1411 K St. NW, Suite 1400
Washington, DC 20005

THE CAMPAIGN LEGAL CENTER

Tel: 202.736.2200
Fax: 202.736.2222

"Follow the Money"

Courts, Corruption, and the Future of American Elections

Trevor Potter
President, Campaign Legal Center
Presented to the 16th Annual Goldstone Forum at the University of Pennsylvania
April 21, 2016

History may well remember the 2016 presidential election as the "campaign of the angry outsiders:" candidates who are trying to pull down the pillars of the temple as they assail the power and corruption of those on the inside. It seems candidates have been running against "Washington" at least since Jimmy Carter and Ronald Reagan, but this year has a higher level of intensity.

Every time Donald Trump tells a rally full of supporters that "the whole system is corrupt" or Bernie Sanders calls for a "political revolution" to usurp power from the "billionaire donor class," they're tapping into a deep vein of anger at money in politics and the growing public sentiment that every politician in Washington has been bought by special interests. And while there is a lot of talk about political polarization, on this issue, the vast majority of both parties are united. Consider a few recent poll numbers:

- 80% and 83%—The percentages of Republicans and Democrats, respectively, who believe *Citizens United* should be overturned, and that corporations should not be funding candidates.
- 87%—The percentage of Americans who believe that that "campaign finance should be reformed so that a rich person does not have more influence than a person without money"
- 75% of Americans believe "corruption is widespread throughout the government"—ranking the U.S. alongside Jamaica, Costa Rica, and Belize. By comparison, a mere 19% of Danes and 14% of Swedes would say the same of their governments.
- Americans agree by a two-to-one margin that their "vote does not matter because of the influence that wealthy individuals and big corporations have on the electoral process."
- Finally, 59% agree with the following statement: "The political system is broken—we need to just start over."

What does it say about the state of our political system when more than half of Americans say the system is so broken we must start over—whatever that means? When two thirds believe that wealthy interests have rendered their own votes meaningless? When three quarters agree that corruption is widespread in the government?

Of all these, the most interesting to me—because it's the opposite of where we are now, both factually and legally—is the 87% in favor of reforming campaign laws to promote financial equality in political campaigns.

They are likely thinking of the news last week about "Team Ryan"—the "joint fundraising committee" set up by House Speaker Paul Ryan. It is raking in donations ranging as high as a quarter million dollars per individual and a half million per couple. Major donors to the committee include Charles Koch, Houston Rockets owner Robert McNair, and New York Stock Exchange chairman Jeffrey Sprecher—and that list is growing.

Meanwhile, the "Hillary Victory Fund"—a similar group benefiting Hillary Clinton's candidacy along with Democratic party committees—reserves its highest donor tier for couples who contribute $1.5 million. You may have seen the press about fundraising dinners for Hillary Clinton that cost up to $350,000 *a plate*. Those events' price tags were criticized by actor George Clooney as "an obscene amount of money," and he should know—he was talking about events that he was hosting!

As for the Democratic convention—taking place in this very city in July—a half-million dollar contribution earns a spot in the premier "Rittenhouse Square" donor level, which includes VIP passes and invitations to high-level meetings with party officials. But if that's a little out of your price range, not to worry: a more "modest" contribution of $130,000 will still put you in the "Fairmount" donor tier—but don't expect any VIP convention passes.

Obviously, those are the "big league" major players. But candidates also raise lots of small contributions from millions of Americans, right? That's where the *rest* of us come in!

Well, the FEC donor database lists everyone who gave $200 or more to a candidate or committee. What percentage of Americans do you think gave that minimum level to at least once candidate, PAC, or party during the last election cycle? One quarter of one percent. How did we get to a place where so few Americans financially contribute to candidates or parties, even at the most minimal level? Where so many are disillusioned and angry over the system—two facts that I believe are clearly linked?

Debate over the role of money in federal elections has been ongoing for over 100 years—roughly since the full flowering of large, multi-state corporations and competing labor unions, and the widening disparity of economic means which came with the explosion of wealth in post-Civil War America. Elihu Root, a prominent Republican attorney who later served as Theodore Roosevelt's Secretary of State, decried money's role in politics as "a constantly growing evil in our political affairs, which has, in my judgment, done more to shake the confidence of the plain people of small means in our political institutions than any

other practice which has ever obtained since the foundation of our government."

