Campaign Finance: Remedies Beyond the Court

By Trevor Potter & Bryson B. Morgan

It is difficult to overstate the impact of the Supreme Court's *Citizens United* decision. Justice Anthony Kennedy, writing for the 5-4 majority, overturned or ignored the Court's own precedents and federal, state, and local statutes that had been in place for more than 60 years. The immediate impact of *Citizens United* and subsequent cases was a dramatic increase in the amount that outside groups (both super PACs and certain nonprofit organizations) could raise and spend in federal elections. Given *Citizen United*'s exceedingly narrow definition of "corruption," and its broad statements dismissing the concerns of those who believe that unlimited spending by well-financed interests is potentially corrupting, reformers are correct to worry about what other federal and state campaign finance laws may be invalidated in the future.

While the consequences of *Citizens United* are dire, it is also easy to overstate the difficulties reform faces today. Despite the myriad calls for a constitutional amendment to overturn the decision, there are several reforms—and venues for these reforms—short of an amendment that can meaningfully mitigate the risks posed by *Citizens United*. In fact, Justice Kennedy's majority opinion itself provides the beginnings of a framework for such efforts. Broadly speaking, these potential reforms include: enhancing disclosure requirements so that voters know precisely who is funding public communications to elect or defeat candidates; requiring outside groups to operate totally independently of candidates and political parties; and creating a system of citizen funding of elections so that candidates and officeholders have the option of being beholden to average citizens rather than to large donors. Each of these reforms can be simultaneously advanced before several government institutions, including the White House, Congress, the Federal Election Commission (FEC), and other agencies, as well

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as various state governmental bodies. In short, the Constitution and the Court do not need to be changed in order for us to advance the cause of reform.

The new framework for reform begins with correcting two mistaken premises within the Court's majority opinion in *Citizens United*. Justice Kennedy, writing for the Court, stated that unlimited corporate and union independent expenditures do not give rise to corruption or the appearance of corruption for two principal reasons: one, the funders of independent expenditures are fully and effectively disclosed, and two, such expenditures are made totally independently of candidates and political parties. The problem is that both of these premises were proven incorrect as a matter of current law and practice in the 2012 election cycle.

EFFECTIVE DISCLOSURE

The Court assumed that existing federal campaign-finance laws would result in the disclosure of the sources of independent expenditures. As Justice Kennedy wrote:

> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed *before today*.... 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. [emphasis added]

His description of the "effective" disclosure regime that he claimed exists "today"—one in which voters and shareholders are provided with "rapid and informative" data on corporate independent expenditures—is a far cry from the reality of our current disclosure system.

A corporation or individual can easily avoid being disclosed by, for example, giving its funds secretly to a trade association or to a social-welfare organization, which can run the same candidate advertising as a political committee that discloses its donors. In those cases, the only name that appears on the advertisement is the name of the organization airing the ad—the Chamber of Commerce, the Sierra Club Foundation, the NRA, or even a new group with no public profile at all, such as the Citizen Awareness Project, a nonprofit that spent hundreds of thousands of dollars to defeat President Obama in Virginia, or Citizens for Strength and Security Fund, a nonprofit that aired ads against Republican Congressman Denny Rehberg's candidacy for the U.S. Senate seat in Montana. Such groups themselves need not disclose their donors. Comedy Central's "The Colbert Report" showed viewers how easy it is to create a new social-welfare organization—technically, a 501(c)(4) group—to provide donors complete secrecy; it took "The Colbert Report" under four minutes to set one up. According to the Center for Responsive Politics, political spending by organizations that do not fully reveal their donors reached

more than $663.8 million as of November 29, 2012, comprising 49.3 percent of all spending by noncandidate and nonpolitical party organizations. In contrast, only $96.3 million was spent by such nondisclosing groups on federal elections during the entire 2008 election cycle, and only $7 million during the entire 2004 election cycle. In short, the 2012 election will perhaps be remembered as the "dark money" election.

