State Capture and Political Finance in the United States

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The United States campaign finance system has created many of the ills now seen in our democracy. It has increased polarization in the country; has resulted in a lack of trust in government and in our political institutions; and has facilitated extreme economic disparity. Much of this is because the very wealthy, the one percent of the top one percent highest earners in the country, contribute the lion’s share of money to federal political campaigns. Consequently, it is the very wealthy who control who is elected to political office, and what public policies are enacted, which naturally favor moneyed and corporate interests. The remainder of the country has little to no influence on public policy. This government capture by a few interests was brought to bear not only through enabling laws but also Constitutional decisions by the Supreme Court, making it difficult to remedy.

Modern campaign finance regulation was passed in the 1970’s after the Watergate scandal. The scandal involved dirty political activity by President Nixon, but it was also a campaign finance scandal. Nixon’s campaign for re-election received suitcases full of cash in the White House to pay burglars to break into the Democratic National Committee office in the Watergate Hotel in Washington, DC. Much of this money came from corporations, in exchange for favorable tax treatment and other favors, and from foreign donors. Although both direct corporate and foreign contributions to campaigns were illegal, there was no mechanism to enforce the campaign finance laws, and no regulatory scheme requiring enforcement of the law.

When the extent of these activities came to light, the public was outraged. Congress responded by strengthening the Federal Election Campaign Act. The new Act required not only disclosure of the sources of campaign finance transactions, but limitations on the amount of money that could be contributed to a campaign, and limitations on the aggregate amount of money on campaigns that could be spent by an individual. The Act also established a Federal Election Commission (FEC) to “limit the disproportionate influence of wealthy individuals and special interest groups in the outcome of elections; regulate spending in campaigns for federal office; and deter abuses by mandating public disclosure.” The FEC was empowered to administer and enforce all campaign finance laws.

The Act was challenged in court, and ultimately the United States Supreme Court upheld parts of the Act, but also struck down many of the major reforms. While the court upheld restrictions on direct contributions to candidates, the court held that the only justification for any campaign finance restrictions is if the government purpose is to stop corruption or the appearance of corruption. The court admonished that the law’s goal of increasing equality of political participation and allowing all people to have an equal voice in political discourse was insufficient to impose campaign finance regulations which would limit the speech of the wealthy. The court held that government limits on expenditures in campaigns were an unconstitutional violation of freedom of speech. Because of this seminal ruling, there are limits on the amounts that candidates can spend to fund their own campaigns, and no limits on the amount of money that others spend in support the candidate, if they do so “independently” (i.e. not directly contributing to the campaign committee.)

This court decision, and later decisions such as in Citizens United v. The Federal Election Commission, which permitted unlimited expenditures in campaigns by corporations, non-profit entities and unions, opened the floodgates for campaign spending by the wealthy. For example, in the 2018 midterm elections for Senate and Congressional seats, $808,669,566 was spent by SuperPACs. SuperPACs came into being after Citizens United. They are independent organizations which amass money from many
sources to fund campaigns on behalf of candidates. In practically every 2018 race, the amount of outside spending was significantly greater than the amount of money that candidates and their donors were able to spend on their behalf. And, from 2010 until 2018, just 11 donors gave $1 billion into U.S. political races, through SuperPACs.

So, naturally, Congress has for many years been unwilling to enact laws to strengthen campaign finance disclosure. Even when it became clear that there was Russian intervention in the 2016 election, a modest proposal to provide greater disclosure about the source of the ads on social media, The Honest Ads Act, has not even received a hearing.

In addition, there is little enforcement of the laws that are still on the books. While the laws were being loosened to enable unlimited outside spending, at the same time the Federal Election Commission (FEC) fails to fulfill its mission of administering these remaining laws. This failure is the result of Agency capture, and has resulted in a campaign finance system where the candidates and committees recognize that they can ignore or skirt the laws that were enacted to protect the integrity of elections.

The FEC consists of six Commissioners, no more than three can be of one political party. Four votes are required to take any meaningful action, such as enacting regulations, investigating campaign finance complaints, and imposing penalties for violations.

The Commissioners are appointed by the President and confirmed by the US Senate. However, because of politics and the Senate’s refusal to confirm some of the President’s selections, in recent years the Democratic and Republican leaders in the Senate have in effect chosen most of the nominees. This has led to Commissioners who are, for the most part, selected not or their willingness to adhere to the law and their independence, but instead for their party loyalty.

One Commissioner, who later went on to be White House Counsel under Donald Trump, publicly said “I don’t enforce the law as Congress intended. I plead guilty as charged”. The FEC is captured by the Senators who appointed some of the Commissioners, and by the lawyers for the political parties and candidates. Some of this is also caused because of revolving door concerns. Commissioners seek positions with the President’s administration, or with law firms that represent campaigns, or with members of Congress.

For the last ten years the Commissioners have deadlocked on all important matters. A bloc of three has voted together on all matters preventing efforts to enact rules to ensure that all campaign spending is disclosed; have blocked even preliminary investigations into major violations of law; and routinely close cases alleging violations without investigating them. Few fines are imposed on violators, and fines are lower than historically levied for the same violation. This has led to rampant lack of compliance with the law, while the one of the bloc of Commissioners has said publicly that the “FEC was set up to deadlock”.

Because of government capture, instead of advancing the policies and concerns of the people, the interests of these political groups and companies has become paramount. This has led to a lack of public confidence in the US political system.

The present campaign finance system is very good at requiring disclosure of contributions and expenditures to candidates and committees. An individual becomes a federal candidate and
must begin reporting campaign finances within 15 days as soon as $5,000 is raised or spent for the campaign. This requires registering with the FEC, setting up a committee responsible for the funds and expenditures of the campaign, and designating an official treasurer. Detailed financial reports must be filed every quarter, and additional reports before the primary and general election.

The law contains contribution limitations of money given by individuals and groups to the candidates and to the party committees and PACs. The limits are $2,800 from individuals per election, and $5,000 a year from PACs. All individual contributors over $200 per election cycle must be identified. And, the law also prohibits contributions from corporations, national banks, labor organizations, federal government contractors, and foreign nationals. Because disclosure of the source of campaign money is at the heart of the purpose of campaign finance laws, no contributions may be made in another person’s name, and no contributions in cash of more than $100.

There are also many ways that the campaign finance system could be improved. With regard to disclosure, the most pressing problem is that large amounts of money is now funneled through “social welfare groups” and “business organizations” thereby hiding the source of the contribution. Congress could enact laws to require more specificity about transparency. A way to provide greater public participation in elections, and to make candidates more responsive to their constituents, is for there to be public financing of campaigns, or a small donor match which requires the candidate to get small donor contributions to receive an equal amount in public funding. On the federal level, there already exists a Presidential candidate public financing fund which limits the amount of money that can be spent in an election. But since President Obama in his first campaign did not take the fund, and greatly outspent his opponent, most of the major candidates have not taken the fund. This could be ameliorated by adding more money to the fund, as well as by extending it to campaigns for all federal races, including Senate and Congressional races.

And, finally, the selection process for FEC Commissioners should consist of a Blue Ribbon Commission of former federal judges or academics choosing potential candidates for the President’s selection, to assure that individuals nominated will follow the law and work collaboratively to fulfill the mission of the FEC.

Many democracy changes to ameliorate many of the problems now faced in the electoral process are proposed in HR1, “For the People Act”, which was a bill introduced on the first day of the 2019 session of Congress. The bill would make changes to the federal voting system, bolster election security, make broad campaign finance reforms like banning contributions from businesses with significant foreign influence, and to require Super PACs and other groups to disclose donors who contribute more than $10,000.