

DANCE WITH DRAGONS: THE UNENDING BATTLE OF CAMPAIGN FINANCE REFORM

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ABSTRACT AND INTRODUCTION

No campaign is free. Funding for a candidate running for office must come from somewhere. Filing and reporting agencies' priority is making sure those campaign contributions adhere to the guidelines set by law. But the role of money and regulator appears adversarial. There is a dramatic clash between dragon and knight. The dragon represents money itself: relentless, fathomless and seemingly impenetrable. It breathes the fires of corruption across the political landscape. The knight is the archetype of the government regulator. While he or she wears armor, it is battered and singed. Her shield is strong but only partly blocks the dragon's flames. His sword, forged by good intentions, has been dulled by constant combat and often glances off the dragon's scales.

The titanic struggle between immortal dragon (for money has always pervaded politics) and knight rages on today. Two landmark cases from this battle will be closely reviewed, *Buckley v. Valeo* 1976 and *Citizens United v. FEC* 2010. This paper will conclude by assessing the future of campaign finance laws and recommending new laws to give regulators a fighting chance.

HISTORY OF TWENTIETH-CENTURY CAMPAIGN FINANCE REGULATION

Campaign finance regulation is relatively new, having mostly come of age in the last few decades. Just one century ago there was no legal impediment to candidates taking unlimited contributions from companies or individuals. The law on the books by the end of 19th century was an 1867 ban on Federal officers requesting contributions from Navy Yard workers.¹ The rest of the century, commonly known as the Gilded Age, featured unregulated giving by private citizens and corporations on scales unheard of. Standard Oil's contribution to Teddy Roosevelt in the sum of nearly two million (in current dollars) for his 1904 presidential campaign is a prime example.²

The start of the twentieth century marked a new era, the Progressive Era. With it came new reforms aimed at stemming exorbitant contributions in the interest of fighting the widespread corruption in politics of the Gilded Age. Several initiatives and laws dating from this period deserve mentioning. The 1907 Tilman Act, which "prohibited any contributions by corporations and national banks to federal political campaigns," was both an answer to the unrestricted flow of money to presidential campaigns (especially the 1904 election) and a way to appease a public suspicious of the effect of this cash on their elected officials.³ Next the 1910 Publicity Act and its 1911 amendments required pre and post election disclosure of receipts and expenditures by campaigns and committees, but more importantly introduced the first spending limits on house and senate elections.⁴⁵ The 1925 Federal Corrupt Practices Act, 1939 Hatch Act, 1943 Smith-Connely Act and 1947 Taft-Hartley Act all expanded the umbrella of those who needed to disclose finances and/or narrowed the sources from which money could enter campaigns.⁶ Here looms an issue which has plagued campaign finance regulation since its inception: enforcement. In theory, campaigns and candidates were subject to these laws, but in practice they were virtually unenforced. Despite all the regulations laid out on paper, Congress had never gotten around to creating a body tasked only with tackling campaign finance. Those duties fell upon congressional clerks who were overworked. Moreover, those same clerks did not receive additional resources to compensate for those new responsibilities.

By the mid-twentieth century, campaign finance regulation was weak, if at all present. Its laws went unheeded and mostly unenforced, while the money in politics only grew. President Kennedy's

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Commission on Campaign Costs was formed by executive order for these reasons. Its 1962 report proposed a series of reforms and innovations to curtail the increasing role money played in politics. For a decade its findings went unheeded, but skyrocketing TV ad costs and the disparity in party fundraising reminded Congress that campaign finance issues remained unsettled.⁷ The resulting 1971 Federal Election Campaign Act and its essential 1974 amendments constituted the “most comprehensive campaign finance legislation ever adopted.”⁸ In the 1971 act’s original text, three items are of particular significance. First, it clearly defines limits to campaign contributions and media expenditures. The limits were an amalgamation of consumer price index changes and the voting age population of a given candidate’s state. Second, it enhanced disclosure requirements to those contributions made very close to elections so that last minute cash infusions into campaigns would not slip by the public’s notice. Finally, and perhaps the greatest failure of original text, it required these expenditure reports to be submitted to the Secretary of State for presidential candidates; and relevant clerks and secretaries thereafter for different officials (such as house members and senators). Again, the burden of enforcement under this new act fell on overworked government agency offices without requisite increases in funding or power.

