

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 creation of the super PAC.² These developments have raised new questions about the existing campaign finance regime and created new challenges for the Federal Election

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1. *Citizens United v. FEC*, 558 U.S. 310 (2010).

2. The formation of super PACs was enabled by the D.C. Circuit's March 2010 decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). To reach that decision, the D.C. Circuit relied heavily on the Supreme Court's rationale in *Citizens United*.

Commission (FEC).

With the 2012 election numbers now in, it is time to begin the process of asking what these changes wrought. This article provides an overview of some of the data on the 2012 election and seeks to provide some analysis of what the data really means and what issues remain. In particular, the article focuses on two developments that affect the political tools available to large donors and one development regarding small donors. In the world of large donors, this article will focus on the rise in outside spending, most notably on the part of super PACs, as well as the uncertain entrance of corporations into the world of independent expenditures. The article will also discuss the FEC's advisory opinions on text messaging, which have provided a new way for campaigns to reach small donors—a case study in how the agency can still constructively engage with emerging issues in the law.

I. THE RECORD-BREAKING 2012 ELECTION

This was a record-breaking election—though it is a longstanding trend that each presidential election is substantially more expensive than the one before.³ Total 2012 spending topped \$7 billion.⁴

High, round numbers have a tendency to attract media attention, but it is important to note that determining the total amount of money spent on federal elections is not an exact science. Any estimate of the election-related spending requires some determination of what an observer wants to measure and what spending is considered relevant.⁵ For example, the Center for Responsive Politics (CRP) subtracts transfers between political committees from the total because that

3. See The Ctr. for Responsive Politics, *The Money Behind the Elections*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/> (last visited May 9, 2013).

4. Press Release, *FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle*, FED. ELECTION COMM'N (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml; see also Ellen L. Weintraub, FEC Chair, *Statement of Chair Ellen L. Weintraub*, FED. ELECTION COMM'N 1–3 (Jan. 31, 2013), http://www.fec.gov/members/weintraub/statements/weintraub_statement_20130131.pdf.

5. Some categories of spending that may be included or omitted from the total include: overhead costs (such as salaries and rent), loans made and repaid, transfers to affiliated committees, contributions to candidates or committees, and a category reported as “Other Disbursements.” See *FEC Forms for PACs and Parties*, *FEC Form 3X*, FED. ELECTION COMM'N, available at <http://www.fec.gov/info/forms.shtml> (last visited Aug. 12, 2013). Also note that some data may be obtained from more than one source—for example, spending may be determined by looking at the “summary page” of a report or by totaling the itemized data reported on the attached schedules. See *id.* Due to reporting errors, there may be some inconsistencies between different sources of information.

money remains in the campaign finance system—it will simply be spent by a different committee. That subtraction is likely the principal difference between CRP’s estimated total “cost” of the election of “at least \$6.3 billion”⁶ and the \$7 billion figure stated above.

Furthermore, none of these figures account for advertisements that occur early in an election cycle or which do not mention a candidate.⁷ These advertisements are often described as issue ads, but as the Supreme Court has noted, some of these advertisements may also involve electoral advocacy.⁸

Finally, many groups that engage in significant amounts of political activity do not disclose their donors. This includes some groups organized under § 501(c)(4) of the tax code, known as “social welfare” organizations.⁹ The money a 501(c)(4) spends on political advertising subject to reporting requirements¹⁰ is included in the overall total of dollars “in the system.” However, such organizations do not generally report contributions or operating expenses to the FEC.

Although there is no such thing as a perfect number when it comes to political spending, the information available, from a variety of sources, is more than sufficient to analyze trends in campaign activity, such as the continued increase in overall spending. According to the Wesleyan Media Project, three million political ads were aired during this election cycle, a total that one of the directors

6. Russ Choma, *The 2012 Election: Our Price Tag (Finally) for the Whole Ball of Wax*, OPENSECRETS.ORG (Mar. 13, 2012), <http://www.opensecrets.org/news/2013/03/the-2012-election-our-price-tag-fin.html>.

7. See 2 U.S.C. § 434(f)(3)(A)(i) (2007) and 11 C.F.R. § 100.29(a) (2006) (providing that “electioneering communications,” for which reporting is required, are defined as any broadcast, cable, or satellite communications that: (1) refer to a clearly identified Federal candidate; (2) are publicly distributed within 30 days before a primary election or within 60 days before a general election; and (3) are targeted to the relevant electorate.).

