

**REFLECTIONS ON CAMPAIGN FINANCE AND THE 2012
ELECTION**

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The last several years have been a time of great instability for campaign finance law, accelerating the pace of change in an area that was already in flux. For many of these changes, the 2012 election was the first real test. It marked the first full election cycle and the first presidential election since the Court's decision in *Citizens United*¹ broke down the last barrier to unlimited corporate spending on independent political advertisements. It was also the first full cycle and presidential election since the

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of the project described as “record-

58%, of the outside spending went to ads attacking the incumbent, Mark Critz, or supporting his challenger, Rep. Keith Rothfus.²² Critz lost by less than 12,000 votes.²³

- x In New Hampshire's 2nd District, there was over \$5.6 million in outside spending, as compared to \$5.2 million in candidate spending.²⁴ About \$3.7 million, or 66%, of this spending went to ads attacking the incumbent, Charles Bass, or supporting his challenger, Rep. Ann Kuster.²⁵ Bass lost by about 16,000 votes.²⁶

Although outside spending is clearly on the rise, it is difficult to determine how much of that spending is attributable to corporations and labor unions

public participation in elections, this growth in small donations must be viewed as a positive development.

II. WHAT THE NUMBERS TELL US

The media narrative about campaign finance spending tends to fixate on the sheer size of the numbers. For example, within days of Chair Weintraub's January 31, 2013, announcement that spending on the election appeared to have exceeded \$7 billion:³⁴

- x Politico stated that 2012 spending "exceeded the number of people on this planet[]";³⁵
- x USA Today reported that campaign spending was "on par" with the \$6.9 billion that Americans spent on Christmas, Hanukkah, and Kwanzaa decorations during last year's holiday season;³⁶ and

spending in last year's election.³⁹ So perhaps the election total is not all that shocking. In fact, our nation might be healthier all around if we spent less money on candy and more on motivating citizens to vote.

To put the numbers in perspective, the \$7 billion we currently spend is equivalent to less than one-fifth of one percent (about 0.18%) of the federal government's \$3.8 trillion budget,⁴⁰ or less than one-twentieth of a percent (about 0.047%) of GDP.⁴¹ The \$7 billion accounted for an election in which 3,514 candidates ran for 475 seats. Much of that money was spent communicating to the public on the merits of candidates and their views on public issues.⁴² Thus, \$7 billion may not be an unreasonable amount to spend to elect the people who will decide how to spend trillions of dollars of taxpayer money.

Some reform-minded commentators, Bruce Ackerman and Ian Ayres for example,⁴³ have suggested that we publicly subsidize campaigns by giving all eligible voters a small amount of money to contribute, providing an interesting comparison to the current system. If every member of the voting age population in the United States, roughly 230 million people,⁴⁴ gave \$100 in political contributions, the total of their contributions alone would be \$23 billion—more than three times the amount that was actually spent in the 2012 cycle. And no one would consider so many small donations capable of corrupting the political process.

As this analogy illustrates, the amount of campaign spending alone should not be the focus of discussion. Rather, we should focus

39. *There's No Spooking Spending as Seven in 10 Americans Plan to Celebrate Halloween This Year*, NAT'L RETAIL FED'N (Sept. 25, 2012), available at http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1430.

40. U.S. GOV'T PRINTING OFFICE, FISCAL YEAR 2012 BUDGET OF THE U.S. GOV'T (2012), available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2013-BUD/pdf/BUDGET-2013-BUD.pdf>.

41. The United States' current gross domestic product is about \$15 trillion. See *United States: Data*, WORLD BANK, <http://data.worldbank.org/country/united-states> (last visited Apr. 1, 2013).

42. Some of the negative attitudes toward the quantity of campaign spending may be a consequence of negative attitudes towards the content of political communications—a related, but separate, issue.

43. See BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2004).

44. According to the Census Bureau, the voting-age population as of 2010 was roughly 230 million. U.S. CENSUS BUREAU, *THE STATISTICAL ABSTRACT OF THE UNITED STATES 245* (2012), available at <http://www.census.gov/prod/2011pubs/12statab/election.pdf>.

on the manner in which money is raised and spent. Thus, some of the more pressing questions concerning campaign spending are as follows:

- x Is enough being done to ensure that election-related spending is legal? In other words, is the FEC faithfully enforcing the judgments that Congress has made about what contribution limits, source prohibitions, and other restrictions are necessary to avoid the reality or appearance of corruption? Congress established these restrictions and the FEC should take the responsibility to enforce these rules very seriously.