The aftermath of the 1971 act and its 1974 amendments warrant consideration. The act became law in April 1972 and had immediate effect on that year’s general election. That election year brings to mind the Watergate Scandal, which included widespread [flagrant] campaign finance corruption by the Nixon campaign. Despite the wet ink on the 1971 Federal Election Campaign Act, Nixon violated many of its provisions. His Committee to Re-elect the President functioned more like a political machine of the Gilded era. It “...was found to have accepted excessively large contributions, to have laundered campaign money, and to have accepted illegal campaign contributions from corporations...[and maintaining] undisclosed slush funds”⁹ Two most memorable instances involved ITT (International Telephone and Telegraph) and the dairy industry. ITT was embroiled in an anti-trust lawsuit in 1971 which was dropped by Richard McLaren (prosecuting lawyer at the Justice Department) when Nixon directed him to do so after receiving \$400,000 from ITT for his re-election campaign (laundered through the City of San Diego’s Tourism board). Only \$100,000 of this amount was publicly disclosed.¹⁰ Milk Producers were unhappy in March 1971 when “Secretary of Agriculture Clifford Hardin had announced that the price of milk would not be increased”¹¹ until a few secret meetings and “a secret contribution of \$2 million.”¹² encouraged Hardin to change his mind so that “...prices were allowed to rise.”¹³ Besides these two poignant examples of the 1972 election, 29 other executives “...ended up being charged with criminal campaign violations, and many plead guilty.”¹⁴ The actions of Nixon during this election show both the limitations of the 1971 Federal Election Campaign Act, and how deep the corruption of loose money had become.

The campaign finance abuses committed during Nixon’s 1972 re-election campaign forced congress to admit that the 1971 act was too weak. Congress responded by adopting the 1974 amendments to the Federal Election Campaign Act.¹⁵ Besides redefining contribution limits and extending these limits to more groups than before, making disclosure reporting more strict, imposing expenditure and contribution limits on candidates, and setting up a system for public funding of candidates (an idea first suggested by Roosevelt nearly **70 years before**), it founded the Federal Election Commission. Finally, an independent agency was established whose sole task is “to administer and enforce campaign finance regulation.”¹⁶

The 1974 amendments were immediately contested. The landmark case Buckley V. Valeo (1976) is the culmination of such contention; the debate spawned by its verdict continues today. Before Citizens United (2010), this case marked the defining moment for all campaign finance legislation. More than ten individuals, parties and organizations brought suit against the FEC, Secretary of the United States Senate, and others, claiming that the 1974 amendments were unconstitutional by infringing on free speech, due process and other complaints.¹⁷ This case went through the District of Columbia and Appeals court, finally reaching the Supreme Court, which issued a 200+ page per curiam opinion. Despite being the opinion of the highest court in the US, this decision was an amalgamation of fundamental disagreements by the justices themselves who each wrote extensive confirmations and dissents with no two justices fully joining in any other’s opinion.¹⁸ While the decision would shape campaign finance for a generation, it was born from criticism.

The Supreme Court's ruling reverberates today because it made a clear distinction between campaign contribution limits and expenditure limits. In essence, limits on campaign contributions are an acceptable infringement on free speech but limits on campaign expenditures are not.

In the court's words:

a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. ... The Act's \$1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents.... In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its **expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and associations than do its limitations on financial contributions.**¹⁹

This exhaustive delineation by the Supreme Court on the differences between expenditures and contributions is quintessential to any informed debate about campaign finance. Expenditures were now legally defined as "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."²⁰ One must not have the *magic words* of "vote for, elect, vote against, defeat" in advertisements or suffer regulation. Buckley v. Valeo's legacy lives on today. The legal loophole for expenditures is one which remains open now.

Expenditures would come under heavy fire in the following years. In Boston v. Bellotti (1978), the Supreme Court ruled that corporations in referendum elections were also free from expenditure limits.²¹ Nine years later, the issues of corporate expenditures again reached the Supreme Court but now for an election with candidates. FEC v Massachusetts Citizens for Life (1986) involved a pro-life-non-profit group which had spent money from its own treasury to pay for a special edition of its newsletter which told its readers to vote for pro-life candidates and against pro-choice ones. The FEC argued that this was an illegal corporate expenditure since corporations were not allowed to make expenditure from their treasuries (they needed a separate account after Buckley v. Valeo). The Supreme Court overruled that part of the law (as applied to non-profits), making such expenditures legal again. Austin v. Michigan State Chamber of Commerce (1990) took the issue of corporate expenditures to task, concluding that corporations were in fact subject to expenditure limits since such limits serve "...a compelling state interest: preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries...will be used to influence unfairly election outcomes."²² Whereas individuals and non-profits were exempt, we see corporations in the 1990s subject to expenditure limits and a ban on direct corporate contributions to federal candidates, still active today.

