

Money in Politics – Hiding in Plain Sight
Prepared for the
Committee for Economic Development (CED)
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I. Citizens United and its Aftermath

Today we have heard the results of a CED sponsored national nonpartisan survey of corporate managers and officers about their on-going concerns and opposition to the money in politics regime which infects American political life, in the aftermath of the Supreme Court Citizens United decision. This latest survey continues and confirms the CED's prior surveys addressing this issue with remarkably similar results. Each survey expresses the disdain of corporate officers and executives for the over-use of money in politics. We thank Geoffrey Garin of Hart Research Associates and Gary Ferguson of American Viewpoint for this highly professional survey and report of the national corporate community.

The CED is also pleased to be joined in this presentation by the Conference Board. The Board has been in the fray longer than the CED but we share a common commitment to the best corporate practice in management of corporate money in politics. We work together to ensure the confidence and trust of the American public in the conduct of corporations and our business community.

By now most of us have reflected on the political mischiefs of the Citizens United case. Ronald Dworkin's early assessment still stands. Dworkin "The Decision that Threatens Democracy", *New York Review of Books*, May 13, 2010. Even before the case was decided, however, we had become increasingly aware of the hazards to our political and free market

systems caused by the increasing tide of money washing over our nation's political process. By cloaking corporate donations to political causes with a constitutional blessing, and First Amendment blessing at that, the Supreme Court addressed only one aspect of the destructive role of money in politics. Already state and local elections of every sort had felt the growing impact of the unprecedented wealth creation and its wide deployment by a variety of actors, personal and institutional, in public and political sectors. Up to that decision, varied limitations on corporate giving obscured the ever enlarging, even if secret and ambiguous, role and scale of personal giving that was already an important factor in U.S. politics.

Putting to one side the concern about corporate giving, in general, the lack of meaningful disclosure and transparency as to all political contributions has been equally important in frustrating real knowledge of money in politics. The Supreme Court emphasized the need for disclosure and transparency. However, the real lack of transparency as to individual or corporate political gifts, whether for candidates or causes, was a more complex issue and obscured the cumulative impact of this new reality. Citizens United only magnified what was already a troubling feature of life in our constitutional system. The case emphasized, perhaps inadvertently, the growth in wealth and the growing gap between those who have the overwhelming share of that wealth and the rest of Americans, and the varied effects of this gap in our shared political life, especially in undermining trust and confidence in our corporate community and market economy.

Adverse public impact of Citizens United was increased by cases in which said that corporations had the same constitutional rights as individuals. This court's decision was seen by many ordinary citizens as preposterous, a reversal of the contrary opinions in Austin vs. Michigan Chamber of Commerce (494 U.S. 652 [1991]). Corporations remain "fictitious

persons”. The expansion of corporate rights, to include “personal rights”, was offensive. The difference between creation of a human being and creation of an artificial enterprise by a state or other political agency with such qualifications and limitations as it chose is profound and irreconcilable. The following recent letter to the *Kansas City Star* is typical:

“Corporations are not people. A corporation can live forever and does not need clean air to breathe or safe water to drink.

It can be many places at once, can commit a crime but cannot go to prison. Because giant corporations own most big media (TV networks, radio stations, newspapers, ad infinitum) their free speech rights can wield overwhelming influence on voters, virtually dictating political choices.” (*Kansas City Star* 6/25/13)

Many citizens, as the writer of this letter, are concerned about the ambiguity of the word “corporation”. Does it embrace “for profit”, “not for profit”, foundations and all organized enterprises? How do we learn of, and monitor, an array of “nepotisms”? Who would police, in a systematic, nonpartisan manner, the political contributions of such enterprises and their executives and their relatives?

Missouri was well ahead of the Supreme Court. In some years prior to the Citizens United case Missouri has had almost non-existent limits on corporate contributions. In 1994, in a statewide referendum, 74% of Missouri voters approved strict campaign finance limits. The Missouri legislature acted promptly to undo the “will of the people”, despite the phrase enshrined in the Missouri Constitution – “The Will of the People is the Supreme Law”. The legislature that abolished corporate contribution limits claimed there would now be transparency for such contributions. For those in the legislature the fairness of the political process would thereby be “improved”. To many voters that result remains to be seen.

