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I am often asked how, after 25 years as an election lawyer, service as an FEC Commissioner, and General Counsel to 2 presidential campaigns, did you end up as Stephen Colbert's lawyer on late night TV. The answer is "I was lucky…"

It just goes to show—90% of life is "just showing up"—and returning phone calls.

I was at my desk one day last spring and the Colbert staff called—"What is a PAC. Would you be willing to explain it on the Show?" And I've been doing it ever since…with the forbearance of my law partners at Caplin & Drysdale, although as one of them put it to me, "For the first time in 30 years, my kids care what I do, because I work with Stephen Colbert's lawyer!"

Stephen Colbert does have a knack for taking very complicated legal subjects and hours of staff discussions and research and distilling it into 4 ½ minutes of Q&A that captures the essence of the issue, and explains it in layman's language in a humorous, captivating way. What every Supreme Court advocate wishes for!

On one Show a shell corporation we had registered with the State of Delaware as "Delaware Shell Corporation" was turned into the Stephen Colbert 501(c)(4) with a pro forma 15 second board meeting in front of the studio audience. Afterwards, I had a call from a law professor at a prominent West Coast law school who said she wanted to thank me. "I have been trying to find ways to explain the role of incorporator to my students—now I can just show them the Colbert Report."

But it is NOT the role of the incorporator that causes millions of idealistic younger Americans— and seen-it-all older ones—to watch the Colbert Report's coverage of campaign finance in this Presidential election year. Nor is it the riveting discussion of IRS filing procedures for Section 501(c)(4) organizations that won the Show a Peabody Award.

The Colbert Report coverage is so successful because it accurately describes a campaign finance world that seems too surreal to be true. A system that claims to require disclosure of money spent to elect or defeat candidates, but in fact provides so many ways around that requirement as to make disclosure optional; a system that says that "independent expenditures" cannot be limited as a matter of Constitutional law because they cannot corrupt because they are "totally independent" of candidates and parties—when the daily news reports about these supposedly "independent" groups show that candidates raise money for them, candidates' former employees run them, and candidates' polling and advertising vendors advise them. And the major donors to these "independent" groups are often also official fundraisers for the candidate.

Other major donors have private meetings with the candidates, or travel with them on campaign trips!

Some of the other realities of modern campaign finance are just as bad. This year, for the first time since 1972, we have a Presidential election with no candidates financed by public funds in either the primary or the general elections. Instead of receiving grants from the U.S. Treasury to campaign, we see a race by both sides to raise a billion dollars each from private donors. They won't make it, by the way, because so much of the money instead will be going into the SuperPACs and 501(c)(4)s and (c)(6)s allied with the parties and the candidates.

Those groups will raise and spend hundreds of millions of dollars, not just in the presidential race but in House and Senate races which present "opportunities" for the interests funding them…opportunities to change control of Congress by knocking off unsuspecting incumbents with last minute expenditures of large sums of money, often paid for by undisclosed sources.

And all of this will be done with unremittingly negative ads created by unaccountable media advisers for unaccountable "independent" "outside" groups. Because if the candidates do not have to stand behind their advertising, and answer to the public for it, there is nothing to prevent every minute of every campaign ad being negative, because those ads are more effective—they do a better job of depressing the opponent's vote. The dirty secret is that voters may not like your candidate any better, but they grow disheartened about theirs, and stay home.

Incumbents have reacted to this new world by running faster and faster on their fund-raising treadmills. Incumbent Senators have to raise hundreds of thousands of dollars a month—every month of their six-year terms.

I recently heard a presentation by the President of a respected centrist Washington foreign-policy think-tank. He discussed the tense situation in the South China Sea, the pirates in the Straights of Malacca, and the geo-political challenges of the melting polar ice cap. Then he identified what he said was "the greatest threat to the United States today"—"the campaign finance system." I froze, wondering if I had heard correctly. He explained that there were two reasons for this. The first was that campaign money had become the largest corrupting factor in Washington policy making today. And the second was the TIME that this fundraising took. Members are only in Washington two and a half days a week—from Tuesday afternoon until Thursday night. While here they spend most free moments in party-provided phone booths dialing for dollars—or at lunch and cocktail and dinner fundraising receptions. On weekends they are often on a coast –or a mountain top—far from home, at fundraising events. The result, said the think-tank president, is that it is the staff who are trying to make policy. As he put it, "I was staff, and I have great respect for staff, but that job belongs to the elected Members, not to staff!"