TWENTY-FIRST CENTURY CAMPAIGN FINANCE REFORM: CITIZENS UNITED

The first major development in campaign finance reform of this century was the Bipartisan Campaign Reform Act in 2002. Better known by its acronym BCRA or McCain-Feingold, it served as another amendment to the original 1971 Federal Election Campaign Act. BCRA encompassed a multifaceted attack on soft money (money that was not subject to regulation).²³ It prohibited national party committees from raising or spending soft money, placed limitations on the ability of federal candidates and officeholders to raise or spend soft money, stopped advertising by outside groups within 30 days of a caucus and 60 days within a federal election, and restricted state and local party committees' use of soft money to pay for certain federal election activities.²⁴ It also strengthened the limits on foreign money²⁵ and redefined what an electioneering communication was.²⁶ One indelible mark left by BCRA on every election since its adoption was its *Clarity Standards for Identification of Sponsors of Election-Related Advertising SEC 311* or the Stand By Your Ad provision.²⁷ Remember "my name is George Bush and I approve this message" and "I'm Barack Obama and I approve this ad"? These changes in campaign commercials went into effect in time for the 2004 presidential election and the 2012 election will have

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them too. Despite its bipartisan origin, BCRA is considered by some to be a debilitating limit to free speech and by others to be a long needed impediment to soft money's influence.

No article written today about campaign finance can ignore this next case. *Citizens United v. FEC* (2010), maybe the single most important Supreme Court ruling affecting election financial law in 36 years. Saving the legal arguments for later, *Citizens United* started as a relatively small case²⁸ about political advertisements and their relevant regulations. *Citizens United* was a non-profit conservative group which operated a 501c (4) organization. That organization made a feature length movie called *Hillary: The Movie* (hereafter referred to as *Hillary*) containing interviews unflattering of Hillary Clinton and scandals which she may have been privy to, which it labeled a documentary. It never used the *magic words* of "vote for or against" meaning that it may not legally be defined as an *electioneering communication*. So when the FEC said that *Hillary* could not be shown within 30 days of the 2008 democratic primary, *Citizens United* took the case to court claiming that the FEC had overreached its powers and that *Hillary* was not subject to regulation for many reasons. The district court agreed with the FEC and *Citizens United* appealed the ruling. The Supreme Court heard the appeal and decided the case in favor of *Citizens United*.

Though the case itself is horribly complex, the Supreme Court's conclusion that "restrictions on corporate independent expenditures"²⁹ are unconstitutional and that "BCRA's disclaimer and disclosure requirements"³⁰ are constitutional are the three most salient points of the case. As explained earlier, the legality of expenditures by corporations was taken up by *Buckley v. Valeo*. In *Citizens United v. FEC* (here after referred to as *Citizens United*), the Supreme Court in effect reversed its earlier position. They reasoned that the limits *Buckley v. Valeo* imposed on contributions could not be applied to expenditures:

we now conclude that the independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption...The fact that speakers may have influence over or access to elected officials does not mean that those officials are corrupt...The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy...[we have not seen] any direct examples of votes being exchanged for expenditures...An outright ban on corporate political speech during the critical reelection period is not a permissible remedy.³¹

Here the Supreme Court's opinion on soft money changed in the time since *Buckley v. Valeo*. It argues that corporate independent expenditures are not corruptive in nature and permissible. It also concluded that the 30&60 day blackout on certain advertisements before a caucus and federal election imposed by BCRA was indeed a violation of the first amendment as *Citizens United* had claimed. The argument that disclosure of donors and the aforementioned 'Stand by your ad' provision in BCRA were both unconstitutional was rejected. The Supreme Court "reject[ed] *Citizens United*'s contention that the disclosure requirements must be limited to speech that is the functional equivalent³² of express advocacy."³³ The 'Stand by your ad' portion of BCRA was necessary since "...the disclaimers avoid confusion by making clear that the ads were not funded by a candidate or political party."³⁴

That said, the opinion of the court was divided.³⁵ For example, Justice Stevens argued vehemently that the first amendment could not possibly apply to corporations since our founding fathers clearly had "...the free speech of individual Americans [not corporations] in mind [when they wrote it]."³⁶ He maintained that the ban on corporate contributions and expenditures "had become such an accepted part of federal campaign finance regulations...no one even bothered to argue that the bar [against them] was unconstitutional."³⁷ The reasoning behind lifting the expenditure limits since they were not corruptive was alien to Stevens since "Corruption can take many forms... [it] operates along a spectrum."³⁸ He concludes that the Supreme Courts decision in this case was shortsighted.

The landscape of Election Finance regulation evolved quickly following *Citizens United*. A week after the January 21, 2010 *Citizens United* decision, the District Court for the Eastern District of Louisiana ruled in *CAO v. FEC*. This case involved the Republican National Committee, the Republican Party of Louisiana and Ahn Joseph Cao who made challenges to the constitutionality of the coordinated party expenditure limits and party contribution limits. They wanted "...permanent injunction enjoining the

FEC from enforcing the challenged provision as applied to the Plaintiffs, their intended activities and all other entities similarly situated."³⁹ The District Court found the coordinated party expenditure limits and party contribution limits were out of date and not adjusted for inflation, but found that the underlying reason for these limits made them constitutional. Later that year in September, the U.S. Court of Appeals for the Fifth Circuit agreed with the District Court.⁴⁰ Hence, *CAO v. FEC* may have started out as a new challenge to existing campaign financial law dating back to *Buckley v. Valeo*, but it proved a toothless attack in the end.

