THIRD WAY

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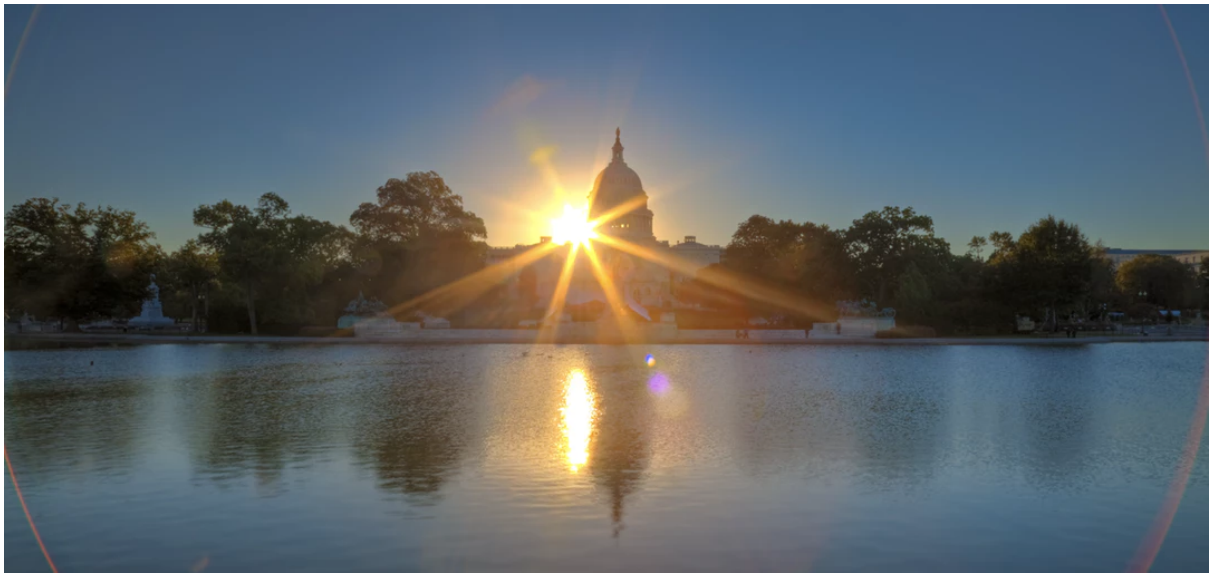
A Way Forward on Money in Politics



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Voters are angry with Washington politicians. Congress's approval rating is at 16%. [1] 50% of Americans have little or no confidence in the federal government. [2] 74% of voters said most elected officials put their own interests ahead of the country's. [3] While this information may no longer be surprising, few policymakers are putting forth real solutions to address the biggest cause of this: America's campaign finance system. Our public opinion research has found that voters believe our political system has careened off the rails, in large part driven by the untoward influence of anonymous money. The campaign finance system is seen as a root cause of partisanship, gridlock, and vitriol in Washington. Voters think anonymous money has become a corrupting force, allowing politicians who are only concerned with reelection to be bought and sold by insiders. When they turn on the news and see stories about how Congress can't get anything done in between campaign attack ads, who can blame them?

Part of the problem, no doubt, is the Supreme Court's recent campaign finance jurisprudence, emblemized by decisions like *Citizens United*, which has unleashed nearly two-billion dollars of advertising onto our airwaves and into our homes

since 2010. [4] Unfortunately, the Court's precedents are unlikely to change in the immediate future—but that doesn't mean nothing can be done. Calls for a constitutional amendment to overturn *Citizens United* have become ubiquitous, at least among policymakers on the left. But voters think that is a long shot. So they are just as likely to view that conversation as an attempt to get political cover as they are to see it as an attempt to actually get something done. Furthermore, it's unclear that overturning *Citizens United* would even solve the problem. That decision allowed corporate political spending but, by far, most of the money spent by outside groups comes from individuals. [5] And outside spending is nowhere near the only money problem in our political system.

With that in mind, we propose a series of repairs to our campaign finance rules. First, we must end the super PAC charade by tightening the rules that govern what counts as coordination between outside spending groups and candidates. Second, we must restructure the Federal Election Commission to make sure that there is a cop on the beat to enforce campaign finance rules and that those breaking the rules actually face punishment. Third, we need to bring anonymous political players out in the open by requiring donors to own the advertisements they fund and require politically active nonprofit organizations to disclose the sources of their political funding. Together, these changes would significantly decrease the influence of anonymous money in politics, and they could all be done without a constitutional amendment.

Part I: End the Super PAC Charade

Super PACs are a charade. They are political committees that are allowed to accept unlimited amounts of money from individuals and corporations, as long as they only spend money independently of candidates with no coordination with the official campaign. No one in their right mind

believes there is no coordination between candidates and super PACs.