The first ban on corporate contributions in federal elections was passed by Congress at President Roosevelt's urging in 1907, followed by various attempts undertaken from the 1920s to the 1950s to require disclosure of money spent in federal elections and limit spending by corporate and labor interests.

All these measures, however, were revealed to be completely ineffective by the Watergate scandal of the early 1970s. Then, President Richard Nixon's 1972 Re-Election Campaign and the Republican National Committee were found to have taken in millions of dollars in illegal contributions, some of it explicitly given in return for favorable government actions. In fact, the burglars who touched off the scandal after being caught breaking into the Democratic National Committee's headquarters were paid with some of this secret cash. President Nixon was impeached for misuse of his office, and 31 business executives faced criminal charges for bribery and money laundering.

Facing a massive public backlash, both parties in Congress passed a series of historic reforms to clean up federal elections. The new law established the Federal Election Commission—the first independent agency charged with enforcing disclosure and limits on campaign money. It created a public funding system for Presidential campaigns so Presidential candidates would not need to rely on wealthy donors and special interests, offering matching funds in the primaries and a large check from the U.S. Treasury for each major party candidate in the general election. And it placed limits on contributions to candidates and party committees, as well as caps on independent expenditures and campaign spending.

A diverse and bipartisan group of plaintiffs soon brought a lawsuit claiming these new reforms violated the First Amendment, and in January of 1976, the Court handed down its decision in that case: *Buckley v. Valeo*. The good news for reformers was that the Justices left the majority of the law's provisions intact: The Court's opinion upheld limits on campaign contributions, its disclosure requirements, and the presidential public financing system.

But the Court also concluded that two limits—the caps on campaign expenditures made by candidates, and on independent expenditures made by individuals and outside groups—*did* violate the First Amendment. It was the logic by which the Court arrived at this conclusion that would define the next three decades of campaign finance law by significantly narrowing the possible legal justifications for limiting money in politics.

The Court's opinion, which was joined (at least in part) by all the Justices sitting on the case, upheld contribution limits on the grounds that they prevent corruption and the *appearance of corruption*. It recognized that simply banning bribery wasn't enough to stop corrupt political relationships, as political campaigns being bankrolled by a small number of incredibly wealthy donors would inevitably create the

same appearance problems as bribery itself.

The Court said that "to the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."

But the Court found that same line of reasoning to be "inadequate" when deciding whether to uphold limits on the total amount a campaign could spend, and limits on total independent expenditures by individuals and outside groups. In so doing, the Court effectively declared that money and politics could be limited and regulated for one reason, and one reason alone: stopping corruption and its appearance.

After *Buckley*, the Constitutional framework for campaign finance law remained largely static and unchanged for over a quarter-century. As new money in politics scandals emerged, such as the "soft money" scandals of the 1990s, laws like the McCain-Feingold Act, passed in 2002, to combat these new problems within the "corruption and appearance of corruption" framework created by *Buckley*. McCain-Feingold was designed to push back against new methods that corporate and labor interests had developed to use their money in federal campaigns. It also combatted practices that parties (along with presidential and congressional candidates) had adopted to accept unlimited contributions by claiming the funds raised would not be used in federal elections—so-called "soft money."

In 2004, the Supreme Court voted 5-4 in *McConnell v. Federal Election Commission* to uphold the law against a challenge similar to *Buckley*. When deciding the case, it held that "Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence[,]'" pointing out that many of the examples of corruption from Watergate that prompted the 1974 FECA amendments were not instances of *quid pro quo*, cash-for-votes exchanges, but of wealthy interests making "substantial donations to gain access to high-level government officials."

In fact, the Supreme Court specifically *rejected* the idea that regulation of money in politics must be limited to such *quid pro quo* arrangements, saying "[t]his crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising[.]"

This would seem to settle the question. 30 years of Supreme Court precedent stated that campaign finance laws are only legitimate when they seek to prevent corruption and the appearance of corruption. But they *also* recognized that corruption can extend beyond simple cash-for-votes—elected officials *can* be unduly

swayed by other forms of spending on their behalf, and public disapproval of these practices is a legitimate grounds for regulating them.