On the heels of *CAO v. FEC* and *Citizens United* came the ruling on *Speechnow.org v. FEC*. *Speechnow.org* planned on soliciting contributions and making expenditures which were larger than that which the law allowed. *Speechnow* wanted to function like a political committee, but since it did not plan on contributing money directly to candidates,⁴¹ it anticipated that the organization would spend more than the limits allowed to political action committees and therefore filed suit against the FEC. The case ended up in the Court of Appeals for the District of Columbia circuit which made a ruling in March 2010. The Appeals court said in its ruling that "[citing *Citizens United*], the government has no anti-corruption interest in limiting independent expenditures."⁴² Hence "No matter which standard of review governs contribution limits, the limits on contributions to *Speechnow* cannot stand."⁴³ The case can be best understood in the public vernacular as the founding of the Super PAC: huge political action committees which are exempt from expenditure limits and may accept unlimited monies, so long as they only practiced independent expenditures. Without *Citizens United* to pave the way, *Speechnow* may have lost the case. Therefore the court of appeals and the language of *Citizens United* expanded the restriction on limits to all independent expenditures.

The FEC soon issued two advisory opinions in late July 2010. One was to *Club for Growth* (conservative) and the other to the *Commonsense Ten* (liberal). Both opinions concluded with assent that either club could "establish and administer the Committee, and the Committee may solicit and accept unlimited contributions from individuals in the general public, including contributions given for specific independent expenditures."⁴⁴ This further enhanced the legality of the Super PAC. Super PACs now have no restriction on the source or size of money it collects because the FEC's hands are tied from enforcing these limits.⁴⁵

Only last year, the door left open by *Speechnow* and *Citizens United* got larger. In June 2011, the US District Court for the District of Columbia issued a preliminary injunction against the FEC in the case *Carey v. FEC*, followed by a Stipulated Order and Consent Judgment in August.⁴⁶ Admiral *Carey* ran a PAC (NDPAC) which solicited money from veterans of the US armed forces. He claimed that contribution limits imposed on his PAC, in the wake of *Speechnow* and *Citizens United*, were unconstitutional as they infringed on his free speech. He wanted injunctive relief against the FEC since he planned on accepting some contributions which were over the regulatory limits and didn't want to suffer legal consequence.⁴⁷ The District Court agreed and stopped the FEC from enforcing contribution limits on PACs which met certain criteria⁴⁸ such as establishing separate treasury 'non-contribution account' for independent expenditures. The FEC issued a press release on October 5 which spelled out the exemptions which non-connected PACs⁴⁹ like NDPAC now enjoy. In short, *Carey v. FEC* was another huge win for free speech advocates and fans of deregulation everywhere in the US.

The final election finance law related case that this paper covers was concluded over the summer. The state of Montana had a law dating back to 1912 (The Montana Corrupt Practices Act) which stated "if corporations⁵⁰ want to participate in Montana elections, they have to do so through political action committees that disclose their fundraising activities."⁵¹ *American Tradition Partnership* (a conservative PAC) challenged the law in court, claiming that it was superseded by *Citizens United*. After working its way through Montana's courts, the Supreme Court issued a *Per Curiam* opinion on June 25, 2012 which reversed the Montana Supreme Court's decision saying that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."⁵² The Montana ruling could mean that the majority of the Supreme Court feels that *Citizens United* is no longer up for debate and that its precedence is now set in stone.

Federal campaign finance law has evolved a great deal in the century or so that it has existed. The major developments addressed in this paper merely dictate what forms that money can take. Money has always pervaded politics that will never change.

RECOMMENDATIONS

With the history of campaign finance law established right up to this summer, I will present some of the newer ideas in campaign finance reform. I have included six recommendations as they each approach campaign finance reform in a unique manner, all in the hopes of fighting corruption. I would personally not make or endorse any of these recommendations unless I felt that the current laws governing campaign finance were inadequate.

