

The Money in Politics Disaster: Where Do We Go from Here*

Trevor Potter

President, Campaign Legal Center

As the 2016 presidential race heats up, you will hear more and more about the money in politics disaster: our broken campaign finance system and the role of big money in our elections. But what does this mean? What is the significance of all this money, what effect does it have on our elections and, more broadly, our system of government?

To get a sense of the current state of our campaign finance system, let me start with three numbers: \$1.6 billion, \$3 billion and \$6.3 billion. \$1.6 billion is the estimated amount of all spending in the 1992 congressional and presidential elections. \$3 billion is the estimated amount of all spending in the 2000 elections. And \$6.3 billion is the estimated amount of all spending in the 2012 elections — so, more than doubling every decade.

Now, I am not one of those people who think it is possible to run for office without money — it costs money to communicate and to make your voice heard over the roar of modern life. I do, however, think it is important to look at the implications of these numbers — of the cost of our elections doubling every decade. Because the money has to come from somewhere, be raised some way, and spent somehow. All of that — who gives it, how it is raised, how it is spent — has an effect on who holds office and what they do, or do not do, once in office.

Those who favor less regulation of campaign fundraising and spending frequently assert that \$6.3 billion is not a lot of money in a large democracy — that we spend a lot on advertising potato chips or soft drinks too — and that political money educates voters and encourages participation in our elections.

If that were so, we would presumably see increases in voter turnout as the costs of our elections rise. But 2014 saw the lowest rate of voter turnout in a mid-term election since 1942 — in the middle of WWII, with millions of soldiers away from home. Congratulations to Colorado, with the 4th highest voter turnout in the nation! It was this state's first election with the new mail-in ballot system, demonstrating that if it is easier for people to vote, they are more likely to actually vote!

One reason for the historically low turnout may in fact be TV ads. Hundreds of millions of dollars are spent on negative TV advertising designed to turn off voters. These ads seek to convince voters that their preferred candidate or party is less than they hoped and to diminish their enthusiasm for voting. That is what political consultants design negative ads to do: turn off the other side's supporters. And the dirty secret is that it works — people often stay home as more money is spent on such ads.

Another problem with the claim that the amount we spend on elections is “not all that much money” is this: spending is not evenly distributed across the country. Instead, money is, of course, disproportionately spent on close elections in swing states.

So, how is all of this money raised, and what are the effects of current fundraising practices? Let's look at another two numbers: 8 and 220. Eight: the number of fundraisers Ronald Reagan attended in his re-election year of 1984. His campaign was publicly funded, so he just attended a couple of big party dinners.

Two hundred-twenty: the approximate number of fundraisers Barack Obama attended in his re-election year, following the death of the Presidential public funding system. And there are only 365 days in a year. This reflects the fact that for 30 years we had a functioning Presidential Public Financing system. We no longer do.

Here is yet another number: 50%. That is the estimate of the amount of time members of Congress spend fundraising while “working” in Washington — at breakfasts, lunches, receptions and dinners — much of it spent in “call time.” This is hours spent in cubicles at party headquarters with headsets, “dialing for dollars” — calling strangers who have already given to someone else and were put on a party donor list.

One effect of this, of course, is that every hour spent fundraising is an hour not spent in committee hearings, meeting with other members, reading reports or negotiating — what we used to call “legislating.”

So, we have all this money being raised by the President and members of Congress, who have spent all these hours fundraising. Where is the money coming from?

“It is often said that the Reagan era tax reform legislation of 1986 could not be passed today because there are so many more special interests, lobbyists and organizations which give us gridlock.”

Let me give you yet another number: \$200. That is the amount that an individual must give to be listed in the Federal Election Commission (FEC) database of contributors. Two hundred dollars is not a lot of money, and hardly the level of contribution that buys access or influence. What percentage of Americans do you think reach that minimal threshold of participation in our political system? One quarter of 1%. So 99.75% of Americans are left out of the principal way that members of Congress and candidates for President interact with their supporters.

Meanwhile, a mere handful of Americans — 100 people — gave 60% of all the money raised and spent by Super PACs in the 2014 election. This year, every candidate seems to have their own Super PAC, funded by their own billionaire or two.

And that brings us to government itself, Washington: what John McCain calls, with only half a smile, “the city of Satan.” Let me give you another two numbers: 400 and 12,000. Four hundred was the number of registered lobbyists in 1959. Twelve thousand is the number today. That is a lot of people being paid to influence Congress. Meanwhile, Congress’ own staffing — its paid experts — has shrunk over the last 20 years.