But then, in 2005, something changed at the highest court in the land: not the law, or the facts, or the Constitution, but the *makeup* of the Court. Justice Sandra Day O'Connor, who had been part of the five-Justice majority upholding McCain-Feingold, retired and was replaced by Samuel Alito, who subscribed to a much narrower view of what could be considered corruption and what means the government could use to prevent it. Five years later, the significance of this change became readily apparent when the Court decided a case whose name has become synonymous with big money's corrupting influence on politics: *Citizens United*.

Citizens United was a direct constitutional challenge to the ban on corporate and union independent expenditures—one that, given the Supreme Court's previous rulings, would not have seemed very likely to succeed. After all, the Court had specifically upheld bans on corporate political expenditures in *Austin v. Michigan Chamber of Commerce* in 1996, and again in *McConnell v. FEC* in 2004. The Court had concluded that corporations' rights under the Constitution were different from individuals, for many reasons.

But the makeup of the Supreme Court had changed by 2010. Writing for this new 5-4 majority, Justice Kennedy declared that corporations had the *same* First Amendment right to make independent political speech as individuals. Perhaps even more important for campaign finance theory, though, the majority opinion in *Citizens United* signaled a move away from the "appearance of corruption" standard by redefining it.

The five-Justice majority in *Citizens United* held that the kind of corruption that campaign finance laws could try to combat was *quid pro quo* corruption—direct trades of cash for votes. By the Court's logic, since independent expenditures weren't given directly to candidates, but instead spent independently, they could not create a *quid pro quo* relationship. The majority also did not share the concerns expressed in the Court's past decisions about independent expenditures being used to buy access to politicians.

Not that they doubted such access could be bought—rather, they didn't see the buying of access as a problem: "That speakers may have influence over or access to elected officials," Justice Kennedy wrote, "does not mean that these officials are corrupt." Kennedy also included a quite extraordinary conclusion about the expectations the American people have of their elected officials, writing that "The appearance of influence or access [] will not cause the electorate to lose faith in our democracy."

Despite all this, *Citizens United* was not a *carte blanche* for money in politics. In fact, Justice Kennedy rested the opinion on several key assumptions. One was that independent expenditures would live up to

their name: “By definition,” he wrote, “an independent expenditure is political speech presented to the electorate that is *not coordinated with a candidate*.” Another assumption was that the public would know who was responsible for these expenditures, as he argued that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” Yet another assumption is that corporate shareholders would know whether and how their money was being spent on politics and have the opportunity to object, since “Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”

Was Justice Kennedy right that, given these assumptions, the threat of corruption would be greatly reduced? Unfortunately, we’ll likely never know, since the world imagined by Justice Kennedy in *Citizens United* looks absolutely nothing like the world *Citizens United* actually created.

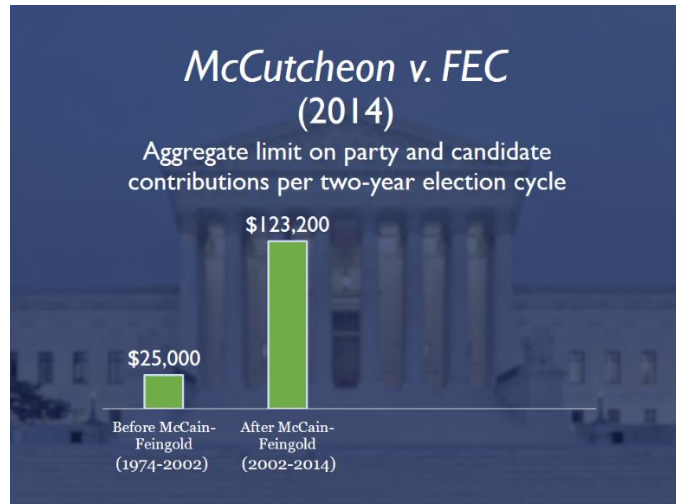
Citizens United was followed almost immediately by a major DC Circuit decision which significantly compounded this change in federal law. In deciding that case, *SpeechNow.org v. FEC*, the DC Circuit Court said its holding was mandated by the Supreme Court’s decision in *Citizens United*.

