

# Campaign Finance Reform:

*Legal Concerns & Policy*

*Proposals After the 2012 Elections*

# A Campaign Finance Reform Advocate's Perspective

1. What components of our current campaign finance system do I consider to be working well?
2. What, if anything, do I consider to be problematic about the current system?
3. What changes do I recommend at the national level?

## What's Working Well?

- Limits on contributions to candidates and parties.
- Disclosure of **candidate and political committee** fundraising and spending.
- Public campaign financing in some jurisdictions, though not at the federal level.

# Contribution Limits

- During the 2012 cycle, candidates for federal office could not accept contributions in excess of:
  - \$2,500 per election from an individual.
  - \$5,000 per election from most political committees.
- National party committees could not accept more than \$30,000 per calendar year from an individual.
- State party committees could not accept more than \$10,000 per calendar year from an individual for the committee's federal election activity.

# Political Committee Disclosure

- Political Committees (organizations “that are under the control of a candidate or the **major purpose** of which is the nomination or election of a candidate”).
  - Required to register with the FEC.
  - Required to file periodic reports with the FEC on a monthly, quarterly or semi-annual basis that itemize all **receipts and disbursements of the committee exceeding \$200.**
  - Must display a clear and conspicuous disclaimer disclosing the name of the committee, and its address, telephone number or website address on all public communications.

# Public Campaign Financing in State & Municipal Elections

- New York City
- Los Angeles
- San Francisco
- Maine
- Connecticut
- Maine
- North Carolina

# What's Not Working Well

- Unlimited contributions to groups closely associated with candidates and parties—no meaningful restrictions on “coordination.”
- Lack of disclosure regarding the sources of these unlimited contributions.
- Broken presidential public financing system.
- Federal Election Commission

# Unlimited Contributions to Groups Closely Associated With Candidates

- The *Citizens United* Court unleashed unlimited “independent” political spending and, by extension, unlimited contributions to pay for such “independent” spending.
- The Court wrongly assumed that “[t]he absence of prearrangement and coordination . . . with the candidate . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” (quoting *Buckley*).
- In *Buckley*, this quote follows a dubious presumption that expenditures meeting the legal definition of “independent expenditure” **are in fact expenditures “made totally independently of the candidate and his campaign.”**
- In *McConnell*, the Court emphasized that “independent expenditures” should be “**truly . . . independent**” and referenced “**wholly independent expenditures.**”

# Unlimited Contributions to Groups Closely Associated With Candidates(Cont.)

- In mid-October, coinciding with the 3<sup>rd</sup> presidential debate, the Romney campaign held a series of events at New York City's Waldorf Astoria.
- According to the *LA Times*: “Among the series of events held Tuesday at the Waldorf Astoria to thank the wealthy donors backing Mitt Romney was a session with the leaders of Restore Our Future, a ‘super PAC’ prohibited from coordinating with his campaign.”
- How can this be?
- I was quoted in the article saying: “**The coordination rules are a joke** and completely undermine the promise ... that this new flood of money would be raised and spent in any **meaningfully independent** way from the candidates. . . . These super PACs are connected at the hip with the candidates' campaigns.”

# Unlimited Contributions to Groups Closely Associated With Candidates(Cont.)

- Federal campaign finance laws and the laws of most states **do not** require “true” or “total” independence between candidates and so-called independent spenders.
- Federal and state law allows nearly-unlimited coordination of fundraising—only **coordinated spending** is regulated.
- “Coordination” only occurs under federal law when an **expenditure for a specific communication** (i.e., political ad) meets **both** prongs of the “coordinated communication” regulation:
  1. the ad contains specified **content** *and*
  2. the candidate requests or suggests the ad; is materially involved in the spender’s decisions regarding the content of the ad, the intended audience, or the media outlet used; or otherwise meets one of the rule’s narrow “**conduct**” standards.

## Unlimited Contributions to Groups Closely Associated With Candidates(Cont.)

- An “independent” spender can be married to a candidate and **share the same bed every night** without running afoul of federal coordination restrictions, so long as the spouses refrain from discussing the details of specific ad buys.
- FEC has also interpreted federal law to **permit candidates to attend, speak and be featured guests at Super PAC fundraisers** where unlimited individual, corporate, and labor organization contributions are solicited, so long as the candidate doesn't make the unlimited “ask.”

## Unlimited Contributions to Groups Closely Associated With Candidates(Cont.)

- Super PAC Restore Our Future is run by several former Romney aides, including Charles R. Spies, who served as general counsel to Romney's 2008 Presidential campaign.
- Super PAC American Crossroads was co-founded by Ed Gillespie, who recently became a Senior Advisor to Mitt Romney's 2012 presidential campaign.
- The super PAC Priorities USA Action was co-founded by former Obama White House aides Bill Burton and Sean Sweeney.

