The Failure of the Separation of Powers in Campaign Finance Law

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Today is May 1st, which is Law Day. Today we celebrate the rule of law in this country. But much of the rest of the world is celebrating May Day, commemorating violent and bloody revolutions. I think it is entirely appropriate that, as Americans, we take the chance today to celebrate the rule of law, and our system of government that has given us that rule of law.

However, there exists no divine guarantee that the American system of the rule of law will continue—that is up to us.

I am reminded of the story about Benjamin Franklin and the Constitutional Convention in Philadelphia. At the close of the Convention, he was asked by a woman in the street, "What have you given us, Dr. Franklin—a monarchy?" He famously replied, **"A Republic, Madame, if you can keep it."**

What the Founders gave us was a republic, but one where they carefully created a separation of powers. For the Founders, the concern was that there not be **too much concentration of power** in a single branch, or a single individual. The branches were supposed to **cooperate**; but they were supposed to **check the excesses** of each other.

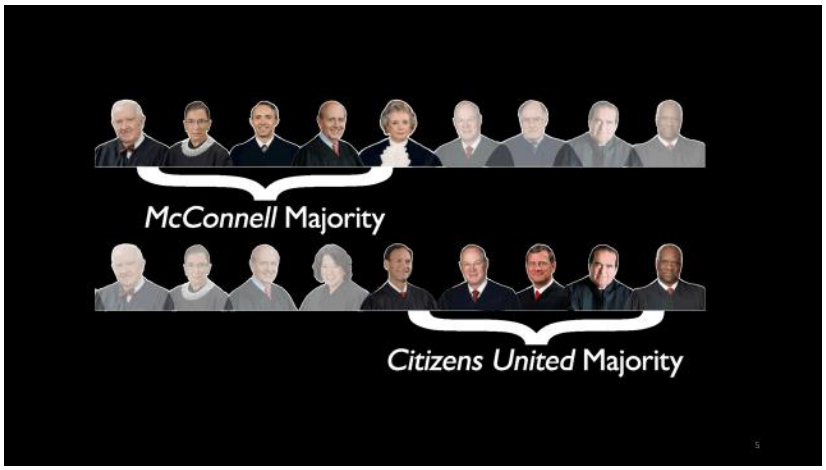
Sometimes, though, the three branches check each other to the point of deadlock. The Founders envisioned a separation of powers—not an **abdication** of government.

Unfortunately, in my view, in the context of campaign finance, it's an **abdication** that we've seen—which has given us a disturbing departure from what the Founders envisioned in terms of norms of government. In particular, since the Supreme Court's 2010 *Citizens United* decision, we've seen failures on multiple fronts: I believe the Court erred in its reading of the Constitution—but I realize others differ with that conclusion. But virtually **no one** thinks the Court understood the reality of how money in politics works in this country, or understood the effect of its decision. Following *Citizens United*, executive branch agencies like the FEC, IRS, and SEC have worsened the situation by failing to **enforce** the law, and Congress has failed to **legislate** to correct the mistakes of the judicial and executive branches.

First, let's look at the Judicial Branch.

The retirement of Justice O'Connor in 2006 and her replacement by Justice Alito on the U.S. Supreme Court resulted in an almost 180 degree turn in the Court's traditional constitutional doctrines on campaign finance regulation. The "new" Court has issued a series of what I believe are badly flawed decisions that replace Congress's judgement with its **own**, and severely narrow what Congress may regulate in elections.

In 2003, Justice O'Connor was the key vote in the Court's decision in *McConnell v. FEC*, which upheld almost all of the new Bipartisan Campaign Reform Act.