The *SpeechNow* decision created independent expenditure-only committees—the legal term for Super PACs—by following Justice Kennedy’s logic in *Citizens United* to its natural conclusion: If money in politics can only be limited to prevent quid pro quo corruption, and if independent expenditures *by definition* cannot lead to quid pro quo corruption, then a political committee that engages exclusively in independent expenditures cannot be barred from raising unlimited amounts from individuals, corporations, unions, and other PACs, or from spending unlimited amounts on independent expenditures.

Or, in the words of the majority opinion: “The Court has effectively held that there is no corrupting ‘quid’ for which a candidate might in exchange offer a corrupt ‘quo’” when it comes to independent expenditures, since the candidate is not involved with the independent group.

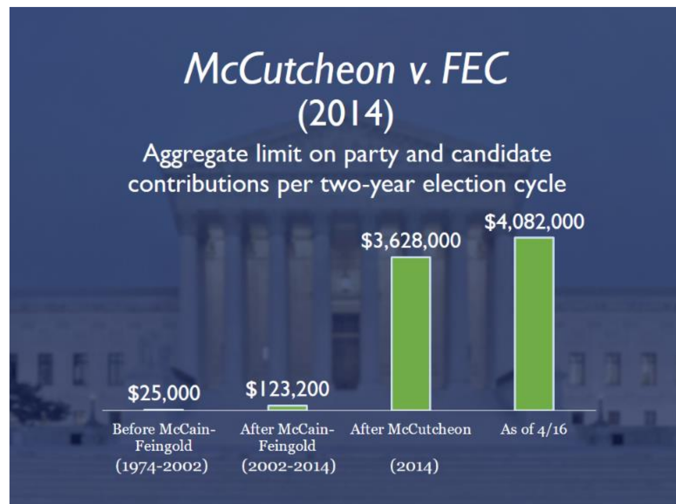
These cases were followed by another Supreme Court decision in 2014—*McCutcheon v. FEC*—that highlighted yet *another* kind of committee that can raise almost unlimited funds while being controlled directly by candidates and political parties, and one that’s just made its way into the national spotlight in 2016: the “joint fundraising committee.”

Prior to the *McCutcheon* decision, the law placed an aggregate cap on how much an individual could give to all candidates, parties and PACs during a two year election cycle: originally $25,000 annually in the years after Watergate, then increased to a "mere" $123,200 by McCain-Feingold to compensate parties for the loss of soft money contributions.



The Supreme Court struck down these limits in *McCutcheon* two years ago, again on a 5-4 vote, and again on the basis that the contributions in question—a vast aggregate sum of money given to party committees and candidates while remaining under the per-recipient contribution limits—would not lead to *quid pro quo* corruption or its appearance.

After *McCutcheon* removed the aggregate caps, a midnight backroom deal by the Republican and Democratic Senate leaders as part of the 2014 "Cromnibus" spending bill significantly raised limits on what individuals could give to party committees, bringing about contribution numbers not seen since the days of Watergate or Soft Money.



Now, both parties have created new joint fundraising committees able to accept seven-figure checks which are then disbursed among presidential and congressional campaigns, along with the national and state parties. In exchange for becoming a top-tier donor, which the Washington Post reports costs roughly $1.5 million per couple, donors to each party are offered retreats and gala dinners with party leadership, in addition to VIP status at the party convention.

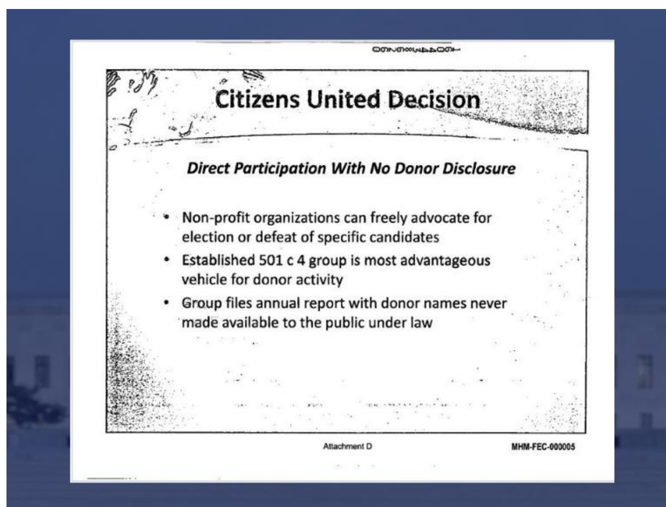
As I noted earlier, this is not just a party phenomenon. This is where the "Team Ryan" and "Hillary Victory Fund" half million dollar contributions come in—they are solicited by candidates on behalf of these JFCs. And yet, somehow none of this, according to the Supreme Court, "will cause the electorate to lose faith in this democracy." Unfortunately, this is far from the only time the Court has seriously misjudged the real-world consequences of its decisions.

