

# AFTER THE “CHANGE ELECTION,” THE MONEY IN THE POLITICAL LANDSCAPE

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Over time, the increased ease of infusing money into our political system has made it much harder to fight the problem of too much billionaire, corporate, and special interest money in politics.<sup>1</sup> The catch-22 of systemic change in this arena is that those with entrenched power want to maintain it, and they have political power from their contributions to fight tooth and nail to do so.<sup>2</sup>

Add to that dynamic a deadlocked enforcement agency in the arena of money in politics—the Federal Election Commission (“FEC”), a set of overreaching court cases (with *Citizens United*<sup>3</sup> only being the most famous) that have stripped away or nullified much of our current system, and the personal attention of Senate Majority Leader Mitch McConnell, a Republican from Kentucky, to the issue (on the side of deregulation)<sup>4</sup> and you have a recipe for the fight of a lifetime. A fight where it is hard work merely to maintain the status quo—without even considering what it may take to improve our system.

With that as the backdrop, we find ourselves in an interesting time to strategize for reform, as we have simultaneously seen a major shift in the public understanding and dynamics of the issues

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1. Yoav Hammer, *Should Corporations Have a Right to Finance Political Campaigns?*, 11 LAW & ETHICS HUM. RTS. 89, 95–99 (2017).

2. Albert W. Alschuler, *Limiting Political Contributions After McCutcheon*, *Citizens United*, and *SpeechNow*, 67 FLA. L. REV. 389, 418 (2015).

3. *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310, 371–72 (2010).

4. Sarah Kleiner, *Democrats Say Citizens United Should Die. Here’s Why That Won’t Happen*, TIME (Aug. 31, 2017), <http://time.com/4922542/democrats-citizen-united>.

surrounding money and corruption in politics, as well as a groundswell call for change.

As a candidate, Donald Trump's claim to legitimacy and mass support was built on a rejection of insider politics.<sup>5</sup> He made multiple pledges to "drain the swamp" in Washington" and to change the system.<sup>6</sup> As a result, we had a "change election," with a component of the electorate's decision-making based on the need to fix our political system.<sup>7</sup> And while Trump's ultimate presidential victory was surprising to many, the issues behind it were no surprise at all to those who have long known how salient these topics are to the general public.<sup>8</sup> People voted *explicitly* to change our system because they distrust the current moneyed establishment, and endless public opinion polls show voters of all political persuasions saying they favor changes to the system.<sup>9</sup>

Trump campaigned vigorously as a champion of Main Street Americans and against big dollars in politics, often repeating the trope that the "political money system [is] 'broken' and [saying] that he knew that, [because] as a billionaire and campaign donor, he had greater access to politicians."<sup>10</sup>

However, it has become blatantly obvious that rather than make good on these promises, Trump is turning control of his policymaking over to wealthy special interests and their ethically conflicted representatives.<sup>11</sup> His hypocrisy and conflicted choices

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5. Anna Brand, *Donald Trump Hammers Home Anti-Establishment Message*, MSNBC (Jan. 25, 2016, 11:25 AM), <http://www.msnbc.com/msnbc/donald-trump-hammers-home-anti-establishment-message>.

6. Conor Friedersdorf, *Trump Has Filled, Not Drained, The Swamp*, THE ATLANTIC (Sept. 21, 2017, 9:23 AM), <https://www.theatlantic.com/politics/archive/2017/09/meet-the-new-swamp/540540>.

7. David Jackson, *Donald Trump Accepts GOP Nomination, Says 'I Alone Can Fix' System*, USA TODAY (July 22, 2016, 12:36 AM EST), <https://www.usatoday.com/story/news/politics/elections/2016/07/21/donald-trump-republican-convention-acceptance-speech/87385658>.

8. Stephen D. Reicher & S. Alexander Haslam, *Trump's Appeal: What Psychology Tells Us*, SCI. AM. (Mar. 1, 2017), <https://www.scientificamerican.com/article/trump-rsquo-s-appeal-what-psychology-tells-us>.

9. Michelle Diggles & Lanae Erickson Hatalsky, *Voter Ire Toward Money in Politics*, THIRD WAY (Mar. 2, 2016), <http://www.thirdway.org/memo/voter-ire-toward-money-in-politics>.