Harvard Law Professor Larry Lessig has written a new book called *Republic, Lost*, in which he argues that our campaign finance system is destroying our ability to have a functioning government. He does not claim that Members of Congress are venal and corrupt—to the contrary he says that they are largely good people, stuck in a system that focuses

overwhelmingly on the need to raise money from interests who have it and contribute to influence legislation. To give you a sense of his book—which I commend to you—a couple of the Chapters are called:

WHAT SO DAMN MUCH MONEY DOES

HOW SO DAMN MUCH MONEY DEFEATS THE LEFT

HOW SO DAMN MUCH MONEY DEFEATS THE RIGHT

As you may have heard, Jack Abramoff is now back in Washington, out of prison and having seen the light. "Ban contributions from lobbyists", he says, "and from the executives of companies that employ them." Not because lobbying is bad, but because in his own personal experience the involvement of lobbyists in campaign fundraising can dominate the legislative process.

All of this is observed—overseen would be the wrong word, because it would suggest some activity—by a Federal Election Commission riven with partisan and philosophical gridlock. It is so bad that the Commission did not even have the necessary majority vote—four out of six Commissioners—to put out a Notice of Proposed Rulemaking after *Citizens United* and seek comment on whether it should change the regulations just invalidated by the Supreme Court. It is an agency so deadlocked that on several occasions it has not been able to agree to appeal when its own regulations were declared "contrary to law" by federal district courts.

Meanwhile, Congress itself is gridlocked over most of these issues—when they are here, and working, rather than fundraising. Disclosure, which used to be like "Mom and Apple Pie"—everyone was for it…is suddenly one of the most partisan issues in Washington. For two straight Congresses, there is not a single Republican Senator supporting the DISCLOSE Act, which would give us the disclosure the Supreme Court said in *Citizens United* that we already had! And the Republican response is that the Act is written to avoid requiring the unions to disclose the individual names of their millions of small dues-paying members. That is true, but is it a relevant criticism? Would they really support disclosing the names of millions of individual small donors to the NRA as well?

How did we get here? It is often forgotten, but for long periods of the previous Century, we had a pretty well functioning campaign finance system. In 1904 President Roosevelt called for public funding of the political parties, and a ban on corporate contributions. In 1907 he got one of those with the passage of the Tillman Act, which banned corporate contributions in federal elections, Congress extended contribution and expenditure restrictions to unions in 1947, and rewrote the laws following Watergate to ensure disclosure, set new individual contribution limits to candidates and parties, and create for the first time a public funding system for presidential elections and establish the FEC as an enforcement and disclosure agency.

Then in 2002, Congress passed McCain-Feingold, which essentially was designed to bring the system back into compliance with the Watergate-era reforms. I know everyone does not agree, but I believe the McCain-Feingold law largely worked in the 2006 and 2008

elections—the parties and candidates raised more money than before, much in small contributions, and there were comparatively few attempted end-runs around the system, and relatively little undisclosed money.

All of that is changed now. Obviously not everything I have described is the result of *Citizens United*—the Congressional fundraising race has been getting worse for years. But much of what we face today is the result—intended or otherwise—of that 2010 decision.

The Court made three fundamental mistakes in *Citizens United*. First, it declared that while corporate spending in all elections—state and local as well as federal—must now be allowed, that would be accompanied by complete disclosure of all campaign spending. Shareholders would know how their corporations are spending their funds, and voters would know who is paying for the election ads they are watching. As we have seen, this has not proved to be the case—largely because the Supreme Court majority was reading the statute, rather than the more obscure FEC regulations which "interpreted" the statutory disclosure mandate out of existence.

Then, the Court assumed that "independent expenditures" would be "totally independent" of candidates and parties—which is how the Supreme Court defined independent expenditures in *Buckley v. Valeo* back in 1976, and why it found them to be free of any possibility of corruption. As we have learned this year, that is a nice theory—with very little grounding in political reality, or in FEC regulations. Instead the FEC has actually deadlocked on an advisory opinion asking about the possibility of making coordinated non-coordinated election communications.

Finally, the Court erred, most seriously of all, in announcing that the only corruption that the government can attempt to avoid is "quid pro quo" corruption—explicitly trading votes or similar official actions for money—exactly the sort of personal venality that rarely exists. Justice Kennedy wrote: "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy…Ingratiation and access, in any event, are not corruption." The Court seems to be saying that the Congress, and state legislators cannot address systemic corruption—what Prof. Lessig calls "type two" corruption-- the effect on the legislative process of the massive amounts of money being raised and spent, and the sale of special access to large donors, and the threats of massive "independent" expenditures if the legislators don't vote as they are asked. This, the Court seems to say, is all protected by the First Amendment—even if it is this sort of systemic corruption which most worried the founders when they sought to make Congress independent of other interests, "accountable only to the people."