Recall the basic assumptions underlying the Supreme Court's invalidation of limits on independent expenditures: (1) That they would be totally independent from candidates' campaigns, and (2) all of the money involved would be fully disclosed. In reality, neither of these requirements—which the Court *assumed* would be in place—has had much of an impact on the activities of candidates, donors, or PACs.

Let's begin by looking at disclosure. The majority in *Citizens United* assured skeptics that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." The question whether disclosure alone provides sufficient mechanisms for accountability is debatable, but what's beyond debate is the fact that disclosure has to *actually happen*. However, instead of disclosure, the 2012, 2014, and 2016 election cycles have been defined by an unprecedented flood of election spending, the source of which is often hidden from the public.

These funds are commonly called "dark money:" funding raised by organizations that claim to be nonprofit "social welfare" organizations under the tax code, but in reality are created for the purpose of influencing elections. Simply by filing with the IRS as "social welfare" nonprofits, rather than with the FEC as political committees, they are able to spend millions in elections without disclosing their donors. Though the FEC requires that political committees publicly disclose contributions, IRS rules allow "social welfare" organizations to keep donors' identities secret.

A recent FEC investigation found that a 501(c)(4) group—which claims social welfare nonprofit status—called the "Commission on Hope, Growth, and Opportunity" had told the IRS that it would engage in no political activity, but then told its potential donors that its purpose was to raise money to run campaign ads in targeted Senate races. Here's the PowerPoint slide it showed to donors.



Note that the slide claims *Citizens United* blessed non-disclosure—the opposite of what the opinion actually said! And now, in the 2016 cycle, dark money groups are playing a bigger role than ever before. Presidential candidates now have their own personal dark money groups, such as Marco Rubio's Conservative Solutions Project, which for a time was the second-most prolific political advertiser in the 2016 race, despite being a "social welfare" nonprofit and not disclosing *any* of its donors.

Despite Justice Kennedy citing rapid and full disclosure as a basis for *Citizens United*, the trend has moved in exactly the opposite direction since that decision.

In the 2004 election cycle, groups that don't disclose their donors combined to spend about $32 million on federal campaign activity—the bulk of it spent by unions. But by 2012, just two years after *Citizens United*, that number had increased to $336 million dollars—a more than *tenfold* increase in only eight years!

Even more troubling is the exaggerated impact these groups can have: A study published last year by the Wesleyan Media Project found that when political ads didn't disclose their true sponsors and instead used a generic, inoffensive name (in the study, they created the fictitious "Center for American Democracy") voters were much more likely to be persuaded by the advertisement than if it was from a candidate's campaign, or if the ad disclosed it was paid for by a small number of wealthy donors.

This is because groups with an obvious political affiliation turned off the supporters of the other party, but when the partisan identity is obscured, *all* viewers tend to see the ad as more credible.

In *Citizens United*, Justice Kennedy stated that "a campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." This was technically true—such a system had not existed before—but that system does not today, either. In fact, by any reasonable measure, since *Citizens United*, the problem of undisclosed spending has only gotten worse.

The Court's guarantees that independent expenditures would not be coordinated with candidates—and thus would not risk corrupting those candidates—have not fared any better. The 2016 cycle is rife with examples of candidates flouting anti-coordination rules and working with supposedly independent groups, sometimes not even bothering to hide their coordination.

Before officially entering the race, a number of Presidential candidates including Jeb Bush, Scott Walker, and Martin O'Malley were active in creating "independent" super PACs and raising money for them. This allowed the super PACs to cover travel and staff expenses for these early candidates while the candidates themselves still claimed to only be "considering whether" to "consider" a run for president—thereby evading requirements that all exploratory activities must be paid for with campaign money subject to

contribution limits and disclosure requirements.

