

Remarks by Trevor Potter
Money In Politics: What Could Go Wrong?
Citizens Congress 2014: Restoring Equality in Our Democracy
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Thank you, Bill and the Citizens Congress for the invitation to speak today. The title of this panel is “Money in Politics: What Could Go Wrong?” I am here to talk about what HAS gone wrong with money in politics and what we can do about it. There is so much to say on this issue that I could fill the entire time allotted to the three of us — and then some! But I’ll focus on the fundamental who, what, and where questions of our current campaign finance system so that we can take stock of where we need to go from here.

Let’s start with the AMOUNT of money in campaigns. Recently, we have seen a tidal wave of money flowing into federal campaigns. In 2012, there was a total of \$7 billion spent in federal elections — more than double the amount spent in 2000. The amount spent on individual House and Senate races is up. The cost of the average Senate race was \$20 million in 2012, double what it cost in 2002. 2012 saw a \$29 million house race and an \$85 million Senate race.

2012 was also the first Presidential election in more than 30 years in which neither candidate participated in the post-Watergate Presidential public funding system — instead opting to raise and spend hundreds of millions of dollars by themselves.

A substantial portion of the huge jump in campaign spending is the result of “outside independent expenditures” which have multiplied in number and amount since the Supreme Court’s decision in *Citizens United*. There was \$240 million in outside spending in 2008 and \$300 million in 2010, compared with more than \$1 billion in 2012.

To make matters much worse, the percentage of this \$1 billion that was from secret sources, so called “dark money,” grew to thirty percent or \$300 million in 2012, spent in key states for the Presidential and Senate races. This secret spending is contrary to our bipartisan tradition of full disclosure of funds spent in elections — a tradition fully consistent with our constitutional norms, but now threatened by a wave of anonymous spending by both sides.

Let me be clear that I do not believe the amount of money being spent is ITSELF the problem. In general, in a democracy, the more money spent on political speech which informs the electorate about its choices is a good thing. However, that is not the case today. The first reason, as I have mentioned, is the growing proportion of money that comes from secret sources — so that voters cannot judge the motives behind political advertising, and spenders can threaten officeholders with retribution for legislative actions without public awareness of the corruption behind the scene.

But there are other problems with the current flood of political money in our democracy. The first is WHERE does it all come from? It comes from a tiny, tiny minority of the American people. The FEC publicly discloses the names of every American who contributes the minimum

reportable amount of \$200 to any candidate or political committee. What percentage of Americans gave this minimum amount triggering disclosure? One-third of one percent. This means that more than 99 percent of Americans do not participate in the fundraising process that has become central to the way we conduct our elections. And this one-third of one percent who disclose their contributions are not major donors — the heavy hitters — these are average Americans involved in the political funding process at the lowest recordable level. An even smaller percentage of Americans contributed to SuperPACs. Just over 600 people gave 90 percent of all SuperPAC contributions in 2012. Fewer than 200 people gave half of all SuperPAC money.

And why is this small minority giving so generously? Often because they want something from government, or want to ensure they don't get something — action — from government. Many of them are lobbyists seeking access to lawmakers, and/or wealthy individuals seeking to protect or extend tax breaks, all fueling the public's growing suspicion that our government operates on a system of special favors and crony capitalism.

The second major part of the problem with money in elections is HOW: how is all of this money raised? To say that Members of Congress are in a constant fundraising cycle — one that requires enormous amounts of time, endless phone calls, hours and hours every workday, weekend and night — is merely to begin to state the problem. These are hours NOT spent doing what Members of Congress are elected to do, and what they are paid to do — work on legislation, attend committee hearings, talk with their colleagues, seek consensus — all of the things that might make our Congress work.

Instead, members spend hours during the week in call centers, or at breakfast, cocktail parties and dinner fundraisers with a small group of people willing to pay for their company because they want something from them — and these are not constituents, but Washington lobbyists. On weekends Members of Congress travel to attractive locations on mountaintops or by the sea selected for their appeal to donors, where they spend their time mingling with lobbyists or billionaires rather than constituents.

This disease has infected the White House as well. The problem is evident when you compare two numbers: 9 and 222. In 1984, the year President Reagan sought reelection, he attended 9 fundraisers, and none of them were for his own campaign because he was in the public funding system. In 2012, President Obama attended 222 fundraisers for his reelection campaign. The whole purpose of the Presidential public financing system we have now lost was to avoid this result and allow the President to spend his/her time solving our nation's problems rather than fundraising.