- x Does the campaign finance system promote transparency and accountability? Disclosure is one of the pillars of the Federal Election Campaign Act. In passing both the original Act and the Bipartisan Campaign Reform Act, it appears that Congress wanted every electoral message to contain an identifiable source who can be held accountable by the public for the content of that message. As Justice Brandeis famously observed, “[s]unlight is said to be the best of disinfectants.”⁴⁵

- x Does the system promote participation? One way to look at political participation is to analyze the diversity of the pool, not only of candidates, but of political contributors and activists. For traditionally disadvantaged groups—including women, minorities, gays and lesbians, the disabled, and those of low income—participation in the political system may be a path to greater empowerment. The political system may depend on private donors, but the path should be open to all.

It is with these values in mind that we turn to some of the above-mentioned developments in the law and the FEC’s consideration of them.

45. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1934) (“Sunlight is said to be the best of disinfectants; electric light the most effi

former employees of the candidates.⁶⁰ Super PACs have become a vehicle of choice for wealthy and ardent supporters of various candidates since, unlike the candidates' authorized committees, the super PACs have no contribution limits—provided that they maintain their independence from their favored candidates. According to a report by Public Citizen, nearly half of all super PACs and nonprofit outside groups devoted virtually all of their spending to supporting a single candidate.⁶¹

The advent of single-candidate super PACs raises a number of tricky questions for the existing campaign finance regime, including whether the FEC's coordination rules are sufficient to prevent what looks like "literal" coordination. This is another issue that the public learned about from Stephen Colbert. For a time, Daily Show Host Jon Stewart took the reins of the "Definitely Not Coordinating with Stephen Colbert Super PAC," while Colbert ran for "President of the United States of South Carolina."⁶² The comically-exaggerated Stewart-Colbert skits exposed a real issue—that coordination rules created prior to the emergence of super PACs may be inadequate to implement statutory bans on coordination in a single-candidate super PAC world.⁶³

Any set of FEC Commissioners might have had difficulty dealing with the pace of change in this area of the law. But the sharp ideological divisions on the current Commission has made moving forward on new, high-stakes issues particularly difficult. Several enforcement matters that have presented some of these thorny coordination issues have resulted in inconclusive split votes.⁶⁴ These

60. See Lincoln, *supra* note 58, at 23–27, 31–33.

61. *Id.* at 6. Note that Public Citizen considered only groups that spent more than \$100,000 on reportable communications. *Id.* at 3.

62. Brian Stelter, *Colbert for President: A Run or a Comedy Riff?*, N.Y. TIMES, Jan. 13, 2012, at A14, available at <http://www.nytimes.com/2012/01/13/us/politics/stephen-colbert-to-explore-or-pretend-to-run-for-president.html>.

63. See Cynthia L. Bauerly, Chair, & Ellen L. Weintraub, Comm'r, FEC, *Statement on Advisory Opinion Request 2011-23* (American Crossroads), FED. ELECTION COMM'N (Dec. 1, 2011), http://www.fec.gov/members/weintraub/statements/AO_2011-23_American_Crossroads_CLB_ELW_Statement.pdf ("It does not forestall application of the statutory definition of 'contribution' . . . where the requestor acknowledged that the ads would be 'fully coordinated' and for the purpose of influencing federal elections.").

64. See Ellen L. Weintraub, Chair, Cynthia L. Bauerly & Steven T. Walther, Comm'rs, *Statement of Reasons on MUR 6611* (Friends of Laura Ruderman, et al.), FED. ELECTION COMM'N (Feb. 1, 2013), <http://eqs.nictusa.com/eqsdocsMUR/13044330712.pdf>; Ellen L. Weintraub, Chair, Cynthia L. Bauerly & Steven T. Walther, Comm'rs, *Statement of Reasons on MUR 6368* (Friends of Roy Blunt, et al.), FED. ELECTION COMM'N (Jan. 31, 2013), <http://e>

disagreements are not going away. Nonetheless, the FEC's inability to address these issues simply means that they remain undecided until current or future Commissioners are able to overcome their differences.