Once the race began, examples of coordination only became more brazen, as outside groups began to take on ever more responsibilities that had traditionally been handled by candidates' campaigns. This unprecedented flood of unregulated money has not gone unnoticed by the American people—a fact that this election has proven is true for supporters of both parties. On this issue, as we have seen, overwhelming majorities of both parties are in agreement.

Remember, in *Citizens United*, the Supreme Court assured its doubters that "the appearance of influence or access will not cause the electorate to lose faith in this democracy." So not only was the Court wrong when it assumed that independent expenditures would, in fact, *be* independent, but it was therefore clearly just as mistaken when it assumed that independent expenditures could not create corruption or the appearance of corruption—the American people have seen the political system the Court created, and to them, corruption appears prevalent.

Again, part of this is due to a change in the Court's makeup: At the time of her retirement, Justice O'Connor was the only member of the Court who had ever held elected office. Today, not one Justice on the Court has run as a political candidate or served in elected office, and thus has had firsthand experience of the realities of political fundraising. This perhaps explains why the five Justices in the deregulatory majority have seemed oblivious to those realities.

Another part of this issue is the Court majority's general ideological dislike of regulation: the Justices in the majority in *Citizens United* tend to view corporations—even huge, international, shareholder-owned corporations—as no different from any other voluntary association of individuals.

But let me turn to yet another key part of the current problem: the Court's assumption that the regulatory agencies charged with ensuring disclosure and anti-coordination laws are followed would do their job and enforce the law. In addition to the Court's gutting of essential tools to regulate money in politics, the regulatory system meant to enforce the laws that remain has suffered a near-complete breakdown.

Let's start with the FEC. Its six-member structure—three Republicans and three Democrats, at least four of whom must agree before the agency can act—was designed to prevent one party from using it for a partisan advantage. But today, that structure has left the Commission utterly crippled: The three Republican Commissioners almost categorically refuse to issue new regulations to enforce the law, or investigate violations of the law, even in cases where the Commission's *own General Counsel* believed the law had been broken!

As a result, 3-3 deadlocks at the FEC are routine and at an all-time high, as the anti-enforcement bloc has

prevented the Commission from taking action in almost any instance. In light of this, it's little wonder that Commissioner Ann Ravel, when she was serving as Chair of the FEC last year, told the New York Times that the agency wasn't merely dysfunctional, but "worse than dysfunctional."

This problem goes beyond the FEC: the Securities and Exchange Commission and the IRS have fared little better. In 2011, the SEC received a rulemaking petition asking it to issue regulations that would ensure corporate shareholders would be informed if their corporations were making independent expenditures in campaigns with corporate treasury funds.

One might assume that such regulations would be common sense: Part of the SEC's job is to protect shareholders, which includes making sure they know how their money is being spent. The law says that political contributions and expenditures are not deductible against profits as a "cost of doing business" under tax law, so the money being spent is after tax dollars—literally, the "shareholders' money." And yet, despite having more than *five years* in which to act, the SEC has not only failed to issue a shareholder disclosure rule, it's refused to even put the matter on their agenda.

In *Citizens United*, Justice Kennedy dismissed concerns that corporate political spending would be an issue, writing that shareholders would be able to "determine whether their corporation's political speech advances the corporation's interest in making profits[.]" But if the SEC won't make sure shareholders even know if their money is being used for political purposes, much less *what* those purposes are, shareholders have no way to make that determination.

The IRS, too, has failed in its duty to make sure that political organizations aren't abusing nonprofit tax status to evade disclosing their donors. The recent IRS "scandal"—the staff decision to use "tea party" and other particular political terms and phrases to trigger additional scrutiny when evaluating applications for (c)(4) nonprofit status—obscured the bigger issue: The agency was inundated with applications from groups which claimed to be focused on social welfare, but many of which were, in reality, political organizations seeking to evade disclosure requirements. These groups like "The Committee for Hope, Growth, and Opportunity" spent tens of millions in our elections and are still doing so.

This brings us to yet another source of inaction and gridlock that has weakened campaign finance law: Congress. Rather than responding to the very clear concerns of the American people and working to fix a broken system, Congress has instead intervened to make the problem *worse*. The IRS had been in the process of drafting new regulations to crack down on sham nonprofit groups when Congress passed the so-called "Cromnibus" bill to continue funding the government last December.