# Unlimited Contributions to Groups Closely Associated With Candidates(Cont.)

- Super PACs and Related 501(c)(4)s
  - American Crossroads (\$104 million) / Crossroads GPS (\$70 million)
  - Priorities USA Action (\$67 million) / Priorities USA
  - Restore Our Future (\$131 million)
- Sheldon and Miriam Adelson gave more than \$50 million to Super PACs.
- Union donors: SEIU (\$30 million), AFSCME (\$17 million)
- Business donors gave more than \$70 million to Super PACs and **unknown amounts to the Chamber of Commerce and other non-disclosing 501(c) organizations.**
- 61 large donors to Super PACs averaging \$4.7 million each matched the \$285 million given by more than 1.4 million small donors to major party presidential candidates.
- **Just as a large contribution given directly to a candidate gives rise to corruption or the appearance of corruption, so too do large contributions to groups closely associated with candidates.**

# Anonymous-Source Money in Politics



# Lack of Disclosure of Contributors to Non-“Committee” Outside Groups

- Prior to the *Citizens United* decision, corporations, including 501(c)(4) nonprofit corporations, were generally prohibited by federal campaign finance law from spending money to influence federal elections.
- *CU* Court promised that **through disclosure laws**, voters and shareholders would have all the information they need **(a)** to hold corporate officers accountable for election spending, **(b)** determine whether elected officials are “in the pocket” of special interests and **(c)** to make informed decisions on Election Day.

# Lack of Disclosure of Contributors to Outside Groups (Cont.)

- According to the Center for Responsive Politics, groups not disclosing their donors spent more than \$300 million during the 2012 cycle.
- The biggest spenders who did not disclose their donors included:
  1. Crossroads GPS, \$71 million
  2. Americans for Prosperity, \$36 million
  3. U.S. Chamber of Commerce, \$36 million
  4. American Future Fund, \$24 million
  5. Americans for Job Security, \$15 million
  6. Americans for Tax Reform, \$15 million
  7. American Action Network, \$11 million
  8. League of Conservation Voters, \$11 million
  9. NRA, \$7 million
  10. Patriot Majority USA, \$7 million

## Lack of Disclosure of Contributors to Outside Groups (Cont.)

- Under federal law, groups that do not meet the definition of “political committee” are only required to disclose donors who gave “**for the purpose of furthering**” the group’s political ads.
  - Old, flawed “independent expenditure” statute.
  - 2007 FEC “electioneering communication” regulation modeled on old, flawed “independent expenditure” statute.
  - 3 FEC Commissioners would only require disclosure if donor explicitly gave \$\$ for the purpose of furthering a specific ad buy.
  - *Van Hollen v. FEC*

# Presidential Public Financing System

- **Insufficient funds** to run viable campaign—less than \$50 million to run primary campaign and less than \$100 million to run general election campaign.
- Funds distributed **too late**.
- **State-by-state spending limit** makes no sense given the importance of earliest primaries.
- **Overall spending limit** makes competing in new era of unlimited outside spending exceedingly difficult.

# Federal Election Commission (FEC)

(a.k.a. “Failure to Enforce Commission”)



# Federal Election Commission

- 6 Commissioners; no more than three Commissioners can be from the same political party.
- 5 Commissioners currently serving in expired terms and may continue doing so until replaced.
- Any final action by the FEC requires votes of 4 Commissioners.
- In recent years, deadlocked partisan 3-3 votes have become increasingly common.

# What Campaign Finance Reforms Should Be Pursued?

- DISCLOSE Act of 2012 (S 3369)
- Empowering Citizens Act (HR 6448)
  - Presidential Public Financing
  - Congressional Public Financing
  - Coordinated Campaign Activity
  - Convention “Soft Money” Ban
- Restructure FEC

# DISCLOSE Act of 2012

- Payments of \$10,000 or more by any person or group other than a 501(c)(3) for a “covered disbursement” (**independent expenditures, electioneering communications and covered transfers**) triggers disclosure of all donors of \$10,000 or more.
- Excludes funds received in the ordinary course of business, donor-restricted funds and affiliate transfers not exceeding \$50,000.

## DISCLOSE Act of 2012 (Cont.)

- “Independent expenditure” includes both express advocacy and its functional equivalent.
- “Electioneering communication” includes ads runs within 120 days of the earliest Presidential primary/caucus or within the calendar year of a Congressional election.