One reform proposal came in the DISCLOSE (Democracy Is Strengthened by Casting Light On Spending in Elections) Act of 2012 which was introduced in the Senate by Senator Sheldon Whitehouse in March. This act would seek to enhance disclosure and reporting; plugging some of the “current loopholes in the nation’s campaign finance disclosure laws [since Citizens United]”⁵³ Two major components of the act include increasing requiring “any corporation, labor organization, section 501(c) organization, Super PAC and section 527 organization [which spends \$10,000 or more on campaign related disbursements]”⁵⁴ to file frequent disclosure reports to the FEC and requiring the largest contributors both in reports to the FEC and through a better ‘Stand By Your Ad’ provision TV political ads to make it clear who paid for the ad, including a list of the top five funders in the ad. Most of this act’s strongest supporters are Democratic Senators. Just last month, the Act was blocked from receiving an up/down vote on the floor by Senate Republicans.⁵⁵ I feel the DISCLOSE act is a necessary addition to existing legislation because its increased disclosure requirements are long overdue. The money flowing into Super PACs deserves the scrutiny which this act entails. Furthermore, the enhanced ‘Stand By Your Ad’ provision better informs the public about the true backers of the ads they are bombarded with during election season. I feel strongly about this provision since I hate these ads on a personal level (they are obnoxious and interfere with my TV viewing experience) and it might discourage the use of them in future elections since some donors do not wish to be publicly identified or affiliated with such ads.

Another idea comes from the US House of Representatives, specifically Michigan Democrat John D. Dingell. The Restoring Confidence in Our Democracy Act or more commonly The Dingell Act “prohibits corporations and unions from making independent expenditures and electioneering communications, and subjects Super Political Action Committees (PAC) [to] the same restrictions as regular PACs.”⁵⁶ This act was co-sponsored by other house Democrats and was only introduced earlier in August. The act continues Dingell’s vocal criticism of Citizens United which he calls “...the most misguided Supreme Court decision of the Modern era [apart from Bush v. Gore].”⁵⁷ Unlike the aforementioned Montana case of July, The Dingell Act if passed would not be so easily brushed aside by the Supreme Court as the push to repeal Citizens United would be coming from Congress itself rather than any single state. The factual record which the act presents is one both Dingell and I find was largely ignored by the Supreme Court in Citizens United. The fallacy that Super PACs are unconnected to the candidates they support and that the large donors funding these Super PACs are not buying influence with those very candidates is nonsense. I suggest that The Dingell Act is the best bet right now to force the Supreme Court to reconsider Citizens United. The odds would be greater if Obama wins reelection since he opposed Citizens United in the first place and could change the existing 5-4 split in the court with an appointment.

Perhaps the biggest impediment to campaign finance reform comes from its relative youth. Our founding fathers never bring campaign funds up in the constitution. Ergo, a constitutional amendment may be necessary. Last year in November, New Mexico Democratic Senator Tom Udall introduced such an amendment S. J. Res. 29. The proposal had three sections stating:

[1]Congress shall have power to regulate the raising and spending of money and in kind equivalents with respect to Federal elections...[2]A State shall have power to regulate the raising and spending of money and in kind equivalents with respect to State elections...[3]Congress shall have power to implement and enforce this article by appropriate legislation.⁵⁸

Other Democrats are open to this amendment; including President Obama himself whose campaign released a statement to supporters in February saying “the President favors action – by constitutional amendment, if necessary – to place reasonable limits on all such spending.”⁵⁹ However, the amendment

has not elicited the support of any Republicans, meaning that it would be mathematically impossible right now for it to garner the two-thirds majority in Congress necessary to pass constitutional amendments. Congress has not made a constitutional amendment in twenty years. I include this recommendation since a constitutional amendment may be necessary if campaign finance reform is to enjoy protection from the Supreme Court.⁶⁰

The source of money in politics must be addressed. Earlier it was explained how Citizens United and Speechnow set the stage for Super PACs, but similarly functioning 501c(4) organizations cause reformers headaches too. One of the major benefits 501c(4) or Social Welfare organizations enjoys is their tax exempt status. Last month, Democracy 21 and the Campaign Legal Center sent a letter to the IRS itself bemoaning "the threat posed by these shadow party committees that are using a privileged tax status to keep secret the names of donors who are pumping tens of millions of dollars into our federal elections...[the IRS should] proceed quickly and effectively in curbing this wholesale abuse of the tax code for partisan political ends...[the IRS must] stop this charade..."⁶¹ The IRS responded with a letter in which they said they would "consider proposed changes in this area."⁶² The IRS is a government body tasked with collecting monies owed to the US and only time will tell if it will crack down on organizations which are clearly taking advantage of their tax exemptions. I maintain that the IRS has a vested interest in removing the charitable designation of organizations which perpetrate such abuse. I agree wholeheartedly that this privilege should be revoked. Not only would this bring new revenues to the IRS (a welcome addition at any time) but make public those people giving that money. If I were to start a fake charity, I'd expect the IRS would eventually expose my ruse and fine me accordingly. Why should it be any different for corporations?