Senator Mitch McConnell insisted on adding a provision to that bill which explicitly barred the IRS from issuing new rules to prevent dark money groups from abusing nonprofit status. Also included was a

measure blocking the SEC from promulgating a shareholder disclosure rule, though that provision is unlikely to have much of an effect, given that the SEC has shown little interest in doing so anyway.

After Watergate, Congress took bipartisan action, enacting laws that were important improvements when compared to what had existed before. But in 2016, not only does Congress deadlock on all solutions to our current problems, but one party seeks to block anyone else from finding a solution either.

Earlier I noted a poll showing that more than half of all Americans believe our political system is broken and that we need to just "start over." Although "starting over"—whatever, exactly, that means—implies a dangerously radical change in our governmental structure, it's easy to see where that frustration comes from. Today, Super PACs, dark money groups, and regulatory failure make it more difficult than any time since Watergate to know who's paying to put elected officials in office, and significantly higher limits—with no aggregate contribution limit or limit on independent expenditures—mean there is much *more* money going to put those officials into office. Confronting this problem will require systemic change at many levels of government.

The Supreme Court's ruling in *Buckley* that political spending can only be curtailed in the name of fighting corruption and the appearance of corruption led to an imperfect but functional system of campaign finance regulation that, even with its flaws, still generally succeeded in its purpose of ensuring public disclosure and accountability. But in *Citizens United,* the Roberts Court began the process of gutting this standard by curtailing the very *meaning* of the word corruption—finding that the government's interest in preventing corruption and its appearance only applies to one very specific kind of corruption: quid-pro-quo, cash-for-votes exchanges. Or, put another way: the government may not prohibit more than outright bribery.

This, of course, ignores that the Supreme Court had, in *Buckley*, considered just such an approach and rejected it as being too narrow. It wrote that laws which ban "the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." Instead, the *Buckley* court correctly recognized the "corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." But now, we have a system featuring unlimited super PAC funding and spending on behalf of a single candidate, and rampant coordination between that candidate and "their" supposedly independent PAC.

The Supreme Court premised its holding in *Citizens United* that spending by such groups would not lead to corruption because they would be totally independent of candidates.

As we have seen, this "independence" has become a myth.

We now also have a system whereby groups can spend millions of dollars on political activities to sway elections while avoiding disclosure of their finances. Even though the Supreme Court assumed in *Citizens United* that such disclosure would—and, indeed, *must*—occur.

That disclosure has become a myth as well.

The reality is that governmental action and inaction—in the courts, the Congress, the Presidency, and regulatory agencies—have eviscerated our campaign finance laws and allowed both the appearance of corruption and untold opportunities for *actual* corruption. They have done this despite the long-standing Supreme Court precedent that money in politics can be regulated to prevent corruption and the appearance of corruption.

True, the recent 5-4 deregulatory majority on the Supreme Court sought to change its corruption jurisprudence in *Citizens United*, but even that case required full disclosure and rules against coordination, and it allowed only unlimited independent expenditures—not unlimited contributions.

Who benefits from all this intransigence and inaction? The officeholders who helped create it, in the sense that they can raise and spend ever-greater sums of money for their campaigns and their parties. But are they really the beneficiaries of this system, or prisoners of it?

Let me give you two numbers: 3 and 223.

Three is the number of fundraisers attended by President Reagan when seeking reelection in 1984. Technically, those weren't even *his* fundraisers—they were for the RNC. Since Reagan's campaign was publicly financed, he didn't *need* to fundraise for it. 223, by contrast, is the number of fundraisers attended by President Obama when seeking reelection in 2012 after he effectively ended the public funding system in 2008 by becoming the first candidate in more than 30 years to opt out.

The situation in Congress is even worse: members spend more time on fundraising for their next election than on any other activity.

This slide comes from a leaked DCCC presentation to freshman representatives. Their single most time-consuming job every "work day"? "Call time"—hours spent on the

phone in party offices, dialing potential donors to ask for yet more dollars.