8. *McConnell v. FEC*, 540 U.S. 93, 126 (2003) (“While the distinction between ‘issue’ and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates . . .”).

9. Note, however, that a 501(c)(4) organization that engages in sufficient political activity may be a political committee subject to registration and reporting requirements. See *Political Committee Status*, 72 Fed. Reg. 5595–02 (Feb. 7, 2007) (Supplemental Explanation and Justification).

10. All persons, including nonprofit organizations, are required to report independent expenditures and electioneering communications. See 2 U.S.C. § 431(17) (2002) (definition of independent expenditure); 2 U.S.C. § 434(3) (2007) (definition of electioneering communication).

of the project described as “record-pulverizing.”¹¹ On the other side of the coin, the 2012 cycle saw a notable decrease in spending by presidential candidates on their own behalf. In 2008, all presidential candidates together spent over \$1.6 billion.¹² In 2012 this number decreased to less than \$1.4 billion.¹³ This decrease is largely attributable to two factors: there were two competitive primary elections in 2008, including an unusually expensive Democratic primary, and there was a shift in spending to outside groups in 2012.

Other campaigns, however, continued to report a rise in spending alongside the increase in outside group spending. House and Senate committees spent a total of approximately \$1.8 billion during the 2012 cycle, a significant increase from the under \$1.4 billion House and Senate committees spent in 2008.¹⁴ These figures are roughly the opposite of the trend in spending for the presidential campaigns. Taken all together, the total for all House, Senate, and presidential campaign committees was only slightly higher in 2012 than in 2008.

Ultimately, the increase in total spending is primarily attributable to the growth in spending by outside groups. Here, the term “outside groups” refers to noncandidate, nonparty organizations that try to influence elections. Similarly, the term “outside spending” refers to the spending that those groups undertake to elect and defeat federal candidates. In the 2012 election cycle, for the first time since reporting requirements have been in place, outside groups outspent political parties. This occurred despite the fact that parties continued to report high levels of spending. While the national party committees spent about \$1.6 billion, outside groups appear to have spent over \$2 billion.¹⁵ Of the total outside group spending, over \$970 million was spent by a relatively new¹⁶ type of political committee—the super PAC.¹⁷ Though super PACs spent slightly less

11. Erika Fowler, *2012 Election Crushes Records for Campaign Advertising*, KNIGHT BLOG (Feb. 14, 2013, 9:57 AM), <http://www.knightfoundation.org/blogs/knightblog/2013/2/14/2012-election-crushes-records-campaign-advertising/>.

12. Press Release, *supra* note 4.

13. *Id.*

14. *Id.*

15. *Id.*

16. Super PACs became legal late in the 2010 election cycle, so 2012 is the first *full* election cycle that they have existed. *See* *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

17. The term “super PAC,” as used here, refers to both independent expenditure-only committees and “hybrid PACs” which have both a contribution account and a non-contribution account. Super PACs were created in the wake of the D.C. Circuit’s decision in

than traditional PACs, they nonetheless accounted for a significant percentage of the overall spending in the election. This is especially noteworthy considering that these organizations had little history or institutional donor base until this election cycle. As one might expect, super PACs spent most of their money on independent expenditures (approximately two-thirds of their total disbursements), whereas traditional PACs continued to spend considerable sums on making direct contributions to candidates and less on independent expenditures (less than 10% of their total disbursements).

Additionally, in a number of key races, outside groups significantly outspent the major party candidates. In House races in particular, there appear to have been several contests where outside money may have made the difference. Such races were likely targeted by outside spenders because the incumbents were already perceived as vulnerable. For example:

- In California's 7th District, outside groups spent over \$8.1 million while the candidates spent \$6.2 million.¹⁸ About \$5.6 million, or nearly 70%, of the outside spending went to ads attacking the incumbent, Dan Lungren, or supporting the challenger, Rep. Ami Bera.¹⁹ Lungren lost by less than 10,000 votes.²⁰
- In Pennsylvania's 12th District, there was over \$10.3 million in outside spending, as compared to less than \$6.5 million in candidate spending.²¹ About \$6 million, or

SpeechNow.org. Id. Hybrid PACs arose as the result of a stipulated order and consent judgment entered into by the FEC in the D.C. District Court. See Press Release, *FEC Statement on Carey v. FEC*, FED. ELECTION COMM'N (Oct. 5, 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

18. See The Ctr. for Responsive Politics, *Outside Spending for California District 07*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/index.php?cycle=2012&id=CA07> (last visited Apr. 1, 2013); The Ctr. for Responsive Politics, *Total Raised and Spent for California District 07*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/index.php?cycle=2012&id=CA07> (last visited Apr. 1, 2013).