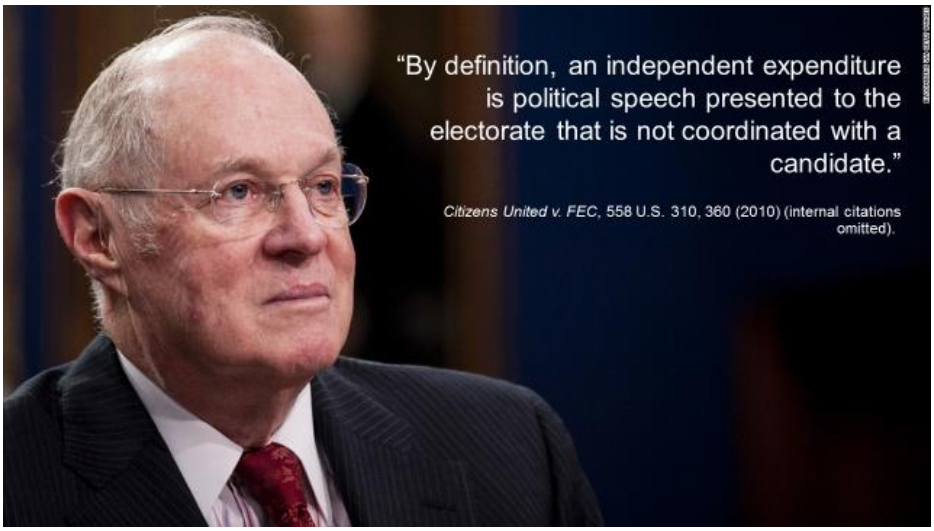


But since then, with Justice O'Connor gone and a different and contrary 5-4 majority of the Court in money in politics cases, the Court has taken an **adversarial approach** to campaign finance regulations. I believe it is relevant that, for the first time in more than two centuries, **not one** of the current Justices is a former elected officeholder: not one has run for or held political office; not one has raised money for their campaign, or negotiated bills in a legislative chamber. Justice O'Connor recognized that there are real problems with unlimited money in

politics, and was willing to defer to Congress's solution. Other Justices clearly think they know better than Congress—on a subject on which they have far less experience.

The Court's first major campaign finance case after Justice O'Connor left was *Citizens United* in 2010. As I see it, on the three key issues in the case: independent political speech, disclosure, and corruption, the new Supreme Court majority misunderstood reality:

First, independence. The Supreme Court's theory since the 1976 case of *Buckley v. Valeo* has been that political expenditures that are "wholly" and "completely" independent of candidates and parties will not corrupt those candidates or parties. The court theorized in *Buckley* that independent speech might not be welcomed by candidates because it might contain the wrong message or otherwise be unhelpful to the candidate. It was—and still is—an interesting and **unproven** *theory*.



In *Citizens United,* the Court extended this protection of independent speech to corporations, with Justice Kennedy saying: "By definition, an independent expenditure is political speech presented to the electorate that is **not coordinated with a candidate**."

Yet again, however, the theory which was the basis for downplaying the consequences of *Citizens United* has met the **reality** of campaign practices.

In the first presidential election after *Citizens United*, both parties' candidates had "**their**" super PACs—everyone knew which was Romney's super PAC, and which was Obama's. Each candidate announced them, met with their leadership and fundraisers, and thanked their donors. Then, in the lead-up to 2016, we saw Jeb Bush and his advisers setting up a super PAC before he was even a candidate. For months, Bush used the super PAC as his main fundraising vehicle—raising millions before he even declared.

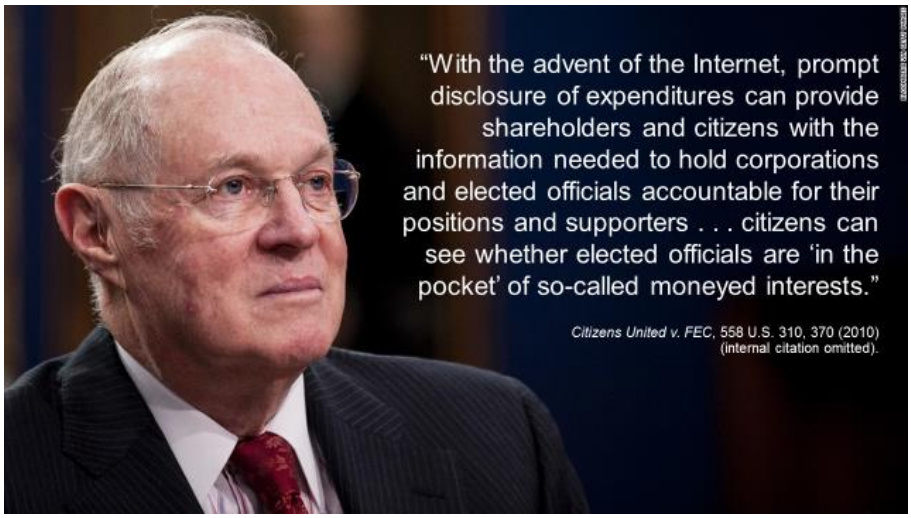
There was also "CARLY for America." Not Carly Fiorina's presidential campaign—that was "Carly for President." "CARLY for America" was her Super PAC, which set up tables outside Fiorina's campaign events, where they passed out "CARLY" stickers, signs, and pro-Fiorina literature, all produced by the super PAC.[1]