I do not pretend this is a simple constitutional issue, precisely because this is where two important Constitutional values meet, sometimes head on: the First Amendment, the quintessential <u>individual</u> right to free speech, which we know about, and the important <u>collective</u> right to a functioning, representational government, which we sometimes forget is the whole purpose of the Constitution. But the Supreme Court has until now recognized repeatedly that the legitimacy of government is threatened at its core when it is corrupt, or even appears to most citizens to have a serious conflict of interest.

Since the Supreme Court's decision in *Buckley*, which upheld most of the Watergate campaign finance reforms (with the important exception of "expenditures totally independent of a candidate or party"), the Supreme Court's jurisprudence in campaign finance has changed. The Court has moved from largely upholding regulation of campaign fundraising and corporate spending, to striking it down. The 6-3 Austin decision acknowledging the corrupting potential of corporate money in elections was succeeded by the Supreme Court's 5-4 decision in *McConnell v. FEC* upholding the McCain-Feingold restrictions and then shortly after by the Court's 5-4 decision the other way in *Citizens United* striking down McCain-Feingold's regulation of corporate and labor money in elections.

One noteworthy aspect of *Citizens United* is that it was decided by a Court which, for the first time in U.S. history, has not a single Member who has held elective office. Justice O'Connor, the key vote to uphold McCain-Feingold, had run for office, raised campaign funds, served in the Arizona legislature as majority leader, and understood how dangerous and complicated the intersection of campaign money and legislation can be. She was willing to defer to Congress, after it spent years discussing the potential and appearance of corruption in the fundraising done by members and party committees. She deferred to the considered judgment of Congress in dealing with what it identified as a serious problem, on the theory that they knew more than the Supreme Court about corruption in the legislative process.

Other Justices show no such deference—in fact, they appear to think any regulation of campaign finance by Congress is suspect, that it must be nothing more than incumbent protections. Having watched firsthand as insurgents and rank and file members of Congress passed McCain-Feingold with considerable public support and over the bitter opposition of insiders of both parties,—I did not regard the legislation that way.

But more importantly, I think the clear propensity of this Court to brush aside Congress' judgment that there <u>is</u> a danger of corruption of the legislative process because of election spending creates a serious institutional barrier to Congress' ability to safeguard the legislative process.

In the last two years, the Supreme Court has allowed unlimited corporate and labor spending in all elections in the U.S., overturning 60 year old federal laws and some older laws in 26 states. It has declared unconstitutional as a restriction on speech the Arizona public financing system, because it provided additional public funds for more speech to candidates participating in the public funding system, triggered if their opponents spent that amount. The DC Circuit has declared unconstitutional the longstanding $5,000 contribution limit to independent-expenditure only political action committees, which decision has resulted in the creation of what we know as SuperPACs—like Stephen Colbert's Americans for a Better Tomorrow, Tomorrow.

All of this has been done in the name of the First Amendment, which as Americans, and as lawyers, we revere. But one can be a First Amendment absolutist without being absolutely sure what it requires and what it prohibits. Well-meaning and wise people can differ on these questions, which I believe argues for some deference to Congress when it seeks to limit corrupting activity, as they are the ones who experience the campaign finance system on a daily basis.

The courts themselves have been of several minds about what the First Amendment requires, and remain closely divided. The Supreme Court's current doctrine is that spending money for an ad that elects a candidate is not corrupting, but giving the candidate the money to run the same ad is. The Court has held that Congress could prohibit corporate and labor expenditures in elections—until it held that it couldn't. The Supreme Court in *Citizens United* said that the government had no business limiting anyone's speech, and that we are better off hearing ALL voices, no matter their source. Then it summarily affirmed the decision of a three-judge district court in *Bluman v. FEC* that held that the government could prohibit foreigners legally residing and working in the U.S. from speaking in U.S. elections. The three-judge court explained that the difference was that foreigners were traditionally outside of participation in the U.S. political system, even if they lived here. Of course, many people thought that was true of corporations too, until *Citizens United*.

