being hanged.

"If you look at the disclosure exemptions that have been recognized in the past, it's like for the NAACP in Alabama in 1957," Birkenstock said in an interview with *OpenSecrets Blog*. "You had strange fruit hanging from Southern trees. That's not happening now."

Birkenstock continued: "I'm not arguing in favor of harassment, but I'm just saying there is kind of a continuum that has been present in the past that isn't there today."

During his remarks to the audience, he suggested that changes to the current campaign finance disclosure rules for political donors might help ease privacy concerns and ameliorate worries about harassment.

"I think the answer is to raise those disclosure thresholds so that people are only being disclosed at meaningful levels," Birkenstock said.

Federal law currently calls for the disclosure of the name, address, occupation and employer of all political donors who contribute more than \$200 to a candidate or committee.

Birkenstock also noted that some donors are currently providing business addresses, or non-residential addresses on campaign finance filings.

He further suggested that regulators consider withholding individuals' names and addresses and only release information about their occupation and employers.

Samples, the Cato Institute official, told *OpenSecrets Blog* that Birkenstock's reform suggestions were worthy of consideration.

"All policy making is a set of tradeoffs," Samples said in an interview. "Sure, you could lose some information, but you would really get around the whole issue of the internet [enabling the possibility of doing] harm to people."

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