This activity has mushroomed, in races at all levels. In March, the Campaign Legal Center filed a FEC complaint against a super PAC and a campaign committee in Mississippi. There, an aide to U.S. Senate candidate Chris McDaniel created the super PAC (Remember Mississippi) before he declared his candidacy, the candidate spoke publicly about how grateful he was for the support of the super PAC's donors, and the super PAC organized, hosted, and promoted three campaign events for McDaniel, which he headlined.

This sort of interweaving of candidates and supposedly independent super PACs (and dark money nonprofits, too) is now occurring in almost every major federal campaign. Super PACs are established by candidates before they announce their candidacy, staffed by supporters selected by the candidate and campaign—often former senior aides or close friends of the candidate—and broadcast ads are filmed in coordination with the candidate but run by the Super PACs. The funding is raised by the candidate's finance team and key supporters. This renders contribution limits effectively meaningless—the money is going into two different pockets of the same coat, worn by the candidate. This is the **opposite** of what the Supreme Court said about independence in *Citizens United*!

[1] Emma Roller, *When a Super PAC Acts Like a Campaign*, NATIONAL JOURNAL (Sept. 10, 2015), https://www.theatlantic.com/politics/archive/2015/09/when-a-super-pac-acts-like-a-campaign/455679/.

Second, disclosure.



It's easy to forget this, but the Supreme Court in *Citizens United* actually **upheld** federal disclosure laws 8-1—but it misjudged how they would work in practice. In a section of the opinion joined by all but Justice Thomas, Justice Kennedy emphasized the importance of "prompt disclosure of expenditures."[2]

However, Justice Kennedy has complained in recent years that the disclosure he envisioned is "not working the way it should."[3] Indeed, it is not.

The *Citizens United* decision, combined with the legislative and regulatory lapses that followed, helped usher in a new era of so-called dark money: non-profit 501(c) groups that don't disclose their donors have reported spending **more than $800 million** on federal elections since 2010.[4] But that's only the political spending they are **required** to report—political ads aired more than 30 days in advance of a primary or more than 60 days ahead of a general election are **not covered** by these filing requirements, nor are direct mail pieces and robo calls—the true sum is surely much more.

Moreover, the dark money is focused where it most matters—in tight elections. In 2014, **$131 million in dark money was spent in the 11 closest Senate races**.[5]

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[2] *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (internal citation omitted).

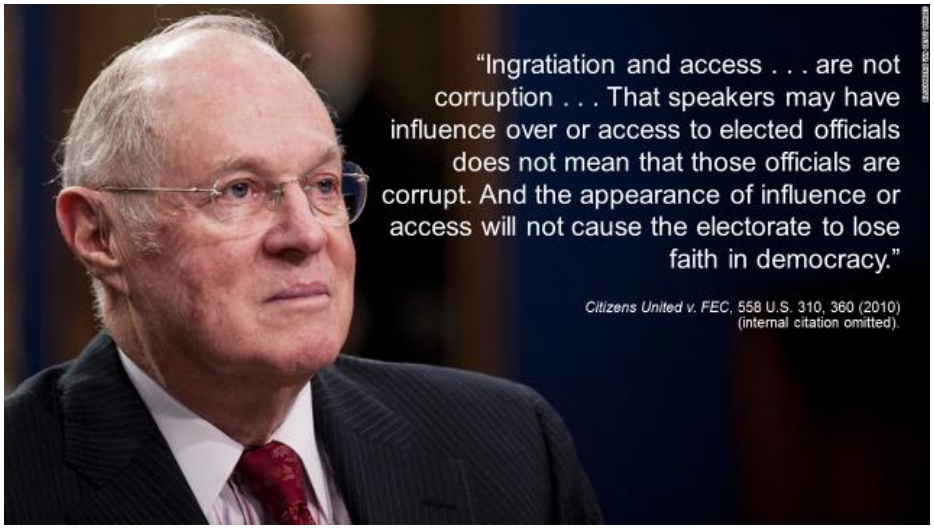
[3] Paul Blumenthal, *Anthony Kennedy's Citizens United Disclosure Salve 'Not Working,'* HUFF. POST (Nov. 2, 2015), https://www.huffingtonpost.com/entry/citizens-united-anthony-kennedy_us_5637c481e4b0631799134b92.