Here are two more numbers: \$200 million and \$3.3 billion. Two hundred million dollars was the total expenditures reported by registered lobbyists when Ronald Reagan was President. Last year’s number was \$3.3 billion. And what do those lobbyists do? In part, they raise money for the members of Congress they lobby. Remember: that \$6.3 billion has to come from somewhere, and it is not coming from 99.75% of Americans.

Then there is another 50%: the percentage of members of Congress who become lobbyists when they retire. And who do they represent? Let me give you a clue: not average citizens!

Of the \$3.3 billion spent lobbying members of Congress in 2014, \$2.5 billion was spent by corporations and their trade groups. That is more than 30 times the \$75 million spent by labor (\$45.6 million) and public interest groups (\$30 million) combined.

It is often said that the Reagan era tax reform legislation of 1986 could not be passed today because there are so many more special interests, lobbyists and organizations which give us gridlock. If that is true, is it possible Congress today would ever pass the Clean Air Act? Or the Clean Water Act? Or create the EPA? And those were passed under a Republican President, working with a Democratic Congress.

This is not a pretty picture. But how did we get here? How did we get to the point where members represent their campaign contributors and not their constituents? Where out-of-state money dominates the selection of a state’s representation in Washington? How did we get to the

“The Supreme Court’s second incorrect assumption in *Citizens United* was that all of the independent spending unleashed by the decision would be “totally,” “truly” or “wholly” independent of candidates — words used in several Supreme Court decisions to explain the sort of speech the government cannot limit.”

point where a handful of billionaires determines who can successfully run for president? Many people point to the Supreme Court’s decision in *Citizens United v. FEC* — and, indeed, that’s part of it.

Justice Kennedy, writing for the majority and unleashing a flood of independent spending into our elections, made three assumptions that have proven dangerously false: (First) that the sources of funding for independent spending would be disclosed, (second) that independent expenditures would truly be independent of candidates and parties, and (third) that the appearance of influence or access being bought will not cause citizens to lose faith in our democracy.

First, disclosure: Contrary to Justice Kennedy’s assurance, the source of much of this new outside spending is not disclosed. In the 2008 election — the election preceding the Supreme Court’s decision — there was \$69 million in dark money spent in our elections. Compare that to the \$310 million spent in the 2012 election — more than quadruple the amount spent just four years earlier. We do not have the disclosure the majority assured us we could rely on to prevent corruption. To use Colorado as an example: of the \$70 million of outside spending in the 2014 Senate race, \$21 million of that came from dark money groups that do not disclose the sources of their funding. We have a huge amount of money, spent on a handful of key races, and we have no idea where much of that money is coming from.

This will only get worse in 2016. Big dollar contributors now have an option as to whether their contributions will be disclosed. In 2012, Senator Rick Santorum’s presidential campaign was kept afloat despite primary losses because of the financial support Santorum’s Super PAC received from wealthy businessman Foster Friess. Santorum is running again, and according to Mr. Friess, “I will find ways to support Rick financially that will be less visible.” Meaning he will still give millions of dollars to groups supporting Senator Santorum, but he can channel the money so his contributions will not be publicly disclosed.

The Supreme Court’s second incorrect assumption in *Citizens United* was that all of the independent spending unleashed by the decision would be “totally,” “truly” or “wholly” independent of candidates — words used in several Supreme Court decisions to explain the sort of speech the government cannot limit. Justice Kennedy’s opinion said “By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” The Court’s expectation that independent expenditures are not coordinated is built on the Court’s seminal campaign finance decision *Buckley v. Valeo*. There, the Court concluded that independent expenditures which are “totally” independent of a candidate and his/her campaign do not create the same potential for corruption as contributions made directly to a candidate.

Justice O’Connor explained in *McConnell v. FEC* that “expenditures made after a wink or nod often will be as useful to the candidate as cash.” The unfortunate reality is that almost all of today’s allegedly independent expenditures are made with a wink and a nod. The effect of this should be that they are not considered to be legally independent, and can therefore be limited by law. But that is not happening.