Some believe BCRA made a mistake in banning soft money. Soft money is unlimited contributions not directly given to candidates. Instead it's mostly used in independent expenditures, which since Citizens United are no longer limited when made by PACs. The rise of PACs and other independent organizations came at the expense of the established and legally grounded party structures. Where once soft money "[revitalized] the parties both nationally and at the state level... [allowing] parties to play more of a role in the most competitive races."⁶³ it today shifts into the shadows. If the soft money ban were removed, accountability could be slowly returned to party politics, "let the political parties be the organizations that play the biggest role in campaigns, not Super PACs or their brethren."⁶⁴ I support attempts to return power and legitimacy to the political parties themselves and remove it from shadowy organizations. The party leaders or candidates themselves should hold the purse strings to a campaign. If the soft money ban was lifted, I suspect that donors would willingly put their money into the parties once again.

The FEC's first years were turbulent to say the least. The 1976 and 1979 amendments, a direct result of Buckley and Boston v. Bellotti made sweeping changes to the commission. One change in the 1979 amendment eliminated the Commission's authority to make random audits. The FEC should have this ability to randomly audit candidates once more⁶⁵ and follow-up on anonymous complaints once again. The FEC itself has been asking for this power back since the 80's. They argue:

[removing the power to audit randomly] has weakened its ability to deter abuse of the election law. Random audits can be an effective tool for promoting voluntary compliance with the Act and, at the same time, reassuring the public that committees are complying with the law. Random audits performed by the IRS offer a good model...Tax audits have helped create the public perception that tax laws are enforced.⁶⁶

In much the same way that Deep Throat was instrumental in exposing Nixon's involvement with Watergate which in turn paved the way to the 1974 FEC amendments, so too could the right anonymous tip to the FEC tomorrow reveal a complex government scheme of comparable implication. This recommendation I feel strongest about since it has the greatest likelihood of being adopted if proposed because it is so small. As a citizen who pays taxes, I am well aware of the consequences from falsifying my returns. Even if I didn't think the IRS cared about me because my income is so miniscule, the random nature of audits best compels me to keep my reports spotless. So too would random FEC audits

command compliance from any and every candidate. The FEC has been missing this power for far too long.

CONCLUSION

Campaign finance law is ever evolving. The world is one of sparsely regulated Super PACs (which the FEC is legally obligated to suffer), but once it was not so. Before Citizens United, before Buckley, before the Tillman Act, money flowed to candidates without even the pretense of regulation. Today's judicially restricted FEC, coordinated expenditures, untrained treasurers, and hidden PAC contributors are a virus in the body of politics which might be remedied by the recommendations aforementioned. Campaign finance law may be even weaker than today; part of a future with even fewer regulations on direct contributions to candidates and possibly no reporting requirements⁶⁷ for contributors – all paraded beneath the banner of free speech and less red tape. Unless sweeping reforms are implemented, there will be no new knights to save politics from the corruptive fires of easy money tomorrow. It's easy to pass the buck and say that the 2012 election may change everything, but it is an indisputable fact that the partisan nature of congress will be the controlling factor in whether campaign finance reform continues or stagnates. If a wave of Democrats⁶⁸ comes into congress, I suspect that the recommendations I provided (excluding the random auditing power of the FEC one) will all have a more sympathetic ear than they do now. The Supreme Court's composition will likely change after this election as at least one member is expected to retire in the next few years. Therefore, the future of campaign finance reform hangs in the balance this year. I must conclude that it will only get weaker under the current status quo.

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Conferenceboard.org <http://www.conference-board.org/politicalspending/index.cfm?id=8365>

Vance, David. "IRS to Consider Changes to 501(c)(4) Eligibility Rules as Requested by Campaign Legal Center and Democracy 21." July 23, 2012. Press Release by Campaign Legal Center.

END NOTES

¹ *The First Ten Years*, The Federal Election Commission p1.

² *Campaign Finance Reform: a sourcebook* p27.

³ *Ibid* p28.

⁴ *Ibid*.

⁵ *[the Act] limited House campaign expenditures to a total of \$5,000 and Senate campaign expenditures to \$10,000 or the amount established by state law, whichever was less. However the spending ceilings...were almost universally ignored...no one was prosecuted for failing to comply with the law. Ibid.*

Buckley v. Valeo 1976 would later rule such spending ceilings unconstitutional.

⁶ *Ibid*.

⁷ *Campaign Costs between 1956 and 1968 had risen 500% largely because of increasing media expenses...*

Trevor Potter's Keynote Address at Conference Board's Symposium on Corporate Political spending 2011.

⁸ *Ibid* p32.

⁹ Gierzynski 2000, p 42.

¹⁰ <http://www.historycommons.org/context.jsp?item=a1969ittlawsuit#a1969ittlawsuit> et al.

¹¹ *Campaign Finance Reform* p40.

¹² *Watergate Prosecutor Assesses Campaign Finance Controversy* 2010 p2.