My point is not that the Court was right in one case or wrong in another, but rather, that these are close and complicated issues of Constitutional interpretation and that the Court slashing its way through campaign finance statutes with a machete seriously threatens the stability of our democracy.

I am occasionally asked questions by reporters and foreign visitors about our campaign finance system and I have taken to responding that there is now no such a "system." The laws written by Congress have been so rearranged by various Court decisions that they resemble the pieces of a jig-saw puzzle, laid out randomly on a table, with important pieces missing.

On occasion, it suits the partisan interests of one side or another to claim that the pieces cannot be put back together even when they can—that a constitutional barrier exists when it does not—because that argument sounds better than acknowledging the partisan reality.

One example of this is the current debate about disclosure. There are certainly good reasons for some of the organizations running political ads this year to think that they will raise more money if they do not have to disclose their donors. American Crossroads started as an organization that disclosed its contributors—but it did not have as many as expected. Then, they created a 501(c)(4) that did not disclose its donor's names—and it suddenly had a whole lot more.

Corporations may have good reason to seek to keep political expenditures secret—secret from their shareholders and customers and employees, at least. The example of Target, which faced consumer boycotts, shareholder resolutions, and angry employees when it contributed to a committee supporting a controversial candidate for Governor in its home state of Minnesota in 2010, is often cited as what other corporations hope to avoid.

However, in addition to these practical arguments, opponents of disclosure attempt to wrap their position in the Constitution. They claim that requiring the disclosure of funders of political ads would "undermine" *Citizens United*. They also claim that the secrecy of corporate funding is protected by the 1950s civil rights case *NAACP vs. Alabama*.

The *Citizens United* claim is particularly far-fetched. One under-reported aspect of the *Citizens United* decision is that the Court upheld the broad disclosure requirements of McCain-Feingold 8-1: every member of the Court except Justice Thomas agreed that "the public has an interest in knowing who is speaking about a candidate before an election."

The eight Justice majority for this portion of Justice Kennedy's Opinion went on to praise disclosure of the sources of political speech in robust terms:

> "With the advent of the Internet, 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. 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…The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

It is hard to think of a more ringing endorsement from the Court of mandated disclosure of the funding of political spending!

The NAACP comparison rests on a similarly flawed foundation: the harm faced by members of a small and highly unpopular civil rights organization in Alabama in the 1950s was severe physical violence—even death. Groups that allege a fear of "reprisals" today are of a different nature entirely, as is the nature of the alleged reprisal. The NRA and Chamber of Commerce are hardly small and vulnerable unpopular minority groups. Nor is the organization in California that led the campaign against same sex marriage in that state to a 52 percent popular vote victory. And the harm alleged is not death or serious physical danger, but insults and consumer boycotts (itself protected first amendment activity).

As Justice Scalia wrote in *Doe v. Reed*, a case about disclosure of ballot signatures:

> "There are laws against threats and intimidation: and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which…campaigns anonymously…[t]his does not resemble the Home of the Brave."

So, where do we go from here, on disclosure or any other campaign finance issue??

We have campaign finance practices that both parties—and presidential candidates—say they dislike. I would like to think that after this election the problems with the status quo will be overwhelmingly clear to both sides, and a consensus on a new way forward will emerge. Unfortunately, at the moment only the first part of that sentence seems accurate—the problems are clear, but the ability to reach a consensus is not.

There is talk of a constitutional amendment. Not only would such an amendment be hard to draft, putting the interpretation right back into the hands of the Courts, but I think talk of an amendment encourages avoidance of the hard work that should be done to solve these problems. For there are legislative solutions that would be both effective, and constitutional—they just take legislative willpower. Such a reform agenda could include:

- Defining independent expenditures so that they are truly independent-of the candidates, their agents, previous staff, close family members, current vendors

- Requiring disclosure of the sources of funding of all election ads, no matter who runs them

- Reform of the FEC, so that it becomes an effective, independent, enforcement agency

- Restrictions on contributions, and fundraising, by lobbyists

- Lobbying regulation reform, as proposed by the ABA, to ensure that people who lobby or run lobbying campaigns, become registered lobbyists

- An effective public funding system, so that candidates for President and the Congress have the resources needed to campaign for office, and to run for re-election, without spending every moment of their working day thinking about fundraising rather than doing the work they were elected to do

These are not easy solutions, and I do not claim they are the only ones, or even necessarily the right ones. But the time has come that we—all of us—need to dedicate ourselves to acknowledging the problems with our campaign finance practices—and what they are doing to our governmental system—and resolve to correct them.