The impact of Citizens United on state politics can readily be seen in other events in Missouri. Earlier this year the Missouri legislature approved House Bill 253 which reduced aid to Missouri public schools. Reduction was accompanied by a tax cut for individuals and corporations. Among other things, Bill 253 calls for a 50% income tax cut for “pass through” businesses -- those that direct income to the owner’s personal returns. It cuts the top personal income tax rate by ½%, and lowers the corporate tax rate by 3%. The Governor vetoed the bill. Missouri citizens recently learned that a prominent St. Louis businessman committed \$2.4 million in cash to override this veto. There is great concern that these monies directed to individual legislators will spur an override of the veto. *The Kansas City Star* on Sunday editorial reflected a statewide hostility to such a political contribution, which appears to support the haves over those who have less.

Whatever the venue or jurisdiction, Citizens United represents forces and agencies substituting the rule of cash for the rule of law. If all decision making in government – legislators, judges, and administrators – is animated, controlled by big contributions of cash from undisclosed donors or in a daisy chain of obscure donors, our system, our processes embedded in the rule of law are undermined. The “rule of cash” in contrast enlarges a high class culture of bribery. Such a “rule of cash”, as we have learned offshore, frustrates economic development by favoring the big checkbooks, by favoring an economic, financial establishment to the detriment of small business, business startups and small competitors. “Pay to play” is the U.S. version of “crony capitalism”.

Offshore American business has frequently experienced such a “kleptocracy” in world commerce. It is this kleptocracy toward which we may be descending, a descent which ultimately results in pervasive corruption. For example, “In China corruption *is* the state”,

usefully so described by Michael Sheridan in his analysis in the *London Sunday Times* of July 28, 2013.

So far we have emphasized the role of money in politics in elections. The power of money in politics allows the bypass of constitutional agents and legislative and election cycles in all political venues. This bypass makes it difficult to achieve the transparency and limitations we strive for. Out-of-season contributions to legislators, their assistants and political parties, coupled with a permanent community of representatives, advisors, and offices close to and controlled by those most important to the source of the cash, have led to creation of a kind of “dark state”. Practitioners of the rule of cash have learned that they are not then bound by the usual structures or processes; they and their networks of relatives, consultants, lobbyists, and corporate representatives are perceived as an alternative to government, if not the real government.

“Dark money” slowly becomes and is transformed into this “dark state” – all the contractors on which governments depend for infrastructure and technology – networks, clouds, cyber services – become the masters and ministers of this dark state. The legal constitutional structure is then understood by the public to be ineffective or bypassed because cash alone directly or indirectly calls the shots.

This “dark state” undermines the will of citizens, but it continues to grow as constitutional agents are seen to be stymied, undependable or self-motivated. Loss of citizen confidence in any government and its programs, no matter how beneficial, is the consequence. Paul Volcker recently warned of this phenomenon as a challenge to all governance. (*New York Review of Books*, December 20, 2012, p 8)

The risk of the rule of cash to small business is particularly serious as such cash is used to fortify dominant market positions; to frustrate market entries by newcomers and startups; to “misallocate” away from productivity to politics. The “kleptocracy” which emerges guarantees the failure of the free market and the free enterprise system practiced under our constitutional guarantees and to which the CED is committed. Issues of money in politics are expressions of the capture of the political system by crony capitalism. Citizens United justifies and authorizes crony capitalism in our political system and undermines the civil society for which America stands – not only in this republic but as a model for builders of civil societies worldwide. And the “pay to play” criticized by survey participants is our version of the crony capitalism we criticize beyond our shores.

