

THE MONEY CRISIS: HOW *CITIZENS UNITED* UNDERMINES OUR ELECTIONS AND THE SUPREME COURT

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As we draw closer to the November election, it becomes clearer that this year's contest, thanks to the Supreme Court's 2010 *Citizens United* decision, will be financially dominated by big money, including, whether directly or indirectly, big money from the treasuries of corporations of all kinds. Without a significant change in how our campaign finance system regulates the influence of corporations, the American election process, and even the Supreme Court itself, face a more durable, long-term crisis of legitimacy.

For years, our political process was governed by an underlying principle: large organizations, primarily corporations, were not allowed to buy their way into elections. For 100 years, our laws reflected this principle.

First, Congress passed the Tillman Act in 1907, which prohibited corporations from using their treasuries to influence federal elections.¹ Signed by President Theodore Roosevelt, the legislation recognized what had become abundantly clear: corporate influence corrupts elections. Later, under the Taft-Hartley Act of 1947, Congress extended the same prohibition to labor unions.² For generations, these regulations provided the bedrock of our election law that followed, including the landmark Bipartisan Campaign Reform Act passed in 2003. And for several election cycles, between 2004 and 2008, our system seemed headed towards more fair and transparent elections. But *Citizens United* changed everything.

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1. Ch. 420, Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b(a) (2006)).

2. Ch. 120, sec. 304, § 313, 61 Stat. 136, 159 (1947) (codified as amended at 2 U.S.C. § 441b(a) (2006)).

SOFT MONEY, REGULATION, AND A NEW ROAD TO CORRUPTION

Unfortunately, in the early 1990s, Democratic lawyers and strategists exploited a loophole created by the FEC in the late 1970s. They created “soft money” writ large—a system that allowed the solicitation of unlimited contributions to the political parties from corporations, labor unions, and individuals. This system was corrupting—Senators would solicit gigantic, unregulated contributions from the same corporations that had legislation pending on the Senate floor. Both parties were guilty. By the peak of the 2002 cycle, combined soft money raised from both Republican and Democratic committees reached nearly \$500,000,000.³

After many years of work, and on the heels of the infamous Enron scandal, Senator John McCain and I won our battle and closed the soft money loophole with the enactment of the Bipartisan Campaign Reform Act (“BCRA”), better known as the McCain-Feingold bill.⁴ The law’s most significant provision, which remains the law of the land today, prohibits parties from raising (and elected officials from soliciting) unlimited contributions.

Almost immediately, the same corporate interests that fought McCain-Feingold set to work to dismantle it. In what was clearly an orchestrated effort by opponents of campaign reform,⁵ a group called Citizens United produced a movie savaging the record of then-Senator Clinton. Ostensibly intended to educate the public about conservative concerns regarding Clinton’s run for the presidency, the film was little more than a legal vehicle to challenge some of the common-sense restrictions enacted by the BCRA. Specifically, the creators of the film sought to challenge the BCRA’s requirement that electioneering communications—commonly known as “phony issue ads” that attack a candidate in the days before the election, but don’t explicitly advocate voting for or against that candidate—be subject to the same disclosure requirements and contribution limits as other campaign ads.

The Court was presented with a narrow question from petitioners: should the McCain-Feingold provision on electioneering communications (either thirty days before a primary election or sixty days before a general election) apply to this movie about Hillary Clinton? The movie, of course, was not running as a normal television commercial; instead, it was intended as a long-form, “on demand” special.

3. David B. Magleby, *Political Parties and the Financing of the 2008 Elections*, in FINANCING THE 2008 ELECTION 210, 214 (David B. Magleby & Anthony Corrado, eds., 2011).

4. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified primarily in scattered sections of 2 and 47 U.S.C.).

5. Philip Rucker, *Citizens United used 'Hillary: The Movie' to take on McCain-Feingold*, WASH. POST (Jan. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012103582.html>.

Yet Chief Justice Roberts apparently wanted a much broader, sweeping outcome, and it is now clear that he manipulated the Court's process to achieve that result.⁶ Once only a question about an "on-demand" movie, the majority in *Citizens United* ruled that corporations and unions could now use their general treasuries to influence elections directly. Despite giving strenuous assurances during his confirmation hearing to respect settled law, Roberts now stands responsible for the most egregious upending of judicial precedent in a generation. As now-retired Justice John Paul Stevens wrote in his dissent to the majority in *Citizens United*: "[F]ive Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."⁷

So while the most significant portion of McCain-Feingold remains law, *Citizens United* created a framework for corruption parallel to "soft money."