In light of these events, the creation of an effective disclosure system for campaign finance should be the immediate focus of those interested in reform. The current Senate version of the DISCLOSE Act, discussed in detail below, would mandate full disclosure of such funding.

"TOTALLY" INDEPENDENT EXPENDITURES

The Court has variously stated that independent expenditures are defined as those made "totally independently," "wholly independent[ly]," and "truly" independently from campaigns and political parties. In practice, however, such expenditures in the 2012 election cycle were often made in close collaboration with candidates and political parties. This happened because the FEC regulations that govern whether a group is considered to "coordinate" its expenditures with a candidate or political party are so permissive that they have proven more apt as a source of comedic inspiration than anything else.

For instance, candidates are free to endorse and solicit contributions for groups that run ads benefitting their campaign, and they can be fully briefed on the group's plans and messaging strategy. In certain periods, the regulations even permit a group to sit down with a candidate, plan the message of the ad together, feature the candidate in the ad, and target the ad to that candidate's electorate. In fact, Karl Rove's super PAC, American Crossroads, argued to the FEC that the regulations allowed its ads to be "fully coordinated" with candidates and political parties if such collaboration did not meet the FEC's narrow legal definition of "coordination." The FEC deadlocked, failing by a split 3-3 vote to reach agreement on the matter. We simply do not have a campaign-finance system that requires independent expenditures to be made independently of candidates and political parties.

At least not yet. But it is not an impossible goal: Having the law match the Court's definition of "whole, total, true" independence from candidates and parties would require only a new FEC regulation or a new statutory definition of coordination.

EMPOWERING SMALL DONORS

Ever since the Court's 1976 decision in *Buckley* v. *Valeo*, which invalidated limitations on political spending by candidates, campaigns, and individuals, the Court

has treated restrictions on independent political spending differently than contributions to candidates and political parties, with independent political spending receiving a higher degree of First Amendment protection. *Citizens United* continues this distinction, and despite substantial criticism, there are no signs that a majority of the Court is willing to revisit the expenditure versus contribution framework.

Because any attempt to limit spending by individuals and groups is likely to be invalidated by the Court, efforts should be made to enhance the ability of American citizens—We the People—to fund political campaigns in order to counterbalance the influence of wealthy individuals and corporations. There is no paucity of proposals to create citizen funding for elections, as discussed below.

THE VENUES FOR REFORM: THE WHITE HOUSE AND CONGRESS

This framework for reform can be advanced in numerous ways. The list begins at the top—with the President of the United States. The frequently deadlocked FEC has proven itself unable to enforce existing campaign-finance laws, and has gone to great lengths to narrow disclosure requirements. This has left many with the impression that "anything goes" with money and politics. During this same period, President Obama allowed five of the six FEC commissioners' terms to expire without nominating new pro-disclosure and pro-enforcement commissioners to replace the deadlocked "hold-over" commissioners. In early 2012, reformers submitted a petition to the White House with more than 25,000 signatures demanding that the President reform the FEC. The White House waited more than four months to respond to the petition, and did so by merely restating the President's commitment "to nominating highly qualified individuals to lead the FEC," with no action whatsoever to date.

More pressure should be focused on the President's power to reform the FEC, beginning with the appointment of competent commissioners who are committed to public disclosure and enforcing our existing campaign-finance laws and regulations. One way to cut the Gordian knot of political party control over FEC appointments would be for a reformist President to appoint a bipartisan group of respected outsiders to suggest names of potential FEC nominees to him, and for the President to announce in advance that he will commit to making nominations only from the names the group proposes. If this procedure were adopted by the White House, it would be constitutional, because the President can seek advice on nominations from whomever he chooses, and it would put pressure on the Senate to publicly justify and defend any partisan objections to the President's nominees.