[4] Open Secrets, *Political Nonprofits (Dark Money)*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/nonprof_summ.php?cycle=2018&type=type&range=tot (last visited Mar. 1, 2018).

[5] Katie Rose Quandt, *How Is Citizens United Ruining Democracy and How Can We Stop It?,* MOYERS & COMPANY (Jan. 21, 2015), http://billmoyers.com/2015/01/21/five-years-citizens-united/

Third, corruption and the appearance of corruption.

Back in *McConnell v. FEC*, the Supreme Court decision upholding the McCain-Feingold reform law, the Court—with Justice O'Connor still on it—took a broad view: It said, quote, "Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption, to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" I think almost all of us would agree with that statement.



Yet, in *Citizens United*, in 2010, the new Court majority reversed field. Justice Kennedy wrote that "Ingratiation and access…are not corruption…That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy." **Where** Justice Kennedy got that conclusion I do not know!

These mistakes have since been exacerbated by failures of Congress and executive agencies. Perhaps one reason is an idealistic—but also naïve—assumption about the "good faith" of the other branches.

Justice Kennedy had this to say when testifying before Congress on the Court's budget in 2015: we "**have to <u>assume</u> that we have three fully functioning branches of the government that are committed to proceed in good faith and with good will toward one another to resolve the problems of this republic.**"[6]

In a vacuum, Justice Kennedy is probably right: it makes sense for judges interpreting statutes to assume that regulators and legislators will continue to execute the basic functions of their job.

But we aren't in a vacuum—this isn't a theoretical exercise in "what if." There is overwhelming evidence pointing to a pattern of near-complete failure on the part of the FEC, IRS, SEC, and other executive branch agencies to deal with campaign finance problems and violations. This is matched by, and the result of, complete partisan gridlock in Congress on these issues, which means Congress cannot step in and correct these regulatory failures.

6 *Notable & Quotable: Anthony Kennedy*, WALL ST. J., Mar. 25, 2015, at A15.

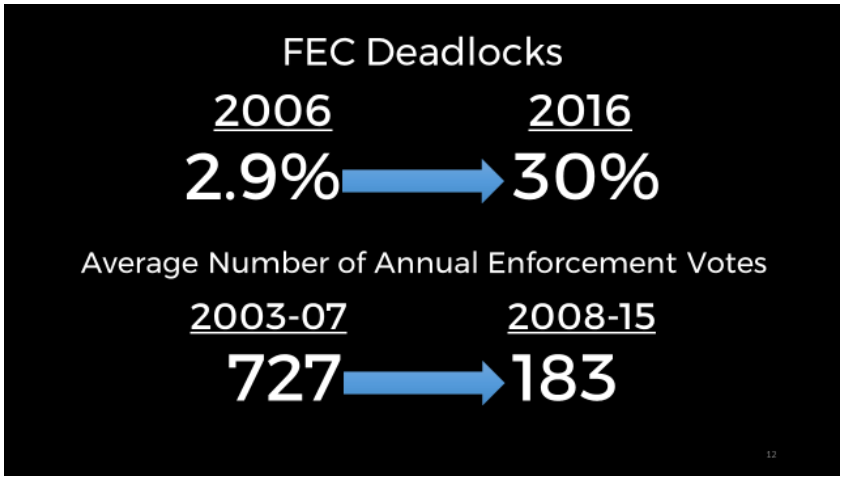
The Executive Branch

My former agency, the Federal Election Commission, has been crippled by deadlocks for a **decade** that have prevented it from taking meaningful enforcement actions in an increasing number of cases.

In many ways, the FEC was the keystone of the Watergate reforms. Created as an independent regulatory agency and supported by members of both parties, the FEC was tasked with administering and enforcing the new Federal Election Campaign Act.

It has 6 Commissioners—not more than 3 of which can be from any one party—and requires 4 votes to take **any** action: to open a rulemaking, to adopt new regulations, or to begin an investigation to determine whether the law has been violated. This means that 3 Commissioners of one party can paralyze the agency if they choose—and the 3 Republican Commissioners have used this power since 2008 to prevent the agency from acting on most major issues—super PAC coordination, the disclosure of dark money groups, disclosure of the sources of funding for Internet advertising.