The most notorious byproduct of *Citizens United* is certainly the super PAC. Super PACs, now ubiquitous across the political spectrum, can collect unlimited funds from corporations and individuals, and then spend that money to elect or defeat candidates for office, so long as that work is not "coordinated" with the candidate campaigns themselves. In practical terms, super PACs can now legally use barely-disclosed money from corporate treasuries to produce blisteringly negative television ads attacking candidates and elected officials directly. The super PAC supporting Governor Mitt Romney's candidacy, for example, spent more than \$50 million in the first three months of 2012 in the pursuit of the presidential nomination.⁸

The *Citizens United* decision also has had an effect on the perceived legitimacy of our elections—increasing skepticism about the campaign finance system. When the public sees the Supreme Court overturn 100 years of settled law, a cynicism sets in. And when the groups created by *Citizens United* dominate our elections with hundreds of millions of dollars of unregulated money, many may begin to believe that the average participant's small contribution is irrelevant, and the average person's vote is grossly outweighed, by the gigantic contributions now allowed.

6. See Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, NEW YORKER, May 21, 2012, at 36, available at http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin.

7. *Citizens United v. FEC*, 130 S. Ct. 876, 932 (2010) (Stevens, J., concurring in part and dissenting in part).

8. See *Independent Spending Totals*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (last visited May 30, 2012).

THE RISE OF INTERNET POLITICS AND THE LESSONS OF 2008

It was not always this way; it was not even this way recently. For three election cycles, in 2004, 2006, and 2008, our system of campaign financing began to take shape in a way that channeled citizen participation and provided incentive for candidates to turn to the democratic support of online activists and small-dollar contributors.

This turn toward online organizing began with the presidential campaign of Howard Dean during the 2004 election, and came to fruition with then-candidate Obama's use of online fundraising and organizing during the primary and general election of the 2008 cycle. The change resulted from two coinciding factors: the changed regulatory environment following the passage of the BCRA, and the technological advances the Internet afforded campaigns and party committees.

The effect of the change in law was immediate. For example, the national Democratic Party raised an unprecedented amount of money from small-dollar donors in 2004, the first election since the BCRA entered into effect. But the true innovation didn't occur until 2008, when then-Senator Obama's campaign invested the time and resources to fully embrace the ability of technology to organize supporters online. Not only did the campaign raise a historic amount in small-dollar contributions, they created a new platform for supporter engagement—an in-house social network called *my.barackobama.com*. The new platform allowed supporters to create their own profiles, track the volunteer time they dedicated to the campaign, and raise money on their own from their personal network of friends and families.⁹ The results were staggering: over 2,000,000 profiles were created on the platform and 30,000 offline events were planned. In total, Obama raised \$500,000,000 online.¹⁰

But as candidates for office were given incentive to connect more directly with average voters and donors, they also found themselves more publicly accountable to those whose support they sought. In the summer of 2008, then-Senator Obama faced a tough vote—whether to support legal immunity for telecommunications companies that assisted the Bush administration's illegal, warrantless wiretapping program. Originally, then-Senator Obama opposed immunity, and favored accountability for those who had helped President Bush break the law, the Foreign Intelligence Surveillance Act (FISA).

When a new bill came up in the Senate, then-Senator Obama decided to support the legislation, which essentially swept the conduct into the bounds of law retroactively. Quickly, a new phenomenon occurred: the social network

9. Sarah Lai Stirland, *Propelled by Internet, Barack Obama Wins Presidency*, WIRED (Nov. 4, 2008, 8:25 PM), <http://www.wired.com/threatlevel/2008/11/propelled-by-in/>.

10. Jose Antonio Vargas, *Obama Raised Half a Billion Online*, WASH. POST: CLICKOCRACY (Nov. 20, 2008, 8:00 PM), http://voices.washingtonpost.com/44/2008/11/20/obama_raised_half_a_billion_on.html.

created to build supporter enthusiasm and translate it into volunteer time and donations had now become a loud platform for dissent. “Senator Obama Please Vote NO on Telecom Immunity - Get FISA Right” quickly became the largest group on the my.barackobama.com social network.

Within weeks of the group’s creation—and subsequent media coverage—then-Senator Obama responded personally, by posting a message to the group explaining (although not changing) his position on the FISA bill.¹¹

The 2008 election cycle, however, saw at least one ongoing major flaw in its campaign finance system: a completely neutered enforcement agency. The Federal Election Commission has been fatally flawed since the time of its creation—any administrative law professor will point out that a law enforcement commission with an even number of commissioners is probably designed specifically not to enforce the law at all. And in 2008, the Commission was especially feeble: for the first half of that year, the FEC could claim only two seated commissioners. In effect, campaign laws were simply not enforced.¹²

Since 2008, despite having a full roster of commissioners, the FEC still remains ineffective, as even Democratic violators go unpunished as conservative commissioners remain unwilling, philosophically, to enforce any campaign finance law.¹³

THE DEEP THREAT OF *CITIZENS UNITED*

The corrupt entities created by *Citizens United* threatened to erase the gains we’ve enjoyed since the Bipartisan Campaign Reform Act. Now, instead of small-dollar, online donors, the most prominent actors in the 2012 election cycle are unnamed corporations and a small group of influential—primarily conservative—billionaires.