B. Corporations After Citizens United

Another recent development enhancing the role of large donors is a direct result of *Citizens United*—corporations can now spend unlimited funds on independent expenditures. As a result of the D.C. Circuit's decision in *SpeechNow.org*, they may also contribute unlimited funds to super PACs.⁶⁵

Although the evidence is incomplete, corporations seem to be exhibiting more caution in the electoral realm than some observers had expected. This may be simply because this is only the second election cycle that corporations could run independent expenditures. Corporations are also accountable to their shareholders and customers.⁶⁶ We saw a glimpse of this when Target's donation to a pro-business group was used to support a gubernatorial candidate who opposed same-sex marriage.⁶⁷ After the donation was revealed, Target faced calls for a boycott even after the company's CEO apologized to employees for the donation.⁶⁸

It's also worth noting that, prior to *Citizens United*, corporations were not barred from politics: they could establish political committees (known as separate segregated funds), run issue ads, and

qs.nictusa.com/eqsdocsMUR/13044330706.pdf; Ellen L. Weintraub, Chair, & Cynthia L. Bauerly, Comm'r, *Statement of Reasons on MUR 6570* (Berman for Congress, et al.), FED. ELECTION COMM'N (Jan. 8, 2013), <http://eqs.nictusa.com/eqsdocsMUR/>

certain non-profit corporations were exempt from the ban on expenditures.⁶⁹ Some corporations may be satisfied with the political tools they had prior to *Citizens United*, or perhaps are still evaluating the costs and benefits of adding independent expenditures to their political repertoire.

The other side of the story, however, is that there may be substantial corporate political activity that is not being disclosed. For example, some corporations are giving to other nonprofit entities, such as 501(c)(4) organizations (often themselves incorporated), that do not disclose their donors. Corporations (and others) could have given to such organizations before *Citizens United*. However, after *Citizens United*, a 501(c)(4) can accept corporate money and use it to pay for independent expenditures. This new use of the corporate form may be providing an avenue for not only other corporations, but for other individuals or groups who want to remain anonymous but still spend unlimited sums on influencing elections.

This is one of the unintended consequences of *Citizens United*. The corporate form, intended as a shield against liability, is now functioning as a shield against disclosure. Nonprofit corporations are being used to hide donor information, which leaves no one accountable for the message conveyed. The new method of maintaining anonymity may be one of the reasons why there were so many negative ads in the 2012 campaign cycle. Though there have always been negative ads, and the campaigns themselves ran negative ads, preliminary reports from the Wesleyan Media Project show that the outside groups supporting the presidential candidates ran almost exclusively negative ads.⁷⁰

This is perhaps partly a result of the fact that a lack of donor disclosure makes it difficult to hold anyone accountable for the content of outside groups' advertising. Some academics and

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States giving more than \$200 is less than one half of one percent.⁸⁰ The percent giving \$2,500 or more is less than one-tenth of one percent.⁸¹ For traditional unauthorized PACs and super PACs, a full 57% of their funds, over \$470 million, came from their top 100 donors, and nearly 70% of their funds, over \$560 million, came from the top 1% of their donors.⁸² Even with recent increases in the number of female donors, women still make up only about a third of the donor pool (other groups, such as racial and ethnic minorities, are not generally tracked).⁸³

One development that benefitted small donors emerged from a series of FEC advisory opinions this past summer dealing with text messaging contributions. The text messaging os pa oed(1)-3.3(1)-3.2(is)3.6/1t gpro.6(pa

committee to \$50 a month, and allowed recipient committees to determine the phone numbers of contributors so that the FEC could collect donor information from those contributors who gave more than \$200 in the aggregate.⁸⁹ The FEC approved another proposal that would allow contributors to give more than \$200 initially, but only once they had provided disclosure information by means of text message or “webform.”⁹⁰ Contributors would agree to a statement certifying that they were not foreign nationals or federal contractors, that they were above the age of eighteen, and that they were donating with their own funds.⁹¹

The FEC ultimately approved all six advisory opinions related to text messaging contributions 6-0, demonstrating that there are still some issues on which the FEC can take effective action. The FEC has not collected data on the totals from text messaging contributions, but according to a survey by the Pew Internet & American Life Project published last October, 10% of contributors had given by either text chee

replicate and build on going forward.