¹³ *Ibid*.

¹⁴ Trevor Potter's Keynote Address at Conference Board's Symposium on Corporate Political spending 2011.

¹⁵ *The 1974 law was a direct result of the experience in the 1972 elections. The abuses revealed by the investigations surrounding the Watergate scandal and the continuing increase in campaign costs convinced the Congress that a more extensive regulatory scheme than that adopted in 1971 was necessary.* Campaign Finance Reform: A Sourcebook.

¹⁶ *Ibid*

¹⁷ *Buckley v. Valeo* p6-9.

¹⁸ The vote of 7 for Buckley and 1 against dose not fully capture the disagreement within the court.

¹⁹ *Buckley v. Valeo* p21-23 (bold added for emphasis).

²⁰ *Buckley v. Valeo* p80

²¹ Campaign Finance Reform: A Sourcebook P64

²² *Austin v. Michigan Chamber of Commerce* p 2.

²³ *The law allowed national political parties to receive soft money- contributions in unlimited amounts. Further, the parties were no longer subject to expenditure limits, provided these funds were spent independently of any candidate. Soft money could be used for voter registration, voter turnout, and overhead expenses- classic "party building" expenses. It could not be used for advertisements. Soon afterward, however, the Federal Election Commission (FEC) issued regulations that created a massive loophole. That loophole still is having repercussions today. The Commission allowed spending on ads as long as the ads were generic and did not promote or oppose any candidate. It greenlighted this spending even though ads were specifically prohibited in the federal amendments. The national parties soon drove a truck through this opening.*

The McCain-Feingold soft money ban should be repealed – NewJerseyNewsRoom March 20, 2012

http://www.elec.state.nj.us/pdf/files/jb_articles/njnewsroom/03-20-2012_McCain_Feingold_soft_money.pdf

²⁴ Federal Election Commission 30 Year Report p7

²⁵ This ban is still in effect today. For a current example, let us consider Mitt Romney's recent trip to Israel. He held a fundraiser dinner which earned more than a million dollars in donations. The catch? All those in attendance had to be current US citizens (dual citizenship counted) in order for their contributions to the campaign to be legal.

http://www.washingtonpost.com/politics/at-fundraiser-in-israel-romney-describes-spiritual-impact-of-visit/2012/07/30/gJQAFXJpJX_story.html

²⁶ SEC 203, section A The term 'electioneering communication' means any broadcast, cable, or satellite communication which—“(I) refers to a clearly identified candidate for Federal office;“(II) is made within—“(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or “(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and “(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

Bipartisan Campaign Reform Act p11-12

²⁷ SEC 311, section d, subsection b: Any communication...through television shall include, in addition to the requirements of that paragraph, a statement that identifies the candidate and states that the candidate has approved the communication. Bipartisan Campaign Reform Act p25-26.

²⁸ All Citizens United asked for was an injunctive relief against the FEC. The case did not start which a direct challenge to the constitutionality of anything. In fact, the Supreme Court itself (in an act some consider ‘legislating from the bench’) were the ones who requested additional oral arguments as to the constitutional questions not brought up in Citizens United’s original briefing.

²⁹ Citizens United v. FEC p 57.

³⁰ *Ibid.*

³¹ Citizens United v. FEC p43-45.

³² Arguing what is and what isn’t the ‘functional equivalent’ of express advocacy was a major point in the earlier case Wisconsin Right to Life Inc v. FEC (2007). In that case, Wisconsin Right to Life wanted to air ads during the blackout period established by BCRA which it argued were issue advocacy ads and not electioneering in nature. The court ruled in favor of Wisconsin. *Because WRTL’s ads may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, they are not the functional equivalent of express advocacy... BCRA §203 [the blackout period] is unconstitutional as applied to the ads.* The Supreme Court in this 2007 ruling allowed issue advocacy ads even greater leeway. In addition to avoiding the ‘magic words’ addressed in Buckley v. Valeo, issue ads could skirt being labeled ‘functionally equivalent to express advocacy’ if they appeared objectively to be issue related. Hence, Citizens United had good reason to assume its *Hilary* movie was safe from the FEC.

³³ Citizens United v. FEC p54.

³⁴ Citizens United v. FEC p53.

³⁵ The decision was split 5-4 in favor of Citizens United.

³⁶ Dissent of Stevens, J p37.

³⁷ *Ibid* p45.

³⁸ *Ibid* p57.

³⁹ http://www.fec.gov/law/litigation/cao.shtml#sc_decision.

⁴⁰ *Ibid.*

⁴¹ Political action committees are limited in their sources of money since corporations cannot give money to candidates (dating all the way back to the 1907 Tillman Act), and a PAC *could* contribute money to a candidate directly. What Speechnow was doing by claiming that it wouldn’t make contributions to candidates was opening itself to corporate cash which it could use to make expenditures above the legal limits.