19. See *Outside Spending for California District 07*, *supra* note 18; *Total Raised and Spent for California District 07*, *supra* note 18.

20. See Debra Bowen, STATEMENT OF VOTE: NOVEMBER 6, 2012, GENERAL ELECTION 7 (2013), available at <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>.

21. See The Ctr. for Responsive Politics, *Outside Spending for Pennsylvania District 12*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/index.php?cycle=2012&id=PA12> (last visited Apr. 1, 2013); The Ctr. for Responsive Politics, *Total Raised and Spent for Pennsylvania District 12*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/summary.php?cycle=2012&id=PA12&spec=N> (last visited Apr. 1, 2013).

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

- 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—organizations that only now, thanks to *Citizens United*, are able to spend treasury funds on independent advertisements expressly advocating for federal candidates. It is estimated that corporations and labor unions spent between 300 and 400 million dollars engaging in such advocacy, the majority of which was through 501(c)(4) organizations.²⁷ However, the precise amount of corporate contributions to super PACs is unknown because the FEC does not track corporate contributions separately from other contributions. Additionally, some corporations may be routing their political activity through other corporations, such as 501(c)(4) organizations, that do not disclose their donors. It is unclear how much of this is taking place.

Determining the source of funds remains a problem, and that problem is not limited to corporations and unions. Even among

22. See *Outside Spending for Pennsylvania District 12*, *supra* note 21; *Total Raised and Spent for Pennsylvania District 12*, *supra* note 21.

23. See *2012 General Election Official Returns*, PA. DEP'T OF STATE (Nov. 6, 2012), <http://www.electionreturns.state.pa.us/Default.aspx?EID=27&ESTID=2&CID=0&OID=11&CID=0&PID=0&DISTID=0&IsSpecial=0>.

24. See The Ctr. for Responsive Politics, *Outside Spending for New Hampshire District 02*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/index.php?cycle=2012&id=NH02> (last visited Apr. 1, 2013); The Ctr. for Responsive Politics, *Total Raised and Spent for New Hampshire District 02*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/summary.php?cycle=2012&id=NH02&spec=N> (last visited Apr. 1, 2013).

25. See *Outside Spending for New Hampshire District 02*, *supra* note 24; *Total Raised and Spent for New Hampshire District 02*, *supra* note 24.

26. See *Representative in Congress - 2012 General Election*, N.H. SEC'Y OF STATE (Nov. 6, 2012), <http://sos.nh.gov/2012ConGen.aspx?id=28237>.

27. The Ctr. for Responsive Politics, *Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/> (last visited Apr. 1, 2013).

organizations that are reporting independent expenditures and electioneering communications to the FEC, many are not reporting meaningful donor information. According to the Center for Responsive Politics, about 30% of outside groups reported no donor information, about 30% reported some donor information, and only about 40% of outside spenders fully disclosed their donors.²⁸ Without donor information, public disclosure is often limited to the contact information of an organization—which may have a bland and uninformative name (along the lines of “Americans for Mom and Apple Pie”). This is a problem that the Supreme Court noted in *McConnell*.²⁹

Finally, one more trend is deserving of note. Discussions of *Citizens United* and of the sheer quantity of spending in 2012 have obscured at least one positive trend: the continued increase in small contributions to candidates, particularly at the presidential level. In 2008, the amount of contributions to presidential candidates raised in quantities of \$200 or less was \$551 million, or about 41% of the total.³⁰ In 2012, that number rose to \$676 million, which was 48% of all money raised.³¹ President Obama was particularly successful with small contributions, raising 61% of his funds in increments of \$200 or less.³² This increase was in part due to an increase in contributors making multiple small donations.³³ For those who support increasing

28. The Ctr. for Responsive Politics, *Outside Spending by Disclosure*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/disclosure.php> (last visited May 9, 2013).

29. *McConnell v. FEC*, 540 U.S. 93, 128 (2003) (“Because FECA’s disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity.”).