Money in politics as a general phenomenon is bad enough. Its special mischief in controlling judicial selection and conduct is worse. That particular “mischief” is most harmful in corrupting the fundamental underpinning of a free market system. Sergei M. Guriev, a prominent Russian economist who recently fled Russia after a series of disagreements with Putin, made an important point about the necessary connections between a truly open market, free enterprise systems, and independent judiciary. He said, “It’s hard to create a strong and independent judicial system for commercial disputes with a dependent political judicial system”. (*New York Times*, 6/1/13)

The U.S. is not alone in its concern for these issues. The British are also more assertive about the influence of money in politics; witness the recent story “Puppetmaster lobbyists boast” of pulling in “sheep like MPs”. (*London Times* 6/23/13, pp. 10-11) This article appeared as part The Times coverage of “Westminster for Sale”. We in the U.S. must always struggle to avoid such a boast.

A Supreme Court endorsement of “transparency” and “disclosure” is inadequate and elusive as evidenced in the actions of the FEC trying to enforce national election laws. Such inadequacy of present regulatory schemes was well addressed in the CED’s recent report: Hiding in plain Sight: The Problem of Transparency in Political Finance. This report is also presented with the survey results you have seen today. There is no rebuttal to its findings.

Such emphasis on rules and process of disclosure and transparency are reminders of the injuries of money in politics and our vain attempts to remedy them. There are so many intricacies in “transparency” -- varied actors including monopoly and cartel industries, oligarchs and oligarchies, public and nonpublic enterprises, private for profit and private nonprofit, all of which can operate through a variety of structures and especially the “daisy chains” which frustrate real knowledge. In the end, for example, will “transparency” and contribution limits work in the environment summarized here?

These developments magnify the risks to corporate and personal enterprise from the use of financial power, a power to which most citizens, shareholders, and customers are hostile. Corporate gatekeepers are thus indispensable. Bruce Freed and the Center for Political Accountability stress “risk awareness”, “risk management” and reliance on those who are the “gatekeepers” of corporate governance:

- accountants
- audit committees concerned about risk
- independent directors
- counsel

Remedies, assuming we sincerely want them, are elusive. Consider this recent comment, again in the *Kansas City Star*, by Steve Kraske, dealing with the efforts to address the situation in Missouri:

“In January, [Governor] Nixon uttered prescient words when he said passing the greatest laws in the world mean nothing if Missourians lose faith in the system.

But would sticking a \$2,000 or \$5,000 contribution limit on how much someone could donate to a candidate for governor solve the problem of too much money in politics?

Not even close.

Nixon understands that in a world of super PACs and “dark money” committees and 501(c)(4)s that permit the wealthy to pour hundreds of thousands of dollars into the system anonymously, a new reality is afoot.

So lower donation limits only result in more secret money flowing into the system.

**Some scholars even wonder whether, in the wake of recent U.S. Supreme Court rulings, any law can be crafted that would both limit money and shed light on donor identity”.
(*Kansas City Star* July 13, 2013)**

With all this said, the CED remains committed to its essential and historical goals to address these concerns. CED’s campaign finance reform efforts are guided in the future as they were in the past by these goals. They include:

The need for effective transparency for campaign contributions and expenditures so that voters know who is giving and spending money to influence their votes,

The need to make individual smaller donors more important and influence-seeking larger donors and outside spending groups less important in financing our elections,

The need to strengthen the oversight and enforcement of campaign finance laws.

But we also count on individual leadership in the corporate community to set standards of corporate behavior to support the larger civil society. In 1951 Frank Abrams, Chairman of Standard Oil of New Jersey and a CED trustee, defined corporate public responsibility as:

“Maintaining an equitable and working balance among the claims of the various directly interested groups...stockholders, employees, customers, and the public at large. Business managers are gaining in the professional status partly because they see in their work the basic responsibilities (to the public) that other professional men have long recognized in theirs.”

We are reminded of this abiding CED commitment as we struggle together to achieve that balance in the use of money in politics.