⁴² Speechnow.org v. FEC p10.

⁴³ *Ibid* p11.

⁴⁴ FEC AO 2010-09 and AO 2010-11, July 22, 2010 p 2.

⁴⁵ An issue about independent expenditures being truly ‘independent’ was raised by the earlier abortive case of CAO v FEC. They argued that ‘coordinated expenditures’ (when an individual or political committee pays for a communication that is coordinated with a candidate or party committee) should not be classified as contributions. They lost their case, but proving that expenditures are coordinated is slippery business.

⁴⁶ <http://www.fec.gov/law/litigation/carey.shtml>.

⁴⁷ *Ibid.*

⁴⁸ *...as long as NDPAC maintains separate bank accounts 1) to receive such contributions for independent expenditures, and 2) to receive source-and amount-limited contributions for the purpose of making candidate contributions. Further, each account must pay a percentage of administrative expenses that closely corresponds to the percentage of activity for that account, and must comply with the applicable limits for the contributions it receives for the purpose of making candidate contributions. Ibid.*

Hence, a PAC which avoids making contributions to candidates and sticks to independent expenditures (and files the appropriate paper work with the FEC declaring its intentions to do so) becomes a Super PAC able to take unlimited money from any source. PACs are regulated in their sources of cash because that cash could find its way to candidates, Super PACs avoid those regulations.

⁴⁹ A Super PAC cannot be run by the candidate it supports, or work in coordination with that candidate’s campaign. That is what makes them non-connected and able to enjoy relative freedom in their actions.

⁵⁰ Originally, corporations were forbidden from making any kind of expenditures “in connection with a candidate or a political committee that supports or opposes a candidate or a political party,” but that law was amended in the 70’s to allow for PACs to do so.

⁵¹ http://www.elec.state.nj.us/pdf/files/jb_articles/Campaigns_Elections/citizens_united_critics.pdf

⁵² <http://www.law.cornell.edu/supremecourt/text/11-1179>.

⁵³ *Executive summary of Rules Committee Testimony by Democracy 21 President Fred Wertheimer.*

⁵⁴ Democracy 21’s Summary of Senate Version of Disclose Act.

⁵⁵ <http://thinkprogress.org/justice/2012/07/17/528181/what-everyone-should-know-about-the-disclose-act-of-2012/?mobile=nc>.

⁵⁶ *Dingell and Dem Colleagues Stand up Against Citizens United*.

⁵⁷ *Ibid.*

⁵⁸ http://www.tomudall.senate.gov/?id=968&p=press_release.

⁵⁹ *Obama Supports Constitutional Amendment on Campaign Finance 'If Necessary'* The Wall Street Journal.

⁶⁰ Imagine the amendment passes; suddenly the FEC has constitutionally protected rights. No longer can any single entity claim an overreach of the legitimate authority of the FEC without also proving that our constitution is subject to revision.

⁶¹ *IRS to Consider Changes to 401c(4) Eligibility Rules as Requested by Campaign Legal Center and Democracy 21*, The Campaign Legal Center.

⁶² *Ibid.*

⁶³ The McCain-Feingold soft money ban should be repealed – NewJerseyNewsRoom March 20, 2012

http://www.elec.state.nj.us/pdf/files/jb_articles/njnewsroom/03-20-2012_McCain_Feingold_soft_money.pdf.

⁶⁴ *Ibid.*

⁶⁵ The FEC now audits only “for cause.” A “for cause” audit is based on a review of campaign finance reports filed by a political committee that reveal systematic reporting violations...as long as its FEC filings are complete and in order, a political committee could be engaging in serious misconduct and never be audited. Campaign Finance a Sourcebook p314.

⁶⁶ Federal Election Commission, “Legislative Recommendations,” Annual Report 1996. Reprinted in part in Campaign Finance Reform: a sourcebook p305.

⁶⁷ Disclosure is usually untouchable. The identity of contributors is not subject to protection under first amendment rights (upheld by Buckley v. Valeo and Citizens United). But, so too was the idea that corporations’ speech [expenditures] was subject to limits overruled a mere two years ago with the argument that such regulation would limit their constitutionally protected free speech. Hence, the notion that contributions might one day too be freed from limits under similar pretense is not necessarily foreign to today’s Supreme Court.

⁶⁸ It is worth pointing out that the tables of campaign finance reform have changed drastically in the last century. Where once Republicans were the ones initiating change to reduce the influence unions wielded on elections because Democrats could regularly out-raise their opponents through union money, now it is the Republicans who enjoy the fundraising edge though Super PACs and the Democrats who are calling for reform! Republican Mitt Romney out raising Democrat Barack Obama this election is prime example of this in action.