30. *2012 Presidential Campaign Finance, Contributions to All Candidates*, FED. ELECTION COMM’N, <http://www.fec.gov/disclosure/pnational.do> (under “Election Cycle,” select “2008”) (last visited July 15, 2013).

31. *2012 Presidential Campaign Finance, Contributions to All Candidates*, FED. ELECTION COMM’N, <http://www.fec.gov/disclosure/pnational.do> (last visited July 15, 2013).

32. *2012 Presidential Campaign Finance, Contributions to Obama, Barack Through 12/31/2012*, FED. ELECTION COMM’N, <http://www.fec.gov/disclosure/pnational.do> (follow “Obama (D)” hyperlink) (last visited July 15, 2013).

33. Note that the discussion above is about small *contributions* as opposed to small *donors*. In some cases, repeated contributions from the same donor will aggregate to quantities greater than \$200. This seems to have been particularly true of contributions to the Obama campaign in 2012, where, according to the Campaign Finance Institute, 69% of donors whose contributions eventually reached the level where reporting is required started with a contribution of less than \$200. See *Money vs. Money-Plus: Post-Election Reports Reveal Two Different Campaign Strategies*, CAMPAIGN FIN. INST. (Jan. 11, 2013), http://cfinst.org/Press/PRelases/13-01-11/Money_vs_Money-Plus_Post-Election_Reports_Reveal_Two_Different_

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

- Politico stated that 2012 spending “exceeded the number of people on this planet[]”;³⁵
- 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
- CNN estimated that the amount of money spent on the election was comparable to the price tag on 28 Boeing 787s or 70 private islands or 50 billion polio vaccines.³⁷

These comparisons are generally used to suggest that campaign spending is too high, or at least a cause for concern.

Similar comparisons can be used, however, to make exactly the opposite point. For example, in the 2008 elections Americans spent almost as much on Halloween candy as on elections.³⁸ Last fall, the National Retail Federation estimated that Americans would spend \$8 billion on Halloween candy, costumes, and decorations, exceeding the

Campaign_Strategies.aspx.

34. Weintraub, *supra* note 4, at 1–3.

35. Tarini Parti, *\$7 Billion Spent on 2012 Campaign, FEC Says*, POLITICO (Jan. 31, 2013), <http://politi.co/VyF4kx>.

36. Fredreka Schouten, *2012 Campaign Hit Record \$7B, Regulator Projects*, USA TODAY (Feb. 1, 2013), <http://www.usatoday.com/story/news/politics/2013/02/01/election-spending-7-billion/1882803/>.

37. Kevin Liptak, *The \$7,000,000,000 Campaign*, CNN POLITICAL TICKER (Feb. 1, 2013, 10:11 AM), <http://politicalticker.blogs.cnn.com/2013/02/01/the-7000000000-campaign/>. It's not clear what CNN would do with 50 billion polio vaccines, given that, as Politico noted, there are fewer than 7 billion people on the planet.

38. Ellen L. Weintraub & Jason K. Levine, *Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up*, 24 ST. JOHN'S J. LEGAL COMMENT. 461, 469 (2009).

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/12stat/abstract/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:

- 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.
- 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
- 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 efficient policeman.”).

III. NEW DEVELOPMENTS FOR BIG DONORS

A. *The Emergence of Super PACs*

As the public learned from the media, perhaps most notably from Stephen Colbert, 2012 was the first full election cycle after super PACs were created. There are currently 1,293 super PACs registered with the FEC, of which 437 reported \$100 or more in contributions received.⁴⁶ Several scholars and practitioners have already given detailed accounts of how this new type of political committee arose.⁴⁷ Here, only a brief background on the issue is necessary.

It is often implied,⁴⁸ or outright stated,⁴⁹ that *Citizens United* “created” super PACs. Although *Citizens United* was an essential step towards the creation of super PACs, it was not quite the immediate cause. In *Citizens United*, the Court restricted the only accepted justification for imposing expenditure limits—the government’s interest in preventing corruption or the appearance of corruption. Justice Kennedy’s opinion transformed what seems like a prediction into a legal conclusion, opining that independent expenditures *do not* “give rise to corruption or the appearance of corruption.”⁵⁰ Justice Kennedy also adopted a narrow definition of corruption, stating that “[i]ngratiation and access . . . are not corruption,”⁵¹ and predicting that “the appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”⁵²

Relying heavily on the reasoning of *Citizens United*, the D.C. Circuit in *SpeechNow.org v. FEC* found that, since independent expenditures could not corrupt, contributions to groups that made

46. A substantial number of registered super PACs exist in name only and never raised or spent significant amounts of, or in many cases, any money.