Candidates and the party committees trying to elect them are subject to contribution limits as a way to combat corruption. In order to stop candidates from circumventing contribution limits by running their campaign through a super PAC, money spent by a super PAC or other outside organization in cooperation or coordination with a candidate is supposed to be considered an "in-kind" contribution to that candidate. And since no super PAC is allowed to make contributions to a candidate of any kind (hence their looser contribution limits), super PACs are barred from coordinating with a candidate at all. But through legal gymnastics, many super PACs may as well be slush funds for particular candidates and operate in ways that any reasonable person would call "coordination."

For example, many super PACs have been established and run by long-time staffers or strategists of the politician the super PAC is trying to elect, and sometimes they are even established with the help of those politicians themselves. In fact, currently a candidate can solicit funds for a super PAC as long as they do not ask for an amount larger than what a donor could give directly to the candidate. [6] And that limitation only applies once a candidate has officially decided to run for office—meaning before an official announcement, no rules apply. Jeb Bush spent months traveling the country helping raise $103 million for a super PAC that later supported his candidacy. During the time he was raising that astronomical amount of money, Bush hadn't officially decided to run and was legally still "testing the waters," so for purposes of campaign finance rules he wasn't considered a candidate yet. [7] Many soon-to-be candidates film footage, advertisements, or even documentaries with a super PAC before they officially enter the race, and then the super PAC uses those ads later when the campaign is in full swing. [8]

Even once a candidate is officially in the race, the activities with which super PACs have been allowed to get away is mind-boggling. For example, the logistics for many of Carly

Fiorina's campaign events were handled by the CARLY for America super PAC—the Conservative Authentic and Responsible Leadership for You and for America super PAC—including setting up rooms, hanging decorations, and passing out literature. The super PAC claimed it could "advance" her events because they were merely acting on public information from her campaign calendar, and that there was no communication between the group and the campaign (a ridiculous claim since the campaign itself would have needed to show up to set up these events had the super PAC not taken on that role). [9] Candidates have also been dumping b-roll footage of themselves and campaign strategy documents on their public websites so that super PACs can run ads more effectively. [10] Correct the Record, a super PAC supporting Hillary Clinton, coordinates directly with the campaign on research and messaging, relying on a loophole that implies so long as materials are only published on the internet and social media, they don't count as coordination. [11]

To put an end to this charade of super PAC independence and non-coordination, we propose that Congress pass a law to do three things:

- Limit the ability of super PACs and other outside organizations to operate as coordinated slush funds for candidates. Any organization should be presumed to have coordinated with a candidate if it spends money in that candidate's race (for a candidate or against his or her opponents) after the candidate has fundraised for the organization or participated in any way in its creation.

- Strengthen the rules limiting when a candidate's former staff can join a super PAC by drastically increasing the required "cooling off" period from when a staffer or consultant can go off the official office payroll or the campaign payroll and on to the payroll of an outside organization that is supporting that campaign. It should also expand which individuals are subject to the "cooling off" period.

- Declare that certain activities will automatically be considered an in-kind donation, such as "advancing" a candidate's event with decorations or materials, or using images, video, or audio of a candidate that were created by the candidate's campaign or created by the super PAC with the participation of the candidate before the candidate officially decided to run, or coordinating strategy even if it is over the internet.

A note on constitutionality: this idea is constitutional because the legal justification for super PACs is this—political spending that is independent of a politician cannot have a corrupting effect on that politician, so the government does not have the power to restrict it. If there is coordination, then the spending is not independent, so it can be corrupting, which means it can be restricted.

Part II: Put a Cop Back on the Beat of Campaign Finance

The Federal Election Commission (FEC) is tasked with enforcing the rules regulating money in politics and punishing those who violate them. However, the FEC is designed to ensure the absolute maximum likelihood of failure in our current polarized environment. The Commission has six members, and no more than three can be of the same party. Because of this structure, votes split down partisan lines on nearly every major issue (and also on many minor issues), and the Commission deadlocks without issuing a formal decision. At one point last year the Commission had 78 pending enforcement cases. Twenty-three had been languishing for more than a year, including five from the 2012 election cycle. [12] This leads to uncertainty about the rules of the road and allows candidates, PACs, and 501(c) organizations to all but flaunt the law with the knowledge that the FEC is unable to bring an enforcement action—even where there are egregious violations.