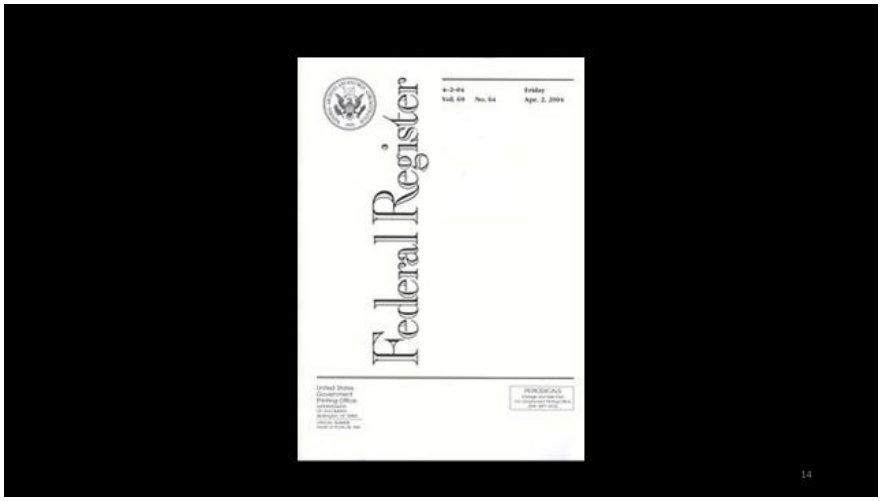
Now, during **my** time on the Commission, my colleagues and I sometimes disagreed about **how** to enforce the law, but we did agree that the FEC's job was to enforce the campaign finance laws passed by Congress, and to faithfully implement those laws in its regulations. In fact, I recall **only** one 3-3 deadlock on an Advisory Opinion during my time there—and that was an accident!



30% of votes on enforcement matters are now deadlocked.

And even these numbers understate the problem, because they include only the results of cases when the Commissioners take a vote at all. The FEC held an average of **727 votes per year** on enforcement actions between 2003 and 2007. But since 2008, that number dropped, to an average of **only 183 votes per year**.

So the FEC is holding fewer and fewer votes on whether to even consider enforcing our campaign finance laws, and it's deadlocking more and more frequently on those votes that it does hold.



It took nearly five years after the *Citizens United* decision for the FEC to muster four votes even to issue the most basic notice of proposed regulations to bring the FEC's regulations into accord with the Court's opinion. This was because the Democrats wanted to include proposals to strengthen the FEC's disclosure regulations, which the Court had just upheld 8-1, and the Republicans refused to allow the subject to even be discussed in a rulemaking.

It's failures like these that led former FEC Chair Ann Ravel to publicly term the Commission "worse than dysfunctional."

Unfortunately, there is no one else easily able to fill the void left by the FEC. The campaign finance laws are largely civil statutes, and the Department of Justice only has authority in those rare cases of a potential criminal violation. Equally, complainants who seek enforcement of the laws almost never get satisfaction from courts that review the FEC's failure to act. There are two main reasons for this.

The first is *Chevron* deference. As you know, *Chevron* deference refers to a Supreme Court holding that federal courts should **defer** to an **agency's understanding** of the statute it is charged with implementing and enforcing, because the agency is presumed to have a particularized expertise in the issue area. In the FEC context, the courts have applied *Chevron* even when the FEC fails to **make** a decision because of a deadlock amongst Commissioners. When such deadlock occurs, courts afford deference to the three Commissioners who vote **not** to enforce the Federal Election Campaign Act, since theirs are the votes that "control" the agency **in**action. This means that even in the face of widespread failures to enforce the law, the courts defer to the FEC Commissioners who **refused** to act and prevented an agency "decision."

Chevron applies to the merits of a case, but, sometimes, the courts won't even get that far, because plaintiffs are barred at the courthouse door by the doctrine of standing.

When Congress passed the Federal Election Campaign Act in 1974, it included certain provisions – specifically, a citizen complaint provision, and a citizen suit provision added in 1979, that would enable ordinary Americans to play a part in the enforcement process. If the FEC fails to act in a timely manner, or failed to find a violation of law, the complainant has the right under the statute to go to federal court and get a judge to enforce the law! This makes sense: elections go to the heart of our collective self-government and there is an important public

interest at stake. But changes in the Supreme Court's standing doctrine since 1974 have gutted this citizen enforcement provision.