47. See, e.g., Cynthia L. Bauerly & Eric C. Hallstrom, *Square Pegs: The Challenges for Existing Federal Campaign Finance Disclosure Laws in the Age of the Super PAC*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 329, 332–44 (2012); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

48. See, e.g., Nicholas Confessore & Jess Bidgood, *Little to Show For Cash Flood By Big Donors*, N.Y. TIMES, Nov. 8, 2012, at A1 (“The bulk of that outside money came from a relatively small group of wealthy donors, unleashed by the Supreme Court’s *Citizens United* decision, which allowed unlimited contributions to super PACs.”).

49. See, e.g., Bob Beckel & Cal Thomas, Opinion, *Voting Against Gridlock*, USA TODAY, Oct. 31, 2012, at 10A.

50. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

51. *Id.* at 360.

52. *Id.*

only independent expenditures also could not corrupt or create the appearance of corruption.⁵³ The decision gave birth to the “Independent-Expenditure Only Political Committee.”⁵⁴ Such organizations, freed of any limits on the size of contributions they could receive, would later become known as super PACs.⁵⁵

There is also one more, lesser-known link in the chain: *Carey v. FEC*. In *Carey*, the D.C. District Court found that an organization that made both independent expenditures and direct contributions could not be limited in the amounts of funds raised for independent expenditures, provided that the organization deposited those funds in a separate account not to be used for contributions to candidates.⁵⁶ The District Court subsequently entered a Stipulated Order and Consent Judgment whereby the FEC agreed not to enforce the contribution limits against organizations that kept these separate accounts.⁵⁷ So now there is another type of super PAC—a “hybrid committee”—that may raise unlimited funds for independent expenditures and limited funds for direct contributions (though those funds must be kept in separate accounts).

The 2012 election cycle has also seen the proliferation of a particular kind of super PAC devoted to the election of a single candidate.⁵⁸ There was a super PAC associated with each of the major presidential candidates, including primary candidates and many other federal candidates as well. Often these “single-candidate super PACs”⁵⁹ were funded or operated by friends, family members, or

53. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

54. The Commission began to use this term in a series of advisory opinions. *See, e.g., Advisory Opinion 2010-09* (Club for Growth), FED. ELECTION COMM’N, <http://saos.nictusa.com/aodocs/AO%202010-09.pdf>; *Advisory Opinion 2010-11* (Commonsense Ten), FED. ELECTION COMM’N, <http://saos.nictusa.com/aodocs/AO%202010-11.pdf>; *Advisory Opinion 2011-12* (Majority PAC), FED. ELECTION COMM’N, [http://saos.nictusa.com/aodocs/AO%202011-12%20\(Majority%20PAC%20dated%206-30-11\).pdf](http://saos.nictusa.com/aodocs/AO%202011-12%20(Majority%20PAC%20dated%206-30-11).pdf).

55. *See* Dave Levinthal, *How Super PACs Got Their Name*, POLITICO (Jan. 10, 2012), <http://www.politico.com/news/stories/0112/71285.html>.

56. *Carey v. FEC*, 791 F. Supp. 2d 121 (D. D.C. 2011).

57. *See FEC Statement on Carey v. FEC*, *supra* note 17.

58. *See* Taylor Lincoln, *Super Connected*, PUBLIC CITIZEN 9 (2013), *available at* <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf>.

59. It is important not to confuse the term “single-candidate” as used here with the regulatory definition of “single candidate committee.” 11 C.F.R. § 100.5(e)(2) (2009). Under Commission regulations, “multi-candidate committees” are subject to higher contribution limits, so the category of single candidate committees is meant simply to distinguish those committees that have not qualified for multi-candidate status. 2 U.S.C. 441a(a)(2) (2002); 11 C.F.R. § 110.2 (2009).

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/13044324817.pdf>.

65. See, e.g., *Advisory Opinion 2010-11* (Commonsense Ten), FED. ELECTION COMM'N, <http://saos.nictusa.com/aodocs/AO%202010-11.pdf> ("Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations such as the Committee that make only independent expenditures.").

