

NOVEMBER 2018

CLC ANALYSIS: FEC RULE KEPT AS MUCH AS \$769 MILLION IN POLITICAL SPENDING IN THE DARK

Recently, in a victory for transparency in elections, a D.C. District Court struck down a Federal Election Commission (FEC) rule that had allowed as much as **\$769 million** in dark money to flow into our elections since the 2010 election cycle, according to a new Campaign Legal Center analysis. But thanks to FEC inaction in the wake of the decision, only a small fraction of dark money political spending since the court's decision has been disclosed.

Laws passed by Congress require disclosure of donors who give to support a group's "independent expenditures," which are ads that expressly advocate for or against federal candidates. But the FEC wrote a rule (at 11 C.F.R. 109.10(e)(1)(vi)) that narrowed the requirement and defeated the law's transparency requirements. Under the FEC's rule, dark money groups only reported donors who gave for the *specific* purpose of funding a *specific* ad—an easily-evaded standard which meant dark money donors were never publicly reported.

In 2011, the Campaign Legal Center (CLC) and Democracy 21 asked the FEC to fix the rule, but the agency deadlocked 3-3 and kept it in place. In a more recent lawsuit filed by Citizens for Responsibility and Ethics in Washington (CREW), the D.C. District Court struck down this rule as contrary to the law it was meant to implement, and the D.C. Circuit Court and the U.S. Supreme Court rejected a plea from a dark money group to stay that decision.

Since the 2010 election cycle, the FEC's now-vacated rule **allowed as much as \$769 million** in dark money to flow into federal elections via independent expenditures alone, according to the Campaign Legal Center's analysis of FEC data.

- In the 2009-10 election cycle, groups other than political committees spent **\$78.3 million** on independent expenditures—and thanks to that weak FEC rule and inadequate enforcement, those groups kept their donors hidden from the public.
- In the 2011-12 election cycle, groups other than political committees spent **\$300.1 million** on independent expenditures.

- In the 2013-14 election cycle, groups other than political committees spent **\$168.0 million** on independent expenditures.
- In the 2015-16 cycle, groups other than political committees spent **\$195.1 million** on independent expenditures.
- And according to the most recent available data from the 2017-18 cycle (through the end of June 2018), groups other than political committees have spent **\$27.3 million** on independent expenditures so far this election cycle.

The explosion in dark money is often attributed to the Supreme Court's decision in *Citizens United*. But as these figures show, the FEC must also shoulder the blame.

Despite Disclosure Decision, Very Little Transparency

Under the statute and the court's decision, groups making independent expenditures—which are ads that expressly advocate for or against the election of candidates—must disclose all donors who gave for “political purposes” and for the purpose of furthering any of the group's independent expenditures.

But there are some grey areas. Only contributors who give to support a group's political activities must be disclosed; donors who give for general support do not.

On October 4, 2018, the FEC issued new guidance on independent expenditure reporting. Under that guidance, groups that made independent expenditures on or after September 18 were required to report contributions received on or after August 4 on their October quarterly reports, which were due October 15. However, the FEC guidance failed to clarify the distinction between reportable and non-reportable donations.

CLC counted 17 groups subject to reporting that together ran more than \$15 million in independent expenditures over the relevant period. 11 of the 17 groups claimed that they did not receive any reportable contributions. Two groups failed to file reports.

The Democratic groups Majority Forward, Patriot Majority, Taking Texas to the Top, and Texas Organizing Project all provided an identical explanation for their lack of disclosure:

"As a matter of policy, [Majority Forward/Patriot Majority/Taking Texas to the Top/Texas Organizing Project] does not accept funds earmarked for independent expenditure activity or for other political purposes in support or opposition to federal candidates."

Humane Society Legislative Fund stated:

"HSLF is aware of the court decision and new FEC guidance related to *Crew v. FEC*. HSLF has not received any contributions earmarked for political purposes or intended to influence elections during the covered period and therefore has no receipts to report under the *Crew v. FEC* decision or related FEC guidance."

Three groups ([AFL-CIO](#), [Environmental Defense Action Fund](#), and [Arizona Wins](#)) provided no explanation for why they didn't disclose any contributors, but apparently took the position that the funds they used to pay for their independent expenditures do not fall within the scope of the disclosure laws.

One group, [Susan B. Anthony List](#), did list a contributor: itself. It disclosed that it used general treasury funds, which appears to be a version of claiming that it received no reportable contributions.

Four groups—[Unite Here Arizona](#), [Working America](#), [Working People Rising](#), and [Mi Familia Vota](#)—reported some contributors.

- Unite Here Arizona and Working People Rising reported contributions in the form of transfers from other unions.
- Working America reported \$79,500 in contributions, \$69,500 of which came from a non-disclosing 501(c)(4), For Our Future Action Fund, and \$10,000 of which came from a union.
- Mi Familia Vota reported that all of its contributions came from a non-disclosing 501(c)(4) called Arizona Wins (which was also running independent expenditures during the relevant period).

The FEC is unlikely to second-guess assertions from organizations that claim they received no reportable contributions. But one group that deserves greater scrutiny is Heritage Action for America, which spent six figures over the reporting period and failed to report any donors.

On August 8, Heritage Action officials stated publicly that the group would “raise” money “to back 12 candidates,” and on that same day its executive director told McClatchy, “What we’re telling donors is, every dollar we raise over our budget we can effectively pour more into these races.” Heritage Action then spent six figures over the reporting period supporting those same candidates. But even though Heritage Action acknowledged that it was raising contributions for independent expenditures, it failed to report the identity of any donors.

Given these public statements—which we haven’t seen from the other organizations—it is awfully hard for Heritage Action to legitimately claim that it received no contributions in support of its political spending.

The next reports subject to disclosure under these new requirements are due on January 31, 2019, which will cover independent expenditures disseminated between October 1 and December 31.