In 1968, the Supreme Court decided *Flast v. Cohen*, reaching what some have described as its high-water mark for standing. There, in an 8-1 decision, the Court allowed standing for a taxpayer to challenge a use of federal funds—specifically, federal spending on secular textbooks for religious schools. Since then—in a series of cases—the Court has retreated from this position. Today, standing doctrine represents a serious jurisdictional barrier to judicial review of government action—and inaction. Review of the FEC's repeated non-enforcement is, sadly, no exception. The courts have made clear, as the D.C. Circuit put it in 1997, that litigants do not have standing simply to force the FEC to "get the bad guys."[7] This leaves an unfortunate regulatory gap that increasingly resembles a regulatory **chasm** as the FEC has shown no willingness to "get the bad guys" on its own. Unless a litigant is seeking to vindicate a right of her own—usually a right to certain types of disclosure—she cannot avail herself of the judiciary, even if the FEC fails to enforce the most uncontroversial aspects of the law.

Another executive branch agency, **the IRS,** has its own failures in this realm.

Of particular relevance to the campaign finance world is how they have dealt with the proliferation of so-called dark money groups—i.e., organizations organized under section 501(c)(4) of the tax code that have become increasingly active in our elections. The Internal Revenue Code defines section 501(c)(4) organizations as "Civic leagues or organizations not organized for profit but operated **exclusively** for the promotion of social welfare."[8] These

[7] *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997).

[8] 26 U.S.C. § 501(c)(4)(A) (emphasis added).

organizations are known as "dark money" groups" because the IRS keeps the names of their donors secret. If they filed as PACs at the FEC instead, their donors would be public.

So, the first question is: How did organizations that exist "**exclusively**" for the promotion of social welfare and file with the IRS as tax-exempt nonprofits end up neck deep in the world of political campaigns?

Since 1959, the IRS has generously chosen to interpret "exclusively" as "**primarily**."[9] So 501(c)(4)s are permitted to engage in political campaign intervention, as long as that isn't their "primary" purpose.

However, the IRS has failed to answer two critical questions: First, **what** constitutes political campaign intervention, and, second, how **much** campaign intervention may a c4 engage in before it impermissibly becomes that group's "primary" activity?

These questions have become vitally important since 501 Cs became the vehicle of choice after *Citizens United* for political actors seeking to influence elections without registering as PACs at the FEC or with states, and thus avoiding disclosure of their funders.

The height of this controversy came in 2013, with the so-called Tea Party Scandal. In the midst of an exploding number of 501(c)(4) applications, the IRS looked for ways to distinguish between true social welfare organizations and organizations that should be classified as political groups. During this period, the agency was widely criticized for allegedly singling out 501(c)(4)s with associated terms like "Tea Party" and "patriot."[10] However, despite claims of a targeted attack on Tea Party groups, an investigation found the IRS in fact was looking for political activity by c4 applicants **across the political spectrum**; other keywords it searched for included "Occupy," "progressive," and "medical marijuana."[11]

Unfortunately, this Washington scandal effectively ended the IRS's effort to police the requirements for 501(c)(4)s. With the FEC deadlocked and the IRS out of action, there is no cop on the beat.

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[9] 26 C.F.R. § 1.501(c)(4)– 1(a)(2)(i) (emphasis added).

[10] Alan Rappeport, *In Targeting Political Groups, I.R.S. Crossed Party Lines*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/politics/irs-targeting-tea-party-liberals-democrats.html.

[11] Francis Wilkinson, *GOP Surrenders Cherished IRS Scandal at Last*, BLOOMBERG VIEW (Nov. 20, 2017), https://www.bloomberg.com/amp/view/articles/2017-11-20/gop-surrenders-cherished-irs-scandal-at-last.

The SEC

The Securities and Exchange Commission has **also** failed to make *Citizens United*'s disclosure promises a reality.

Although Justice Kennedy's opinion in *Citizens United* asserted that disclosure would allow shareholders to know how their money was being spent, the reality has been that a publicly traded corporation's contributions to 501(c)(4) and 501(c)(6) political organizations are never publicly reported, despite the SEC receiving many petitions requesting it adopt rules requiring transparency in political spending for publicly traded corporations.