Already in the 2016 election cycle, we have seen candidates raising millions of dollars for their Super PACs. Unlike amounts raised for the candidate’s campaign committee, Super PACs can accept unlimited contributions. Super PACs today are run by close associates of the candidate, and the candidate committees have “outsourced” some of the functions they traditionally performed — like ground game activities — to the candidate’s Super PAC. Thus, these PACs have become an important cog in a candidate’s fundraising machine — the opposite of the “independence” the Court says is necessary to avoid corruption. This week Senator Ted Cruz’s campaign announced the fundraising results of both his official campaign committee and the supposedly “totally independent” Cruz Super PAC. Sen. Cruz himself said to the press in Iowa: “Between the campaign fundraising and the Super PAC fundraising, we have over \$40 million cash in

the bank.” So much for “totally independent.”

Another key element of the Court’s recent campaign finance decisions is they narrow its definition of corruption, and thus what money can be limited to prevent corruption. As the definition of corruption narrows, so too does the type of conduct campaign finance laws can address. Five justices now define corruption as only “quid pro quo corruption,” or, in more straightforward terms: a bribe.

Linda Greenhouse, a leading reporter covering the Supreme Court, summed up the problems with the Court’s reasoning in *Citizen United*:

Justice Kennedy’s elaboration on this point is so divorced from reality that it reads more like a parody in *The Onion* than words to be found in a Supreme Court opinion. “Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” Justice Kennedy wrote. “The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.” And then this beauty: “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”

New research suggests that the Court’s understanding of corruption was better 40 years ago in *Buckley*. There, the Court said: “Of almost equal concern as the 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.”

On dark money and coordinated activity, though, the Court’s incorrect assumptions need not be fatal; the FEC, along with other agencies, could require more disclosure and penalize groups that coordinate their spending with candidates. However, they have not — and thereby hangs another sorry Washington tale. FEC Chair Ann Ravel recently said: “People think the FEC is dysfunctional. It’s worse than dysfunctional.”

Now, the Commission fails to enforce the law, even deadlocking on whether to open investigations. A Republican commissioner publicly stated he has blocked the Commission from deciding cases because many more complaints allege violations by Republican candidates than Democratic ones. The vast majority of cases come before the Commission through citizen complaints — the commission has no control over the complaints coming in the door. And yet, this commissioner is using explicitly partisan reasons to avoid deciding cases and enforcing the law.

In the case of the IRS, political efforts to undermine the law and the turmoil that can create have been well documented. Tax law provides an exemption for section 501(c)(4) social welfare organizations, which may engage in some limited political activity and are not required to report their donors to the public. According to IRS regulations, (c)(4)s must be “primarily” engaged in promoting social welfare. Now, after the “IRS scandal” created by an overwhelmed IRS administering the (c)(4) regulations in demonstrably wrong and politically disastrous ways, the IRS shows little interest in enforcing any part of the (c)(4) standards. The backlash in Congress from the alleged targeting of “tea party” conservative groups has been too great. The IRS’s reluctance to enforce, coupled with the rise of (c)(4) and (c)(6) political machines, created a

very effective way to channel undisclosed dollars into our elections.

***“People think the FEC is dysfunctional.
It’s worse than dysfunctional.”***

- FEC Chair Ann Ravel

The SEC, another agency that may be able to shed some light on political spending, has to date failed to do so. The SEC received a petition in 2011 asking the Commission to require publicly held companies to disclose their political spending to shareholders. As the agency charged with protecting shareholders, requiring this type of disclosure is certainly within the SEC’s purview. The SEC received a record-breaking 1.2 million comments supporting the petition. And yet, under pressure from the Chamber of Commerce and Republican leaders in Congress, the SEC Chair removed the petition from the Commission’s agenda. In June, the House Appropriations Committee approved a bill that prohibited the SEC from using appropriated funds to draft such a rule. All of this despite the fact that Justice Kennedy in *Citizens United* said corporate money in elections would not be a problem because “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.”

Finally, President Obama has failed to use the power of executive orders to provide greater disclosure in the political process. In 2011, the White House announced that President Obama was considering issuing an executive order to require government contractors to disclose their contributions to dark money groups. To date, he has not, despite very public calls for him to do so.

Something has to change — both in terms of the national campaign finance crisis I have described, and in our involvement as citizens with politics and government. A recent *New York Times* poll revealed 84% of Americans believe money has too much influence in our elections and that changes to our campaign finance system are necessary. Eighty-five percent of Americans think our campaign finance system needs to be completely rebuilt or fundamentally changed. Seventy-eight percent think spending by outside groups should be limited. This overwhelming public support for reform provides an opportunity — so what should be done? A couple of modest changes could produce dramatic results.