And the public is noticing. A recent poll conducted jointly between the *Washington Post* and ABC News found a staggering reality: nearly seven in ten

11. Barack Obama, *My Position on FISA*, HUFFINGTON POST (July 3, 2008, 5:05 PM), http://www.huffingtonpost.com/barack-obama/my-position-on-fisa_b_110789.html; see also *Response from Barack on FISA and Discussion with Policy Staff*, Joe Rospars’s Blog (July 3, 2008, 4:32 PM), <https://my.barackobama.com/page/community/post/rospar/gGxsZF>.

12. See *Senate Confirms New FEC Commissioners, Ending Long Partisan Standoff*, CBSNEWS (June 26, 2009, 5:15 PM), http://www.cbsnews.com/2100-501743_162-4206600.html.

13. See Jesse Zwick, *Broken Federal Election Commission Fails to Enforce Campaign-Finance Laws*, WASH. INDEP. (Sept. 28, 2010, 4:36 PM), <http://washingtonindependent.com/98816/broken-federal-election-commission-fails-to-enforce-campaign-finance-laws>.

registered voters believe that super PACs, the prominent vehicle used to channel unlimited funds into our elections, should be illegal.¹⁴

Public disapproval extends to the Court itself, and that sentiment is bipartisan. A recent survey conducted by the Pew Research Center found that public favorability of the Court dropped a full six percentage points (from 58% approval to 52%) since 2010, the year the Court handed down *Citizens United*.¹⁵ And unlike public opinion during the George W. Bush administration, which saw a split in approval along party lines—Democrats disapproved far more often—now, both Democrats and Republicans disapprove. Pew found another striking figure: among self-identified independents, the Court’s approval rating is down twelve points since 2009 (from 64% approval to 52%).

While this drop in public faith in the Court is undoubtedly attributable to many factors, including the nomination of new Justices, it’s clear that a large majority of Americans oppose the *Citizens United* decision and disagree with the Court’s assertion that corporations should enjoy similar First Amendment rights as individuals.¹⁶ This concern about corporate influence began to manifest itself in the past year, most notably in the form of legitimate, earnest protest of Wall Street.

Now-retired Justice John Paul Stevens, in his stinging ninety-page dissent in *Citizens United*, recognized the danger in the majority’s departure from precedent regarding corporate regulation:

At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.¹⁷

It’s also true that Congress can and must do more to reform our elections. Possible legislative steps include passing strong disclosure legislation, fixing our now broken system of presidential public financing, and replacing the dysfunctional Federal Election Commission with a true enforcement agency.

Ultimately, however, it is the Supreme Court that must find its way back to the path we began in 2004, 2006 and 2008, when candidates for office were

14. Chris Cillizza & Aaron Blake, *Poll: Voters Want Super PACs To Be Illegal*, WASH. POST (Mar. 13, 2012, 7:00 AM ET), http://www.washingtonpost.com/blogs/the-fix/post/poll-voters-want-super-pacs-to-be-illegal/2012/03/12/gIQA6skT8R_blog.html.

15. PEW RESEARCH CTR., SUPREME COURT FAVORABILITY REACHES NEW LOW 1 (2012), *available at* <http://www.people-press.org/files/legacy-pdf/5-1-12%20Supreme%20Court%20Release.pdf>.

16. Press Release, Democracy Corps, Greenberg Quinlan Rosner Research, & Pub. Campaign Action Fund, *Two Years After Citizens United, Votes Fed Up With Money in Politics* (Jan. 19, 2012), *available at* <http://campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf>.

17. *Citizens United v. FEC*, 130 S. Ct. 876, 979 (2010) (Stevens, J., concurring in part and dissenting in part).

given an incentive to seek the support of small-dollar contributors, if only from necessity.

The Court has a clear opportunity. A new challenge from Montana, based on that state's historic anti-corruption laws, could allow the Supreme Court to reconsider its decision in *Citizens United*, and at least two justices have hinted that the 2010 ruling is untenable. In granting a stay of a Montana Supreme Court decision upholding that state's anticorruption laws, Justice Ginsburg, writing with Justice Breyer, found the pulse of the chaos *Citizens United* has wrought: "Montana's experience, and experience elsewhere since this Court's decision in *Citizens United v. Federal Election Commission*, make it exceedingly difficult to maintain that independent expenditures by corporations 'do not give rise to corruption or the appearance of corruption.'"¹⁸

Justice Ginsburg is correct. Today's framework for corruption cannot stand.

18. Order Granting Stay in Pending Case, *Am. Tradition P'ship v. Bullock*, No. 11-1179 (Feb. 17, 2012) (citation omitted).