Finally, the Legislative Branch

In recent years, and particularly since *Citizens United*, Congress has failed to pass **any** new, sorely-needed campaign finance laws, or update old ones. The problem goes beyond gridlock—the action that it *has* taken on these issues has mainly been to **impede** executive agencies like the IRS and the SEC from doing their jobs. This is not the separation of powers—this is the lack of power in **any** branch.

One reason: Campaign finance reform has become a far more **partisan** issue than it once was.

In the wake of Watergate, in the 70s, it was the **Republicans** who mainly pushed for the creation of the FEC and for campaign finance reform, because the Democrats dominated Congress and had no great interest in independent oversight. Now, unfortunately, the current official position of the RNC and the Republican Congressional leadership has become: **no** regulation, **no** contribution limits, and **no** disclosure. I do not believe this accurately represents the views of the vast majority of Republicans in the United States, but rather is a response to the Washington-based political influence industry.

The **DISCLOSE Act**, written after *Citizens United* to ensure full disclosure of federal political spending, received no Republican votes in 2010 in the Senate, or ever since. Among other changes, the Act would require 501(c)(4)s to report much more of their political activity, including independent expenditures that are more than $10,000.[12]

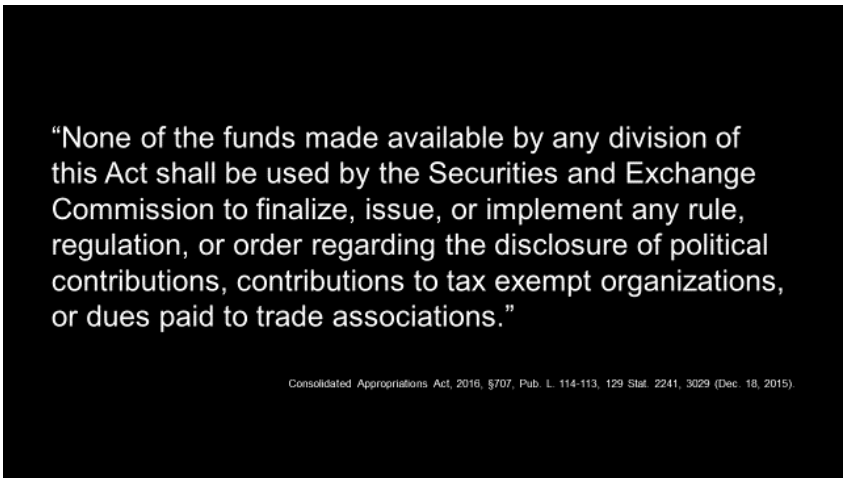
Similarly, the **Shareholder Protection Act** has been introduced repeatedly in both houses of Congress since *Citizens United*. If passed, the bill would require corporations to disclose to the SEC their political spending—including by identifying which candidates they supported or

[12] H.R. 5175, 111th Cong. § 211 (2010). *See also* S. 3295, 111th Cong. (2010); S. 2219, 112th Cong. (2012); S. 3369, 112th Cong. (2012); S. 2516, 113th Cong. (2014); S. 229, 114th Cong. (2015); H.R. 430, 114th Cong. (2015).

opposed—and to alert shareholders and the public to political expenditures over a particular amount.[13] But it has made no progress in either chamber.

This is despite the fact that Justice Kennedy, the author of the *Citizens United* decision, said that disclosure of spending to corporate shareholders was essential to make the decision work.

That has not happened—and one reason why is that the current Congressional leadership has fought to see that it does **not**. Instead, recent appropriations bills have contained a rider about the SEC that prohibit SEC funds from being used to require disclosure of corporations' political activities:



Appropriations bills since 2015 have also contained a parallel rider for the IRS and political spending by 501c4s. These riders have been attached to every appropriations bill since.

This is the height of dysfunction: Congress does not have the votes to **change** laws on the books, but then the leadership uses must-pass spending bills to make it **impossible** for agencies to enforce them either.

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[13] Lisa Rosenberg, *Transparency Provisions in the Shareholder Protection Act Important to Disclose Corporate Political Expenditures*, Sunlight Foundation (June 21, 2011), https://sunlightfoundation.com/2011/06/21/transparency-provisions-in-the-shareholder-protection-act-important-to-disclose-corporate-political-expenditures/. *See also* H.R. 4537, 111th Cong. (2010); H.R. 4790, 111th Cong. (2010); S. 1360, 112th Cong. (2011); H.R. 2517, 112th Cong. (2011); H.R. 1734, 113th Cong. (2013); S. 824, 113th Cong. (2013); S. 214, 114th Cong. (2015); H.R. 446, 114th Cong. (2015); H.R. 376, 115th Cong. (2017); S. 1726, 115th Cong. (2017).