10. Kate Ackley, *Campaign Finance Laws Poised for Rollback Under Trump*, ROLL CALL (Nov. 14, 2017, 11:07 AM), <https://www.rollcall.com/news/politics/campaign-finance-laws-poised-rollback-trump>.

11. Aaron Rugar, *Trump Used to Brag That He Wasn't Controlled by Special Interests. Today, Everything Changes*, THINKPROGRESS (June 9, 2016, 5:44 PM), <https://thinkprogress.org/trump-used-to-brag-that-he-wasnt-controlled-by-special-interests-today-everything-changes-50e0c11a3066>.

since taking office have become the number one talking point for the left, and a part of almost all other substantive pushback on his policies and personnel choices.<sup>12</sup> Activists have continuously highlighted the disconnect between his corporate-connected cabinet,<sup>13</sup> his choices to cut regulations and budgets that protect the American people,<sup>14</sup> and his campaign rhetoric.<sup>15</sup>

To get more granular, Trump's Secretary of Education, Betsy DeVos;<sup>16</sup> Secretary of Treasury, Steve Mnuchin; and Secretary of Commerce, Wilbur Ross; are all major political donors, and Mnuchin and Ross have longstanding ties to Wall Street.<sup>17</sup> Former Secretary of Health and Human Services Representative, Tom Price, came under criticism for pushing legislation that would benefit a healthcare company in which he owned stock,<sup>18</sup> while EPA Administrator Scott Pruitt's close connections to and funding from big oil and coal companies are seriously concerning.<sup>19</sup> Trump's Secretary of State, Rex Tillerson, is the former CEO of

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12. See, e.g., Jonathan Tasini, *Trump Trip Shows US Hypocrisy on Human Rights*, CNN (May 19, 2017, 5:37 PM EST), <http://www.cnn.com/2017/05/19/opinions/trump-trip-abroad-human-rights-tasini-opinion/index.html>.

13. Public Citizen, *Exposing the Corporate Ties, Corrupting Influences and Conflicts in Trump's Billion Dollar Cabinet*, TRUMP'S CORP. CABINET, <http://www.corporatecabinet.org/> (last visited Dec. 31, 2017).

14. Josh Boak, *Trump Is Cutting Regulations*, U.S. NEWS (July 20, 2017, 4:36 AM), <https://www.usnews.com/news/business/articles/2017-07-20/trump-cutting-hundreds-of-planned-regulations>.

15. Editorial Board, *The Lasting Damage of Trump's Campaign Rhetoric*, CHI. TRIB. (Mar. 17, 2017, 9:00 AM), <http://www.chicagotribune.com/news/opinion/editorials/ct-trump-muslim-travel-ban-judges-edit-0317-20170316-story.html>.

16. Ulrich Boser, Marcella Bombardieri & CJ Libassi, *Conflicts of DeVos: Donald Trump, Betsy DeVos, and a Pay-to-Play Nomination*, CENTER FOR AM. PROGRESS (Jan. 12, 2017, 12:01 AM), <https://www.americanprogress.org/issues/education/news/2017/01/12/296231/conflicts-of-devos>.

17. Steve Pearlstein, *Trump Packs Cabinet with Wolves of Wall Street*, ALASKA DISPATCH NEWS (Jan. 20, 2017), <https://www.adn.com/opinions/national-opinions/2017/01/20/trump-packs-cabinet-with-wolves-of-wall-street>.

18. Jayne O'Donnell, *HHS Nominee Tom Price Bought Stock, Then Authored Bill Benefiting Company*, USA TODAY (Feb. 2, 2017, 4:17 PM EST), <https://www.usatoday.com/story/news/politics/2017/02/02/hhs-nominee-tom-price-bought-stock-then-authored-bill-benefiting-company/97337838>.

19. Eric Lipton & Coral Davenport, *Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors Over Regulations*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html>.