II. Is “Darkness” Descending?

The main narrative for “Money in Politics” (July 24, 2013) gave insufficient attention to the on-going influence of dark money, the dark state, the dark economy. The inescapable reality is that these “dark” forces cannot be ignored or avoided; they continue to influence and corrupt the civil society and the market economy in which we function. They are the obstacles to the idealized transparency the Supreme Court and other commentators continue to recommend as antidote to excesses of money in politics.

Recently the *Financial Times* offered a useful presentation on the disappointing consequences of money in politics. Jacob Weisberg, on August 12, 2013, described a process by which “pay to play” in Washington transforms “true believers into the stay-and-get-rich club”.

As he put it so well ... “they come for the politics but stay for the money”. Such a process is the foundation for creation of the “dark state”.

These words come from a growing number of voices which, like those quoted letters to the editor, are outraged and troubled by the role of money in politics. They are, by no means, the only such voices. They are offering different perspectives about the evils and challenges such a fundamental vice creates for effective constitutional government. The reader may also find it useful to consider Frank Rich’s, “A Stench on the Potomac” (*New York Magazine*, August 12, 2013) describing the revolving door in which White House alumni become the new Washington establishment. The article insufficiently addresses details and discussion of dual employment in government and the private sector. Leibovich’s, *This Town*, (2013) emphasizes the power of the media-industrial complex in Washington. He was recently interviewed by Steve Kraske on KCUR.

The long history of the *Kansas City Star* in resisting excesses of money in politics has been forgotten. Lewis Gould’s recent presentation at the Kansas City Public Library on “I Am with You Tooth and Nail – William Rockhill Nelson and Theodore Roosevelt” was an unexpected reminder of the energetic and forceful opposition of Nelson and the *Kansas City Star* to the influence of political contributions. In these views Nelson was following the progressive lead of Theodor Roosevelt’s “New Nationalism” speech from 1910. There he says: “Corporate expenditures for political purposes, and especially such expenditures by public service corporations, have supplied one of the principal sources of corruption in our political affairs” *The New Nationalism* (New York: The Outlook Col, 1910, page 14).

Nelson could not have imagined how the magnitude of those contributions would have exploded in recent times. The attached chart is a dramatic reminder of the sums recorded as

direct reported contributions. They did not show the massive indirect contributions in the form of investments, consultant, salaries, and other support that indirectly achieves the same mischiefs in the “dark state” one can associate with direct contributions. Indeed, one might analogize the ratio of direct contributions and indirect political support to that of the iceberg in which the ice one can see is so much less than that under water, out of sight and more dangerous.

III. Journalism in the Dark State

One may arrive at the conviction that this dark state is the parent of the “dark intelligence”, the dark network that we have recently learned the state works so diligently to conceal. The free press which is essential to the enjoyment and preservation to our constitutional system finds itself frustrated, indeed criminally charged, for its investigations, its revelations about this dark intelligence.

David Carr of the *New York Times* reports each Monday on journalism and its challenges. His recent report of the indictment of Barrett Brown is a revelation on this score. One of his points is that Brown’s indictment is, in major part, based on Brown’s link of public data to other public data. So the indictment is for a link:

Peter Ludlow, a professor of philosophy at Northwestern and a fan of Mr. Brown’s work, wrote in *The Huffington Post* that, “Project PM under Brown’s leadership began to slowly untangle the web of connections between the U.S. government, corporations, lobbyists and a showy group of private military and infosecurity consultants”....

But keep in mind that no one has accused Mr. Brown of playing a role in the actual stealing of the data, only of posting a link to the trove of documents....

By trying to criminalize linking, the federal authorities in the Northern District of Texas – Mr. Brown lives in Dallas – are suggesting that to share information online is the same as possessing it or even stealing it. In the news release announcing the indictment, the United States attorney’s office explained, “By transferring and posting the hyperlink, Brown caused the data to be made available to other persons online, without the knowledge and authorization of Stratfor and the card holders.”... (*New York Times*, September 9, 2013)

How is one to escape the conclusion that the journalism of the free press and free association is also jeopardized by machinations of the “dark state?”

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