66. One report found that 56% of Americans thought it was inappropriate for corporations to take positions on political issues and that taking political positions weakened a corporation's favorability. GLOBAL STRATEGY GROUP, BUSINESS & POLITICS: DO THEY MIX? 5-6 (2013), available at http://images.politico.com/global/2013/03/27/gsg_study_white_paper_business_and_politics_do_they_mix.html.

67. Jia Lynn Yang & Dan Eggen, *Exercising new ability to spend on campaigns, Target finds itself a bull's-eye*, WASH. POST, Aug. 19, 2010, at A1.

68. *Id.*

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

69. As Richard Briffault has stated, “[p]rior to *Citizens United*, corporations were already able to spend virtually as much as they wanted in connection with elections.” Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643, 644 (2011). *Citizens United* simply provided another avenue for corporate spending. See also Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 219–20 (2010) (describing how cases prior to *Citizens United* “gave for-profit corporations ample lawful opportunity to support or critique candidates quite vigorously.”).

70. Erika Franklin Fowler & Travis N. Ridout, *Negative Angry, and Ubiquitous: Political Advertising in 2012*, THE FORUM, Dec. 2012, at 59 (“Fully 85% of ads sponsored by non-party organizations were purely negative, and another 10% were contrasting, leaving only 5% positive.”).

commentators have begun to express skepticism about the value of disclosure.⁷¹ In our view, although disclosure is not a cure-all, it is essential to being able to hold the makers of a message accountable. Moreover, disclosure can be an important tool for voters in evaluating the content of a message.

A couple of examples may help to illustrate this. Recently, in Maryland, there was a hotly contested ballot measure, Question 7, seeking to legalize casino gambling in Prince George's County. An organization identified as "For Maryland Jobs & Schools" ran supporting advertisements, while an organization identified only as "Get the Facts—Vote No on 7," encouraged voters to oppose the measure.⁷² From the public disclosure records, the media was able to discover and report that each of the two competing organizations were funded primarily with donations from two competing casino operators—MGM Resorts International, which sought to build a new casino in Prince George's County, and Penn National Gaming, which owned the nearest competing casino in West Virginia.⁷³ The ads never mentioned the financial reasons behind the two competitors' positions on the ballot measure, but as a result of the disclosure of who was funding these ads, Maryland voters were better positioned to evaluate the source and credibility of their messages. Public disclosure of the identity of the companies seems to have been particularly harmful to Penn National, because the ads opposing the measure appeared hypocritical to some observers—a casino owner casting a negative light on "expanded gambling."⁷⁴ In the end, the

71. See, e.g., Lloyd H. Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255 (2010); Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010), <http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure/>. But see Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557 (2012).

72. John Wagner, *Big Bucks Fuel Casino Ad War*, WASH. POST, Sept. 23, 2012, at C1.

73. MGM Resorts International spent almost \$41 million in favor of Question 7, while Penn National spent over \$42 million opposing it. Howard Stutz, *Maryland Vote Dismays Casino Operator Penn National*, LAS VEGAS REVIEW-JOURNAL (Nov. 7, 2012), <http://www.reviewjournal.com/business/casinos-gaming/maryland-vote-dismays-casino-operator-penn-national>.

74. See, e.g., Michael Dresser, *Penn National-backed Group Makes Anti-Casino Pitch*, BALT. SUN (Aug. 30, 2012), http://articles.baltimoresun.com/2012-08-30/news/bal-penn-nationalbacked-group-launches-anticasino-ad-20120830_1_national-harbor-new-casino-hollywood-casino ("The ad comes with a dose of irony. Though sponsored by a group backed by a casino company, it uses the term 'expanded gambling' when trying to defeat a ballot proposition. In virtually all other contexts, casino companies avoid the term 'gambling' and prefer the more genteel 'gaming.' The ad also makes the point that legislators were negotiating with 'out-of-state' companies—as if that made the talks especially sinister. Penn

ballot measure passed—52% to 48%.⁷⁵

Another example, cited by Rick Hasen on his Election Law Blog, is California Proposition 16, which would have shielded a utility company, Pacific Gas and Electric, from competition by other public utilities.⁷⁶ Pacific Gas & Electric spent *\$43 million* supporting the measure through a “Yes” committee. The opposition to the measure had only \$1 million. However, the measure was ultimately defeated, and Hasen posits that it lost in large part because each “Yes” ad included a disclaimer, under California law, stating that it had “major funding from Pacific Gas and Electric Company.”⁷⁷

As the Supreme Court stated in *Citizens United*, disclosure allows citizens to “see whether elected officials are ‘in the pocket’ of so-called moneyed interests . . . [and] [t]his transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁷⁸ In some cases, the difference between an “informed decision” and a decision without the benefit of disclosure may be outcome-determinative.