The second reform venue is Congress, which can act on all three concerns laid out in the previous section. First, to improve disclosure, Congress should

pass the DISCLOSE Act. (Its full title is Democracy Is Strengthened by Casting Light On Spending in Elections Act of 2012.) This act, introduced by Senator Sheldon Whitehouse of Rhode Island, would require any group that spends $10,000 or more to influence federal elections to file a disclosure report with the FEC within 24 hours of the spending, and a new report every time an additional $10,000 or more is spent. Such reports—made immediately available on the FEC website—would disclose the names of each donor who gave an aggregate amount of $10,000 or more to fund its election-related activities. Other pieces of legislation that would enhance the transparency of political spending also have been introduced, such as the Empowering Citizens Act, introduced by Representative David Price of North Carolina, which would expand the disclosure requirements applicable to contributions bundled by lobbyists.

To counteract *Citizens United*, we need not amend the Constitution or change the Court. There are effective reforms we can pursue now.

Congress also could act to limit the role of lobbyists in campaign fundraising; enhance lobbyist registration and disclosure requirements; require members of Congress to recuse themselves from certain actions that benefit large campaign donors; strengthen its ethics enforcement processes by expanding the powers of the newly established and independent Office of Congressional Ethics; further restrict the ability of congressional staffers to parlay their time on the Hill into lucrative lobbying positions; and reform the FEC. These reforms could each be pursued separately. Or, more effectively, they could be pursued through a single legislative package, such as the comprehensive set of reforms advanced in the American Anti-Corruption Act proposed by the nonprofit, nonpartisan reform group United Republic.

Second, to make independent expenditures truly independent, Congress could enact legislation setting forth strict requirements that must be met in order for an organization's political spending to not be considered "coordinated" with federal candidates or political parties. Legislation could also apply strict contribution limits to super PACs that seek to benefit the election of a single or small number of candidates. Legislation introduced in August 2012 by Michigan's John Dingell, as well as United Republic's American Anti-Corruption Act, would do just that.

Finally, to empower small donors, Congress could adopt for federal elections the mechanisms that already exist in numerous states and localities for partial citizen funding of elections, usually in the form of matching funds for small donations provided to candidates who commit to raising small-dollar contributions. These programs have a demonstrated record of success. Congress could create

a tax rebate, voucher, or similar mechanism to provide incentives for citizens to contribute to political candidates. Numerous such proposals exist, including the American Anti-Corruption Act advocated by United Republic and its *Represent.us* campaign, that would provide registered voters with a $100 tax rebate that they could use to make one or more contributions to the federal candidates, political parties, and political action committees of their choosing.

THE VENUES FOR REFORM: THE AGENCIES

The FEC constitutes a third reform venue. When Congress passed and President Bush signed the Bipartisan Campaign Reform Act of 2002 (more popularly known as the McCain-Feingold bill), it specifically required every person who made "electioneering communications"—ads that refer to a candidate for federal office but do not expressly advocate for their success or defeat—aggregating more than $10,000 in a year to disclose the names of each donor who contributed $1,000 or more to the organization. However, under FEC regulations issued in 2007, organizations that make such communications must disclose only the names of donors who contributed to the organization specifically "for the purpose of furthering" such communications. The practical effect of this regulation is that only the rare donor who earmarks her donation for such communications must be disclosed. The FEC could close the loophole it created by amending its regulations to require groups that spend money on such communications to disclose all of their donors. The FEC could similarly amend its existing coordination regulations to require organizations that engage in independent expenditures to do so "totally independently" of federal candidates and political parties. Finally, the FEC could also step up enforcement of alleged campaign-finance law violations.

Next, the Securities and Exchange Commission (SEC) could act. Justice Kennedy's opinion focused on the ability of shareholders to use the "procedures of corporate democracy" to ensure that their "corporation's political speech advances the corporation's interest in making profits." Currently, however, most publicly traded companies do not disclose their political spending to the public or even to their shareholders. The SEC, which is charged with protecting shareholders, could require publicly held companies to disclose their political spending. In fact, just such an effort is currently underway. In August 2011, a group of law professors petitioned the SEC to issue rules requiring such disclosures. As of November 8, 2012, the SEC had received more than 300,000 comments on this petition, with nearly all comments expressing support for disclosure. The SEC has yet to respond to the petition, and continued support is needed to ensure that such rules are adopted. On a broader scale, corporate and union

democracy could be strengthened by requiring that members and shareholders authorize political spending, or have the ability to opt out.