The implications of this complete inability to enforce the rules we do have are astounding. For instance, whether a candidate can coordinate with a super PAC before the candidate has announced is unclear under the law and regulations. [13] But when attorneys for Democratic super PACs

requested an advisory opinion on the matter, the FEC deadlocked—meaning they refused to answer the question. [14] When the FEC's own lawyers concluded that a political non-profit, Crossroads GPS, had likely broken the law, the commissioners couldn't even agree whether or not to open an investigation. [15] And when they did agree to investigate another political non-profit that spent 85% of its money on political ads, the Commission deadlocked on whether the organization should count as a political committee and be subject to FEC regulations. [16] The FEC has also deadlocked on how to decide when an organization should have to disclose its donors, if foreign nationals are allowed to contribute to local ballot initiatives, and whether ads on mobile phones need to have disclaimers. [17]

Not only does the body tasked with clarifying and enforcing our campaign finance rules refuse to answer direct questions about what those rules mean, it also refuses to enforce the rules that are clear. The few who are punished tend to get away with a relative slap on the wrist, as the punishment for most violations is supposed to be a penalty equal to the monetary value of the infraction, but that can often be reduced through negotiation with the FEC. [18] Although $7 billion was spent on the 2014 midterms elections, the total amount of fines and penalties was a record low at just under $600,000. [19] Even assuming that most of the FEC penalties in 2015 are also for violations during the 2014 election cycle, it amounts to approximately $2 of fines for every $10,000 spent on campaign activity. [20] Under the circumstances, why would anyone obey the rules?

To put a cop back on the beat of campaign finance, we propose that:

- Congress passes a law to un-deadlock the Commission by adding another commissioner, with no more than four allowed from a single party. With an odd number of commissioners, the FEC should be able to avoid paralysis and give political players guidance to operate within clear lines after up-or-down votes on rules and enforcement actions. Because it is better to operate under rules you don't like than no rules at all.

- This law should also make the punishments fit the crimes. Certain offenses should have "mandatory minimum" fines, equal to triple the value of the infraction or a third of the organization's total political spending—whichever is higher. And any person who commits a major campaign finance violation should be subject to a "time-out" period where he or she is not allowed to direct political expenditures for the remainder of that cycle and the one that follows.

A note on constitutionality: this idea is constitutional because Congress has the power to regulate federal elections and can legislate the structure of a federal agency largely as it sees fit. It can also clearly increase financial penalties and fines for legal violations, and there is precedent supporting restricting the rights of those found to have broken the law.

Part III: Unmask Anonymous Political Donors

Internal Revenue Service regulations allow 501(c)(4) social welfare organizations to spend up to 49.9% of their money on political activity, but under current FEC rules these nonprofits do not have to disclose their donors to the public even if they are spending millions of dollars on TV ads. Other types of non-profits like 501(c)(6) business leagues can also spend sizable amounts of money to influence elections without disclosing donors. Over the past few election cycles, political spending by these organizations has exploded, from $5 million in the 2006 cycle to over $300 million in 2012 and nearly $175 million in 2014. [21] Political nonprofits are staking out their territory in American elections, but their donors are allowed to remain anonymous, creating an open invitation to form shell groups to hide the source of electoral money.

Adding to the problem, while many political ads are required to have a "paid for by" disclaimer listing which group is behind the ad, for super PACs and other outside groups this is meaningless. These groups simply create vague and patriotic sounding names (like Right to Rise USA, America Leads, or New Day for America) to hide their donors and their intentions. Voters can't tell what kind of organization or person is really behind these ads. And although donors are sometimes disclosed to the FEC, voters have to proactively visit a daunting database to search for the information. Even if they are able to take the time to do that—an overwhelming task considering how many ads a voter in a battleground state or district is likely to see—money is moved around between individuals, corporations, and political committees so the "donor" listed may still be an obscure shell organization. Voters are entitled to have donor information easily and clearly displayed, so they can know who is trying to steer their votes.

Therefore, we propose that Congress passes a law to:

- Require political video advertisements to feature a list of the top five donors to the organization, specifying that the donor listed be the ***real donor*** and not a shell organization (mirroring state laws like the one in California which has done the same). Radio or audio advertisements should be required to list the top two donors.

- Require 501(c) organizations to disclose to the FEC the names of donors who give over $50,000 if the organization spends more than 5% of its budget on political activity, or, if it chooses to only pay for political activity out of a segregated fund, to disclose all donors of $1,000 or more to that fund.

A note on constitutionality: this idea is constitutional under the current First Amendment legal regime. Even in *Citizens United* the Supreme Court stressed the importance and constitutionality of disclosure. This proposal essentially adds another location where currently disclosed information must be listed and broadens who has to disclose activity that is of the type that is already subject to disclosure for other people and organizations.

Conclusion

Voters feel that our campaign finance system is broken—and they're right. Vitriol towards money in politics is at historic levels. Americans are fed up and are looking for solutions that will actually address their concerns about anonymous money, corruption, and partisan gridlock. A constitutional amendment would be great, but it's a longshot, and there are constitutional ways to have a real impact now. The platform outlined above would change the way our campaign finance system operates and address the concerns that voters have about money in politics. By ending the super PAC charade, putting a cop back on the beat of campaign finance, and unmasking anonymous political donors, we can restore at least some of voters' faith in our government and our political system.

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