# DISCLOSE Act of 2012 (Cont.)

- “Covered transfer” includes any transfer if the donor:
  - **requests or suggests** the funds be used for a campaign-related disbursement;
  - gave the funds in response to a **solicitation** to pay for a campaign-related disbursement;
  - engaged in **discussions** with the recipient regarding use of the funds to pay for a campaign-related disbursement;
  - made campaign-related disbursements exceeding \$50,000 **during the previous 2 years**; or
  - **knew or had reason to know** the recipient would make campaign-related disbursements exceeding \$50,000 in the coming 2 years.

# Empowering Citizens Act

- Reforms Presidential **public financing** system and creates new public financing system for Congressional elections.
  - Voluntary participants agree to \$1,250 contribution limit (50% of standard \$2,500 limit).
  - No “bundled” contributions or lobbyist contributions.
  - Must collect specified number of “qualifying contributions” (individual contributions of \$250 or less) to be eligible (House 400, Senate 400 x # of Cong. Districts, President \$25k in at least 20 states).
  - \$5-to-\$1 match for **individual** contributions up \$250 from in-state donors.
  - Up to \$100 million in primary and \$150 million in general (\$50 million grant + \$100 million matching) for Presidential election candidates.
  - Up to \$2 million per cycle for House candidates and \$10 million per cycle for Senate candidates.
  - **No spending limit.**

# Empowering Citizens Act (Cont.)

- Strengthens “coordination” restrictions.”
  - “Covered communications”: any public communication that **PASOs a candidate** at any time or that simply **refers to a candidate** within 120 days of a Presidential election or 90 days of a Congressional election.
  - Payment is “coordinated” if it is not made “entirely independently” of the candidate, including:
    - Made by a group “**directly or indirectly formed or established by or at the request or suggestion of**, or with the encouragement of the candidate.”
    - Made by a group for which a candidates has **solicited funds** or engaged in any other fundraising activity during the election cycle.
    - Made by a group established by anyone who has **worked for** the candidate during the election cycle or four years prior (8 years total).
    - Made by a group that has had “**more than incidental** communications with the candidate about campaign needs.

# Empowering Citizens Act (Cont.)

- Convention “soft money” ban.
  - Federal candidates, officeholders and party officials prohibited from soliciting, receiving, directing, transferring or spending any funds in connection with a presidential nominating convention unless funds comply with contribution amount limits and ban on corporate and labor union funds.

# Restructuring FEC

- Decade-old report *No Bark, No Bite, No Point*, available on Democracy 21 website.
  - Odd number of Commissioners
  - Strong executive director with single, long term.
  - Stronger enforcement powers with use of administrative law judge to eliminate the need for Commission to serve as both prosecutor and judge.

# What Campaign Finance Reforms Should NOT Be Pursued?

- Federal Constitutional Amendment to “fix” the *Citizens United* decision.
- Elimination of limits on contributions to candidates and/or parties to “fix” the disparity between candidate/party fundraising and outside group fundraising.

# Constitutional Amendments?

- Practical Concerns
- Legal Concerns

# Constitutional Amendment— Practical Concerns

- Requires 2/3 vote in House & Senate + ratification by 3/4 states.
- Tremendous financial and organizational resources required to successfully amend the constitution.
- Drafting constitutional amendment language that restricts rights is tricky business.
  - All but 1 of our 27 Amendments have granted rights and/or restricted government.
  - Notable exception: 18<sup>th</sup> Amendment abolishing liquor.

# Constitutional Amendment— Legal Concerns: Too Broad and/or Narrow

- **Too narrow**: Most rely on the term “expenditure” to define their reach and, consequently, will be easily evaded because this word has for decades been defined to include only “express advocacy.”
- **Too broad**: Some proposals, including Sen. Udall’s, would authorize Congress to “regulate the raising and spending of money . . . with respect to federal elections, including through setting limits on . . . the amount of expenditures that may be made by, in support of, or in opposition to . . . candidates.”
  - No check on Congress’ power to limit newspapers, TV stations and other media outlets from spending money to disseminate stories that might be perceived as supporting or opposing candidates.

## Constitutional Amendment— Legal Concerns: Too Broad and/or Narrow (Cont.)

- **Too broad**: Most contain language stating that the Amendment shall not be construed to abridge the freedom of the press
  - Who or what is the “press”?
  - According to the FEC, Citizens United is now the “press” and is therefore exempt from federal campaign finance laws—**but in 2004, the FEC concluded that Citizens United was not the “press,”** which led to the landmark SCOTUS decision.

# Elimination of Contribution Limits?

- If outside groups can raise unlimited contributions, should candidates be permitted to do the same in order to keep up?
- No!
- Courts have allowed unlimited contributions to outside groups precisely **because—unlike contributions to candidates—**contributions to outside groups supposedly can't corrupt candidates.
- Courts have for decades recognized the corruptive potential of large contributions to candidates. **This hasn't changed.**



Questions and/or Comments?