IV. TEXT MESSAGING CONTRIBUTIONS: A SMALL VICTORY FOR THE SMALL DONOR

Lastly, as touched upon earlier, one of the more positive trends in this election cycle was the continuing importance of small donors, at least at the presidential level. From 2008 to 2012, the proportion of funds contributed to presidential campaigns in increments of \$200 or less increased from 41% to 48%.⁷⁹

This is a particularly positive sign in light of how exclusive the group of larger donors has become. According to the Center for Responsive Politics, the percent of the adult population of the United

National is based in Wyomissing, Pa.”).

75. Michael Dresser, *In Campaign Spending, Penn National’s Loss is Md.’s Gain*, BALT. SUN (Dec. 3, 2012), <http://www.baltimoresun.com/news/maryland/politics/blog/bs-md-sun-investigates-spending-20121202,0,6329207.story>.

76. Rick Hasen, *Responding to Lessig on Transparency and Americans Elect*, ELECTION LAW BLOG (Mar. 8, 2012, 12:34 PM), <http://electionlawblog.org/?p=31244>.

77. *Id.*; Rick Hasen, *Plugging In a Monopoly*, ELECTION LAW BLOG (Apr. 19, 2010, 8:08 PM), <http://electionlawblog.org/?p=14596>; see David R. Baker, *PG&E’s Prop 16 Lost Big in its Service Area*, S.F. CHRONICLE (June 10, 2010), <http://www.sfgate.com/business/article/PG-E-s-Prop-16-lost-big-in-its-service-area-3185513.php>.

78. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

79. See FED. ELECTION COMM’N, *supra* note 31; FED ELECTION COMM’N, *supra* note 32.

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 advisory opinions provide a good example of the competing concerns that the FEC must weigh when dealing with new practices in campaign finance.

On the one hand, there was a strong desire, from Commissioners and the public, to encourage small donors and to encourage new technology, which has the possibility of allowing campaigns and political organizations to expand political involvement to new groups of people. Political participation among young people has been a particular problem, and cell phones and text messaging are one of the primary ways that young people communicate.⁸⁴ Therefore, good reasons exist for regulators to try not to stand in the way of political actors seeking to embrace those forms of communication.

On the other hand, the FEC has an obligation to ensure that existing rules are not circumvented. Donations by text message pose a challenge for disclosure because only a limited amount of information is conveyed from the cell phone user to the recipient of the donation. If those small donations add up to more than \$200 per individual to a particular campaign, the donation must be itemized and donor information must be provided.⁸⁵ Additionally, depending

80. See The Ctr. for Responsive Politics, *Donor Demographics*, OPENSECRETS.ORG, <http://www.opensecrets.org/overview/donordemographics.php?cycle=2012&filter=A> (last visited July 1, 2013).

81. *Id.*

82. See The Ctr. for Responsive Politics, *2012 Super PACs: How Many Donors Give?*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidesspending/donor_stats.php (last visited July 1, 2013).

83. See *Donor Demographics*, *supra* note 80.

84. See, e.g., Aaron Smith, *Americans and Their Cell Phones*, PEW RESEARCH CENTER 6 (2011), <http://pewinternet.org/~media/Files/Reports/2011/Cell%20Phones%202011.pdf>.

85. 11 C.F.R. § 104.8(a)-(b) (2011).

on who pays the bill, cell phones present the possibility that users could be donating funds that are not theirs to donate—for example, if users are on “family plans” and they are not the ones paying the bills. Finally, donations by text message present a challenge for the ban on contributions from foreign nationals, federal contractors, and corporations because the sender of the text message is not identified except by their phone number.⁸⁶

From April to October of 2012, the FEC received six different advisory opinion requests related to the solicitation of contributions through text messaging.⁸⁷ During that process, the FEC received information about a range of organizations involved with the business-side of text messaging, including not only the committees seeking to solicit contributions, but also the consulting firms, content providers, application providers, connection aggregators, and wireless service providers.⁸⁸ Proposals submitted by a variety of these organizations sought to meet the requirements of the law while clarifying who would be responsible for unlawful conduct.