ExxonMobil, a major political contributor to both Republicans in Congress<sup>20</sup> and the Trump inauguration.<sup>21</sup>

His cabinet, among his other choices (such as his decision not to divest from his own benefits and use the Presidency to profit personally), has caused a new awareness of the need to tackle ethics issues, and it may lead to an opportunity for defense to protect our anti-corruption and campaign finance laws.<sup>22</sup> And this opening is sorely needed, as the advent of this Administration means that we are on the defense like never before. Attacks on the last restrictions that remain in place in our system of money politics will be fast and furious; expect to see them in stand-alone bills, but also attached as policy riders to other must-pass pieces of legislation.<sup>23</sup>

“You can expect the Republicans to be very aggressive in lifting a lot of the regulations that are currently not only on political parties but on the system generally,” said attorney and campaign finance deregulation supporter, James Bopp Jr., after the election.<sup>24</sup>

“Voters not only picked Trump, but they also kept the Senate in GOP hands.”<sup>25</sup> As mentioned earlier, Senate Majority Leader Mitch McConnell is an advocate for campaign finance deregulation and for relaxing coordination rules between party committees and their candidates, and we expect to see him continue to push to move deregulatory measures in this space.<sup>26</sup>

While vigorous defense against the expected assault will be a big part of the policy agenda in this space, we also must strive for a proactive agenda. There must be a way to *actually* get change after our “change election.”

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20. *Exxon Mobil: Summary*, CENTER FOR RESPONSIVE POL., <https://www.opensecrets.org/orgs/summary.php?id=D000000129> (last visited Dec. 24, 2017).

21. Carrie Levine, *Donald Trump's Inauguration Fueled by Tobacco, Oil and Drug Company Money*, CENTER FOR PUB. INTEGRITY (Feb. 2, 2017, 2:48 PM), <https://www.publicintegrity.org/2017/01/31/20651/donald-trumps-inauguration-fueled-tobacco-oil-and-drug-company-money>.

22. Zohar Lazar, *Trump Has Turned America's Reputation for Fighting Corruption into a Joke*, MOTHER JONES, <http://www.motherjones.com/politics/2017/07/ethics-violations-corruption-trump-international-reputation/> (last visited Oct. 29, 2017).

23. Ackley, *supra* note 10.

24. *Id.*

25. *Id.*

26. *Id.*

The good news is that defenders of campaign finance continue to be creative, and will be stepping up efforts in new areas. Campaign finance groups will also increase focus on state and local ballot initiatives, as well as state level legislation.<sup>27</sup> “They also plan to put greater emphasis on working to convince big corporations to voluntarily disclose more of their political spending, a move that has had increasing success” and is important for company shareholders, as well as the public at large.<sup>28</sup>

State and corporate forums are battlefields where we can have concrete victories to improve our system, regardless of the challenging realities of federal politics. President Trump has shown that he has no issue with targeting specific companies on Twitter or in other public remarks, and corporate executives are scrambling to figure out how to avoid being a subject of the President’s attention.<sup>29</sup> The athletic brand Under Armour recently served as a prime example of how a company’s entanglements with the new Administration can pose a risk to shareholders. The company’s CEO Kevin Plank said in a CNBC interview that the President is “a real asset for this country,” which sparked public backlash from some of the company’s celebrity brand ambassadors, including Misty Copeland, Stephen Curry, and Dwayne “The Rock” Johnson.<sup>30</sup> The celebrity criticism caused a Susquehanna financial analyst to downgrade Under Armour’s stock to “negative,” citing “reputational risk.”<sup>31</sup>

In this hyper-politicized environment, one way to be above the fray and to mitigate risk is to enhance your own transparency. You only need to look at the blowback many CEOs have received for their involvement with President Trump’s Strategic and Policy

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27. *Id.*

28. *Id.*

29. James Fontanella-Khan & Shannon Bond, *Corporate America Employs New Tactics to Avoid Trump Ire*, FIN. TIMES (Jan. 27, 2017), <https://www.ft.com/content/b3a3c99c-e43e-11e6-8405-9e5580d6e5fb>.

30. Jena McGregor, *In Full-Page Ad, Under Armour CEO Kevin Plank Tries to Put Praise for Trump Behind Him*, WASH. POST (Feb. 16, 2017), [https://www.washingtonpost.com/news/on-leadership/wp/2017/02/16/in-full-page-ad-under-armour-ceo-kevin-plank-tries-to-put-praise-for-trump-behind-him/?utm\\_term=.b7e9c49d3dfd](https://www.washingtonpost.com/news/on-leadership/wp/2017/02/16/in-full-page-ad-under-armour-ceo-kevin-plank-tries-to-put-praise-for-trump-behind-him/?utm_term=.b7e9c49d3dfd).