Consider what Tim Wirth—who represented Colorado in both the House and Senate for almost two decades—had to say at a conference earlier this month about the toll this takes on members' ability to do their jobs:

> "Once elected, Members of the House and Senate can't then escape the chase for money. The Congressional calendar is organized to accommodate relentless fundraising; in a typical week, Members show up late Tuesday, do business on Wednesday, including long hours of "dialing for dollars," and leave again on Thursday. Seldom are votes called on Monday or Friday, as members fan out to tend to politics in their district and mobilize their campaign war chests. Anyone outside the safest seat will tell you that they spend significantly more time raising money than they do addressing constituent needs or dealing with public policy. In fact, we now have a part-time Congress."

Think about that a moment: Arrive Tuesday evening, maybe have fundraising events that night, work a few hours Wednesday between more fundraising events and calls, then another few hours on Thursday morning, then head home or off to a weekend fundraiser. That is between one half to one day of work a week—and that's during weeks when Congress is *in session*, which is only about 40 weeks out of the year! That's at best 40 full days a year of legislative work in Washington—for a full-time job.

I am not suggesting members are slackers; I am suggesting that the system we have has made their *real* job raising campaign funds for their own campaign committees, leadership PACs, super PACs, and party committees. What Senator Wirth calls their "part time" job is serving as members of Congress—researching and understanding legislation, attending committee hearings and markups, working with fellow members. It is the time for these activities—central to the job of legislating—that has been robbed by the current world of almost full-time fundraising. And our democracy and legislative process are the losers.

In response to this broken and ineffective system of legislating, there have been calls—some of them from distinguished figures in the field of campaign finance—to loosen restrictions on parties, allowing them to accept even more massive contributions from wealthy donors as a way to "strengthen the parties" and make the burden of fundraising for members less onerous. But this ignores one of the Supreme Court's core holdings in *Buckley v. Valeo*, not to mention a key lesson of Watergate: it is large *contributions* to candidates and parties from mega-donors that lead to corruption and the *appearance* of corruption.

As I noted earlier, Congress has already increased limits to amounts that were almost unimaginably high just a few years ago—$350,000 for one seat at a fundraiser, $500,000 "Team Ryan" checks, $1.5 million

dollar per couple to a joint fundraising committee! In light of this, how can anyone claim that the solution is allowing political parties to accept yet larger contributions? Especially donations that are directly solicited by party leadership, along with congressional leaders and presidential candidates?

So what *is* the answer? There is not, nor has there ever been, a single “silver bullet” that will solve the problem of big money in politics, but there *is* hope for change.

For one, the makeup of the Supreme Court has already changed. Today, the Justices are split 4-4, and whoever is appointed to fill the late Justice Scalia’s seat will have enormous influence over the approach taken by the Court in future campaign finance cases. Whomever that new Justice is (and whoever appoints them), they will need to recognize that the Court’s ever-narrowing definition of corruption has completely lost touch with the realities of politics—something the American people are clearly already well aware of.

Beyond that, the current public outcry over campaign finance provides the most compelling reason in decades for the Court to reconsider the principle it laid out in *Buckley*: that preventing corruption and its appearance is the *only* permissible justification for campaign finance law. This myopic view of the consequences of money in politics has defined our politics for far too long, and left unacknowledged every American’s interest in, and right to, have a say in our political discourse.

However, one new Supreme Court justice will not guarantee change—even under ideal circumstances, a receptive Supreme Court can only uphold *new* campaign finance laws that are passed by Congress or the states and signed into law. The task still falls to Congress and state legislatures to write them, and on competent and functional administrative agencies to enforce them. For some years now, the FEC, SEC, and IRS have failed to faithfully execute the laws they were charged with enforcing, and Congress either refused to act to remedy the situation or went so far as to actively obstruct attempts to address the problem. This must change.

It was 44 years ago that Associate FBI Director Mark Felt—then under the *nom de guerre* “Deep Throat”—told two young reporters from the Washington Post that, if they wanted to know the truth about Nixon, Watergate, and the endemic corruption of the 1972 election, they would have to “follow the money.”

Well, they *did* “follow the money,” and the scandal they uncovered brought down a President and prompted the single most important overhaul of money in politics regulation in American history—one that has now been largely undone. I believe our current crisis of money in politics, and the loud public anger over this state of affairs, must spur everyone involved—the President, Congress, the Supreme Court, regulators, candidates alike—to recognize that if they are to regain the confidence of the American people, bold and sweeping reform now must not merely be treated as a goal, but as an absolute necessity.