The Internal Revenue Service (IRS) could also play a role here. As noted above, the vast majority of "dark money" is attributable to spending by tax-exempt social-welfare organizations or trade associations that do not publicly disclose their donors. In order to preserve its tax-exempt status, such an organization must not have the "primary purpose" of engaging in political campaign activities.

There is, however, considerable evidence that the IRS, under pressure from Republicans in Congress, is failing to enforce this requirement. The result is that several groups on both sides of the partisan divide—Crossroads GPS, Americans for Prosperity, Priorities USA, and others—appear to be, in fact, primarily engaged in political campaign activities, and therefore may be required to register as political committees and disclose their donors. The IRS could also take a more aggressive role in investigating and curtailing the increasing amount of political campaign activity by 501(c)(3) organizations, including churches and religious organizations. Existing laws strictly prohibit such entities from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office, yet there is a widespread perception that the IRS is failing to enforce this limitation.

The Federal Communications Commission (FCC) has recently taken the promising step of requiring the broadcasters of the top four network-affiliated stations (ABC, CBS, NBC, and Fox) in the top 50 markets to post their public political files online. These files contain detailed information about political advertising buys. This is a welcome development that will provide voters with the ability to quickly identify which organizations are running ads to influence their votes. Moving forward, the FCC also could require organizations that purchase political advertisements to disclose information about their top donors either as part of the public political file or as a disclaimer contained within the advertisement itself. Additionally, voters should encourage television stations to reject political advertisements purchased by outside groups that are inaccurate or misleading.

And finally, considering Washington's current state of paralysis, many of the reforms outlined above could also be sought at the state level, where the prospects for success may be significantly more promising. Indeed, in the wake of *Citizens United*, certain state legislatures have been quick to respond. For example, Rhode Island enacted legislation in June 2012 that requires any organization that spends more than $1,000 on election-related advertisements to disclose the identity of each donor who contributed $1,000 or more to the organization within seven days of making the expenditure. The previous month, the Connecticut legislature also approved a bill that required the board of directors of any corporation or nonprofit

organized or doing business in the state to approve every political expenditure greater than $4,000, but unfortunately the legislation was vetoed by Democratic Governor Dannel P. Malloy. And, recognizing the need to empower small-donor contributors, a broad coalition of public-interest groups announced a push for public financing of New York State campaigns in April 2012. These efforts may serve as useful models and build momentum for future reforms at the national level.

THE TIME FOR REFORM IS NOW

The corrupting influence of massive sums of campaign money (much of it secret from the public but not necessarily from the candidates and parties) and the close collaboration between campaigns and supposedly "independent" groups in the 2012 elections demonstrated the dire consequences of the *Citizens United* decision. But what's past is prologue. Historically, our nation has responded quickly and appropriately to address such threats. In the early 1900s, allegations that presidential campaigns were beholden to corporate interests led Congress to prohibit corporate political contributions. In the 1930s and 1940s, when union spending began to rise dramatically, Congress acted to prohibit corporate and union expenditures on behalf of candidates. The Watergate scandal gave rise to limits on the amount individuals can contribute to campaigns, the establishment of the FEC, and the creation of a public financing system for presidential campaigns. Most recently, the Bipartisan Campaign Reform Act of 2002 responded to large soft-money donations to political parties and the proliferation of so-called "issue ads."

We need not wait for the Constitution to be amended or for the ideology of the Supreme Court to change. Now is the time to pursue these effective and feasible reforms in order to repair the damage caused by the *Citizens United* decision and to fortify the integrity of our political process. **D**

Building a Permanent Majority for Reform

By Russ Feingold

In the wake of the Supreme Court's lawless decision in *Citizens United,* it's clear that corruption is alive and well in our political system. Super PACs, 501(c)(4) nonprofit corporations, and trade associations such as the Chamber of Commerce funneled hundreds of millions of dollars into the election this

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