WHY is this happening and how did we get to this point? How did we end up with \$7 billion spent on federal elections in 2012, and an election flooded in secret money? One answer is that the Supreme Court is now at war with the post-Watergate reforms, and at war with Congress's attempt to deal with corruption and the appearance of corruption in federal campaign fundraising through the McCain-Feingold law.

The case most notoriously associated with the Roberts Court’s efforts to unravel campaign finance law came in 2010 with *Citizens United*—a name now synonymous with corporate and undisclosed money in our elections. The Court ruled that corporations have the same political speech rights as individuals, thereby allowing corporations (and now unions) to make unlimited independent expenditures and electioneering communications.

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This brings us to the bigger question: Where do we go from here? How does our democracy deal with these challenges? This is the moment when we have to stop and think about basic American values — the values that make a democracy work. There is a historic danger of allowing a small subset of our society to control elections, and thus government — whether it’s an aristocracy, a crowned monarch, or a couple of hundred of the richest Americans in a country of 320 million. Citizens are willing to respect the legitimacy of a government they believe is transparent and acting in the national interest. They will distrust the decisions of a government they see as captured by narrow special interests bent on self-enrichment.

We need a system that allows for full participation, including the ability to communicate and have our voices heard — for all citizens. And we need a system in which Members of Congress are responsive to the people they represent. Former Supreme Court Justice John Paul Stevens spoke recently about this fundamental principle of our democracy, saying, “rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions.” Justice Stephen Breyer’s dissent in *McCutcheon* addresses this same idea. He said that part of the interest protected by the First Amendment is the ability of citizens to speak and be heard by their representatives. In our current system, the voices of voters are drowned out because members are listening to — indeed spending most of their time with — big money donors instead of voters.

Finally, we need to take another look at what sort of rules on money in politics are appropriate, even necessary, to protect our democratic system of government. As former Justice Stevens said, the Court got it wrong on corruption: “For years the Court’s campaign finance jurisprudence has been incorrectly predicated on the assumption that avoiding corruption or the appearance of corruption is the only justification for regulating campaign speech and the financing of political campaigns. . . . It is fundamentally wrong to assume that preventing corruption is the only justification for laws limiting the First Amendment rights of candidates and their supporters. Elections are contests between rival candidates for public office. Like rules that govern athletic contests or adversary litigation, those rules should create a level playing field.”

The current system does not create a level playing field, but a playing field drastically tilted in favor of those with large amounts of money to buy speech. A recently released book quotes President Obama as saying, at a fundraiser in 2012 to a roomful of millionaires and billionaires, “You now have the potential of 200 people deciding who ends up being elected President every single time.”

The good news after all of this is that there are solutions to these problems and, as evidenced by this event, there is citizen interest in changing our broken system. Some of the ideas worth spending time and effort on include:

The MayDay PAC: Professor Lessig's imaginative idea of raising money to defeat Members of Congress who oppose reform, and elect Members who will make it happen.

A Constitutional Amendment — recently endorsed by former Justice Stevens — allowing Congress and the states to place “reasonable” limits on campaign funding.

Public financing: We need to provide an effective alternative to the current system, so that candidates who want to avoid being indebted to special interests can still compete in elections. There are models out there that work, like New York City's program in which small private donations are matched five-to-one out of city funds. This sends candidates out to raise money from average citizens rather than concentrating on the wealthy few.

Another funding idea is in the American Anti-Corruption Act, which I helped draft. It would give every registered voter a \$100 tax rebate, a credit or voucher of their own money back, which can be given to any candidates or parties of their choice, so that citizens have a much greater say in how the rest of their tax money is spent.

The American Anti-Corruption Act also proposes breaking the current connection between lobbyists and campaigns by prohibiting Members of Congress from accepting contributions or fundraising help from the lobbyists who lobby them. Additionally, Members and senior Congressional staffers cannot work for lobbying firms and companies that employ lobbyists for a long “cooling off” period after leaving Congress.

We can insist that Congress require full disclosure of the sources of all funds spent in federal elections, and that the FEC require that “independent expenditures” be truly independent of candidates and political parties.

Speaking of the FEC, my former agency, we need to free it of its current 3-3 partisan deadlock, which has kept the Commission from doing its job. We need Commissioners who will work on a bipartisan basis to enforce the law, or perhaps a new structure to enforce campaign finance laws altogether.

So, we have much work to do. We need to start now, and gatherings of interested and engaged citizens — such as this — are the start!