First, we need disclosure. Amendments to federal law and FEC regulations could provide meaningful disclosure and shine some light on the dark money in our elections.

We could also require actual independence between candidates and supposedly independent outside groups. In all likelihood, the outside groups would not have as much money as they do now if they were truly independent. Part of the fundraising cachet of these groups is that big dollar donors know they are giving to the candidate’s Super PAC — blessed by the candidate and run by the candidate’s close associates — and the donor accordingly expects to benefit from access to the candidate once in office.

Nationally, we need a new system for financing elections — one that frees candidates and elected officials from the world of “dependent corruption” they live in now. There are several good options to get such additional sources of funding to candidates.

On the federal level, the presidential public financing system worked well for two decades. But, due to legislative inaction, the system did not receive the necessary maintenance that would have kept it up to date with how modern campaigns are run.

Changes could make public financing a real option for presidential candidates again. New York City's citizen financing model has worked. Their small contributions are matched six-to-one out of city funds. This sends candidates out to raise money from average citizens rather than concentrating on the wealthy few.

Professor Richard Painter, who served as President George W. Bush's White House ethics chief and was appalled by what he saw in Washington, has recently proposed a new and inclusive, rather than restrictive, idea: **\$100 a year "taxpayer rebate."** Every registered voter would receive the first \$100 of his/her taxes returned as a voucher or debit card, which they could use to support candidates or parties of their own choosing. As Professor Painter has put it, "the key point is that the money is our money, not the government's, and the first \$100 a year should go toward allowing the taxpayer to choose who spends the rest." This is not "food stamps for politicians," as Mitch McConnell calls public funding. This is citizens re-asserting primacy in our democratic system, and using the first fruits of our labor to decide who gets to spend the rest of our tax money.

The American Anti-Corruption Act, a proposal which I drafted, would break the current connection between lobbyists and campaigns by prohibiting members of Congress from accepting large contributions or fundraising help from those who lobby them. Additionally, members and senior congressional staffers would not be able to work for lobbying firms and companies that employ lobbyists for a long "cooling off" period after leaving Congress.

Finally, members would be prohibited from fundraising while Congress is in session.

Indicative of what can be done is what is already being done through citizen involvement in state and local governments. State and local races are also feeling the damaging effects of Citizens United and have reported an increase in the amount of outside money spent in elections. Maryland's campaign finance agency reported it fielded a call about setting up a Super PAC to support a 16 year-old candidate for the student slot on the Maryland School Board! Because of the smaller size of many of these races, money spent on local media ad buys and ground game activities can have an enormous impact.

Many jurisdictions have taken steps to update their campaign finance laws in response to these new trends. After a huge amount of dark money was spent in the 2012 election, California strengthened its outside spending disclosure laws. Earlier this year, the Montana legislature passed a new outside spending disclosure law. New York City, San Diego and Philadelphia have all recently strengthened their coordination regulations.

Two successful ballot initiatives recently approved by voters show there is an appetite for these types of reforms. In Chicago, voters approved a ballot measure promoting small-donor public financing with 79% support. In Tallahassee, 67% of voters approved a citizen financing measure. Historical and current examples show that many of these reforms are driven by citizen initiatives.

In addition to these newly adopted measures, several more jurisdictions are pursuing reform measures: this November,

Seattle voters will consider a democracy voucher program on the ballot and Maine voters will consider a referendum requiring increased transparency for dark money spending.

Efforts for disclosure are coming through other avenues as well. The New York State employee retirement fund has successfully used its leverage as a large shareholder to push the companies it invests in to disclose their political spending.

There are a number of groups working on all levels of government to promote campaign finance reform and fighting to reduce the influence of money in politics. But this is a David versus Goliath battle. Compared to billions of dollars of campaign contributions, outside spending and lobbying expenditures, it is estimated that groups trying to reduce the influence of money in politics have an annual budget of roughly \$20 million. The Los Angeles City Department of Animal Services has an annual budget of \$20 million. Do we really value pets in LA as much as we value the future of our democracy? We need to do better at supporting these reform efforts.

A key component to any of these reforms is an informed and engaged electorate, invested in their communities and in our democratic system of government. Our government was designed to — and should — represent us, the people. But it's up to us to engage with our elected officials and the democratic process in order to push for a better system that is more responsive to constituents than contributors. After all, it's our country, and worth fighting for.