Foreign Interference and Digital Political Ads

Here's another recent example where we've seen the severe consequences of the failures of our government to deal with serious election problems. By now you've probably all seen this ad—or ones like it—that a Kremlin-linked group called the Internet Research Agency ran on Facebook during the 2016 presidential campaign.

It was only *after* the election that we learned the Russian government was behind thousands of Facebook political ads like this one that reached at least 10 million Americans, and that much of this online activity was targeted to only a few key "swing" states, such as Wisconsin and Pennsylvania.[14] A bipartisan group of senators has introduced legislation to close some of these online transparency loopholes, but the Honest Ads Act has yet to even receive a hearing, despite having been endorsed by Facebook's Mark Zuckerberg in the recent Congressional hearings.

As a roomful of lawyers is undoubtedly aware, there is a broad prohibition in U.S. law against foreign nationals expending funds in our elections. In *Bluman v. FEC* in 2012, the Supreme Court summarily affirmed a D.C. District Court decision upholding this foreign national ban: "It is **fundamental** to the definition of our national political community that foreign citizens do not have a constitutional right to participate **in**, and thus may be excluded **from**, activities of democratic self-government," wrote the District Court in its decision by a three-judge panel.[15]

So how did all three branches fail us here? For one, the Supreme Court erroneously assumed that the advent of the digital age automatically meant disclosure, and both Congress and the executive branch have since failed to address the issue. The FEC chair has announced that it

[14] David Ingram, *Facebook says 10 million U.S. users saw Russia-linked ads*, Reuters (Oct. 2, 2017), https://www.reuters.com/article/usfacebook-advertising/facebook-says-10-million-u-s-users-saw-russia-linked-ads-idUSKCN1C71YM.

[15] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011).

might consider new regulations—after the 2018 midterm elections! And Congress has yet to schedule hearings—never mind a **vote**—on the Honest Ads Act.

Conclusion

So, where are we, and where do we go from here?

For those of us who believe in the rule of law, the current Washington reality is dangerously lawless, and unacceptable. To have the FEC routinely **deadlock on all important matters** before it (with **no** effective judicial review) vitiates the law it exists to enforce. To have **Congress** pass riders buried in Appropriations bills prohibiting the IRS or the SEC from clarifying what their statutes mean, when there is obvious confusion, is disingenuous at best. If Congress does not like the current laws, it should justify changing them—not prohibit the expert agencies from interpreting and enforcing them.

Fortunately, there are a number of solutions.

Congress **could** pass the DISCLOSE Act, and the Shareholder Protection Act.

A reformed FEC could also do a lot, even under current law. For example, it could write new rules requiring the disclosure of c4 donors, if the c4s engage in significant political activity. Without Congressionally-imposed barriers, the IRS and the SEC could require additional disclosure of current dark money campaign spending.

On the digital ad front, both Congress and the FEC could do a lot. Congress could pass legislation like the Honest Ads Act, which would go a long way in updating our disclosure rules for the digital age and creating a large "political ad file" so that anyone can see all the ads a given page is running on Facebook, Twitter, Google, or other platforms. The FEC could write new rules on this issue, too—in fact, thanks to considerable pressure and more than 100,000 public comments urging them to do so, the Commission finally announced it will open a

rulemaking. I hope they take the opportunity to give our disclosure regulations sorely-needed updates.

The separation of powers was never intended to mean government was unable to act—rather, the idea was that the three branches would **cooperate**, check each others' excesses, and avoid power concentrating in a single branch. If the Courts, regulatory agencies, and Congress could take some of the steps I've mentioned, perhaps we could return to that ideal—and our campaign finance system, along with our democracy, would be much better off.

Meanwhile, the states may have to lead the way, setting an example of cooperation across the political aisle, and across the branches of government. A Supreme Court Justice once termed the states "laboratories of democracy"—now is the time for New Mexico and other states to follow through on that, as you already are with disclosure rules and the proposed new Ethics commission. It is a **start**!