Ultimately, the FEC approved proposals to allow text message contributions, provided that certain safeguards were in place to prevent illegal contributions from being made and to ensure that some disclosure information could be collected. For example, the contributions could not exceed the threshold for reporting of donor information unless there was a way to collect the necessary donor information. The FEC approved one proposal that limited the amount that a cellular customer could donate to a particular political

86. See 2 U.S.C. § 441c(a) (1980) (prohibiting contributions from government contractors); 2 U.S.C. § 441e(a) (2002) (prohibiting contributions from foreign nationals); 2 U.S.C. § 441b (2002) (prohibiting contributions from national banks, corporations, and labor organizations).

87. *Advisory Opinion Request 2012-17* (Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.), ARENT FOX LLP (April 5, 2012), <http://saos.nictusa.com/aodocs/1206315.pdf>; *Expedited Advisory Opinion Request 2012-26* (Cooper for Congress, Armour Media, Inc., and m-Qube, Inc.), ARENT FOX LLP (July 18, 2012), <http://saos.nictusa.com/aodocs/1214812.pdf>; *Advisory Opinion Request 2012-28* (CTIA – The Wireless Association), WILEY REIN LLP (July 3, 2013), <http://saos.nictusa.com/aodocs/1214939.pdf>; *Advisory Opinion Request 2012-30* (Revolution Messaging, LLC), SANDLER, REIFF, YOUNG & LAMB, PC (Aug. 6, 2012), <http://saos.nictusa.com/aodocs/1216859.pdf>; *Advisory Opinion Request 2012-31* (AT&T Inc.) (Aug. 16, 2012), <http://saos.nictusa.com/aodocs/1223966.pdf>; *Advisory Opinion Request 2012-35* (Global Transaction Services Group, Inc.), GLOBAL TRANSACTION SERVICES GROUP, INC. (Oct. 12, 2012), <http://saos.nictusa.com/aodocs/1227197.pdf>.

88. For a brief overview of the industry, see *Advisory Opinion 2012-26* (Cooper for Congress, Armour Media, Inc., and m-Qube, Inc.), FED. ELECTION COMM’N, <http://saos.nictusa.com/aodocs/AO%202012-26.pdf>.

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 message or cell phone app.⁹² That represents a step forward for the small donor, and one that may have even more untapped potential.

V. CONCLUSION

Campaign finance law is still in flux, in part because of the broad sweep of the courts’ decisions in this area, and in part because of the FEC’s inability to reach consensus on a number of important, outstanding issues.

Although the FEC has not kept up with the pace of change, there are still plenty of opportunities ahead. The text messaging advisory opinions are one example of how the agency can continue to make progress. Hopefully it is an example that the FEC will be able to

89. See *Advisory Opinion Request 2012-17*, *supra* note 87, at 3–5.

90. See *Advisory Opinion Request 2012-30*, *supra* note 87, at 2–4.

91. For example, m-Qube proposed the following example of an attestation to which a user might have to agree: “Reply YES to give \$20 to Romney & certify ur 18+ & donating with own funds, not foreign national or Fed contractor. Terms m-qube.com/r Msg&Data Rates may Apply.” *Advisory Opinion 2012-17* (Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.), FED. ELECTION COMM’N 3 n.4, [http://saos.nictusa.com/aodocs/AO%202012-17%20Red%20Blue%20T,%20LLC,%20ArmourMedia,%20Inc.,%20and%20m-Qube,%20Inc.>%20Final%20\(Signed\)%20\(6.11.12\).pdf](http://saos.nictusa.com/aodocs/AO%202012-17%20Red%20Blue%20T,%20LLC,%20ArmourMedia,%20Inc.,%20and%20m-Qube,%20Inc.>%20Final%20(Signed)%20(6.11.12).pdf).

92. Aaron Smith & Maeve Duggan, *Presidential Campaign Donations in the Digital Age*, PEW RESEARCH CENTER’S INTERNET AND AMERICAN LIFE PROJECT 1–3 (2012), http://www.pewinternet.org/~media/Files/Reports/2012/PIP_State_of_the_2012_race_donations.pdf.

replicate and build on going forward.