31. Tomi Kilgore, *Under Armour Downgraded as CEO’s Praise of Trump Creates ‘Reputational Risk’*, MARKETWATCH (Feb. 15, 2017, 11:27 AM EST), <http://www.marketwatch.com/story/under-armour-downgraded-as-ceos-praise-of-trump-creates-reputational-risk-2017-02-15>.

Forum<sup>32</sup> to see how challenging it can be to interface with politics right now. The Forum—Trump’s business council—meets in an unofficial capacity so as to skirt standard transparency and good government requirements.<sup>33</sup> Uber’s CEO Travis Kalanick already dropped his involvement in the Forum, citing Trump’s travel ban, and many other CEOs are facing pressure to do the same.<sup>34</sup>

This past shareholder season, companies faced increased pressure to be more transparent about their political spending, as well as created clear policies as to strong board oversight of managements’ campaign contributions and companies’ campaign donations.<sup>35</sup> Openness and broad oversight help shareholders understand how companies they invest in are playing in politics, and they help companies receive credit for transparent behavior.<sup>36</sup>

This spring, many companies will face shareholder resolutions calling for the companies to be completely honest about how they attempt to influence politics.<sup>37</sup> This year’s resolutions are a continuation of a trend in which investors have been demanding that companies be more upfront about whether they exploit loopholes in the political system to gain secret and special access to politicians.<sup>38</sup> With our Administration more closely linked to private industry than ever before,<sup>39</sup> companies have to pick sides,

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32. Bloomberg & Fortune Editors, *President Trump’s Council of CEOs Is Disbanding Amid Outrage over His Charlottesville Response*, FORTUNE, <http://fortune.com/2017/08/16/donald-trump-ceo-strategy-council-disbanding/> (last updated Aug. 16, 2017, 2:01 PM EST).

33. Josh Gerstein, *Trump May Be Skirting Transparency Law on Advisory Boards*, POLITICO (Feb. 2, 2017, 11:22 PM EST), <http://www.politico.com/story/2017/02/trump-transparency-law-advisory-boards-234583>.

34. *Id.*; see also Bloomberg & Fortune Editors, *supra* note 32 (explaining how BlackRock Inc. CEO Larry Fink and other executives on the council are facing pressure to leave the council).

35. Kristin Casler, *Corporate Political Spending: Investors Demand Transparency*, LEXISNEXIS, <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2016/04/29/corporate-political-spending-investors-demand-transparency.aspx> (last visited Oct. 29, 2017).

36. *Id.*

37. New York (AFP), *Investors Push for More Info on Lobbying at US Companies*, BREITBART (Apr. 22, 2017), <http://www.breitbart.com/news/investors-push-for-more-info-on-lobbying-at-us-companies/>; see also *Teamsters Demand Lobbying Transparency at FedEx*, TEAMSTERS (Sept. 21, 2017), <https://teamster.org/news/2017/09/teamsters-demand-lobbying-transparency-fedex> (discussing the pressure placed on the corporation FedEx by the union Teamsters as one example of companies facing influence by shareholders).

38. Bruce Freed & Nanya Springer, *Guess Who’s Addressing Money in Politics? It’s Not the Government*, THE HILL (May 24, 2017, 1:40 PM EDT), <http://thehill.com/blogs/pundits-blog/campaign/334951-guess-whos-addressing-money-in-politics-its-not-the-government>.

39. See Public Citizen, *supra* note 13 (illustrating profiles of the various cabinet members’ ties to private industry).

which will hopefully result in their push to the right side of history when it comes to transparency.

After this election, we need a twofold strategy. Advocates must: [1] work to call out the new Administration on its conflicts and corruption by defending the campaign finance rules we still have on the books—in a very challenging federal environment; and [2] simultaneously push for state level and corporate affirmative changes like enhanced transparency.

The battle lines for success have changed, but the “change” that citizens want, has not.