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TEXAS **U**NDERGRADUATE **L**AW **R**EVIEW
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FINANCIAL DIRECTOR
Michael Laitkep

TECHNICAL DIRECTOR
Rachana Mallavarapu

GRAPHIC DESIGN
Davey Bemporad

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ALL THE WAY TO THE COURT:

Abe Fortas, LBJ, and the Separation of Powers

By Josh Armstrong

Introduction

The separation of powers is one of the hallmarks of the American constitutional order. As James Madison wrote in *Federalist 47*, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands…may justly be pronounced the very definition of tyranny."[1] This is not to say that the branches should have no interaction. The judicial branch, however, carries a greater expectation of independence than do its counterparts. As Alexander Hamilton wrote in *Federalist 78*, "the complete independence of the courts of justice is peculiarly essential in a limited Constitution."[2] This expectation applies no less to the Supreme Court of the United States than to any other federal court. However, profound impact a single Supreme Court justice can have on national policy outcomes through judicial review incentivizes the appointment of justices friendly to the president's interests. Close connections between justices and the president threaten the respective branches' ability to serve as checks on each other. Such behavior occurs when the Court guides the president's hand or when justices take the administration's preferences into account in deciding a case.

In an effort to maintain its independence, the Supreme Court has held a longstanding rule against issuing advisory opinions. During the very first presidential administration, the Court's justices wrote President Washington a letter declining his request for their advice on matters of foreign neutrality, reasoning that,

"The Lines of Separation drawn by the Constitution between the three Departments of

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[1] James Madison, "Federalist 47," in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 2003), 298.
[2] Alexander Hamilton, "Federalist 78," in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 2003), 465.

> Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments."[3]

Any advice from a member of the judiciary to the executive, by this logic, would exceed constitutional boundaries. Again in 1911, the Court reiterated its refusal to issue advisory opinions, striking down a statute granting federal courts jurisdiction over native land rights before concrete cases had arisen. Justice Day wrote for a unanimous court that, were the justices given this power,

> "the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning."[4]

Chief Justice Jay and Justice Day, writing more than a century apart, both recognized that the Constitution's tripartite system of checks and balances necessitates keeping the judiciary out of the other branches' policymaking processes. Not every justice, however, has been so conscientious.

President Lyndon Johnson's nomination of Abe Fortas to the Supreme Court of the United States in 1965 must have raised some eyebrows with respect to judicial independence. Fortas, LBJ's longtime friend and occasional personal attorney, served in an advisory role for the first years of the Johnson administration. According to others close to the president, as well as records of his time in office, Fortas never relinquished this role upon ascending to the nation's highest court. His involvement persisted to

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[3] The Justices of the Supreme Court, "Letter to George Washington from Supreme Court Justices, 8 August 1793," Online by Founders Online, National Archives.

[4] *Muskrat v. United States,* 219 U.S. 346 (1911).

such a degree that the Special Assistant to the President Joseph Califano later recalled that "the Supreme Court Justice became part of the staff and his involvement so routine that early shock and concern over time faded, like Fortas himself, into the woodwork of the White House."[5] This essay will examine Justice Fortas' involvement with the Johnson administration as a case study in judicial-executive collusion. It will do so by examining the record of primary sources detailing Fortas' advice on domestic policy, foreign policy, and politics, requests to Fortas for advice by the administration, and Johnson's response to allegations of cronyism during Fortas' 1968 chief justice confirmation hearings. Pieces of evidence available at the LBJ Presidential Library, though neither cohesive nor conclusive, come together to present a suspect picture of the relationship between the president and his friend on the Court. While it is unclear whether any of Fortas' actions posed a serious threat to the independence of the judiciary, it is clear that his advice on matters foreign and domestic carried an appearance of impropriety, and blurred the lines between branches of the federal government.

Fortas' Relationship to Johnson Before his Appointment

The intertwined relationship of Fortas and Johnson's careers began in earnest when the former helped the latter escape legal troubles pertaining to the 1948 Democratic primary for a U.S. Senate seat from Texas. Fortas, whose firm had contributed to Johnson's campaign, represented the candidate when he was rightly accused of having won the race against former Governor Coke Stevenson by stealing votes.[6] Fortas argued the case before Supreme Court Justice Hugo Black in a 5th Circuit hearing and won on procedural grounds, allowing Johnson to continue to the general election, which he would later go on to win.[7] The relationship endured throughout Johnson's time in the Senate, the vice presidency, and the presidency. By 1965, Fortas had taken on such a prominent role in the White House as to negotiate personally with foreign leaders.[8] Later that year, this role would begin to raise questions upon Fortas'

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[5] Joseph Califano, *The Triumph and Tragedy of Lyndon Johnson: The White House Years* (College Station: Texas A&M University Press, 2000), 314.

[6] Laura Kalman, *Abe Fortas: A Biography* (New Haven: Yale University Press, 1990), 200.

[7] Laura Kalman, Abe Fortas: A Biography (1990., 201-202.

[8] Ibid., 233-234.

nomination and confirmation as an associate justice of the Supreme Court.

Advisory Role in Domestic Policy

Perhaps the most obvious potential breaches of judicial independence came with Fortas' advice to the president on matters of domestic policy. In a constitutional order that entrusts the Supreme Court with the power of judicial review, the involvement of a sitting justice in making the policies which could eventually come before him presents an apparent conflict of interest—a sort of one-man, informal advisory opinion. Records of the Johnson administration show that Justice Fortas did just that. One particular episode revolved around a bill intended to fight crime in the District of Columbia. A memo from Special Counsel Harry McPherson and Joe Califano to President Johnson, with the bill as it had passed Congress attached, relays the opinions of various cabinet members and advisers, noting that "Ramsay Clark and Justice Fortas recommend veto."[9] While the document provides no explicit reasons for this recommendation, Johnson's eventual statement of disapproval, which Fortas helped write,[10] claims that "fundamental constitutional questions pervade the bill," and that its provision on obscenity is likely "unconstitutional-in violation of the First Amendment" — though the statement claims this advice came from "the Acting Attorney General."[11] If any of this input on matters of constitutionality actually came from Fortas, his recommendations would resemble an informal advisory opinion. Fortas' involvement evidently followed the D.C. Crime Bill to its second iteration a year later. A 1967 memo from Deputy Counsel Larry Levinson to Appointments Secretary Jim Jones references changes to President Johnson's potential signing statement on the bill "to incorporate suggestions by McPherson, Fortas, [and] Clifford."[12] This revised statement, which the president ultimately released upon signing the bill, calls it "a substantial improvement" upon the 1966 version, which "would have seriously invaded

[9] Memorandum from McPherson and Califano to the President (Nov. 9, 1966) (on file with author).
[10] Memorandum from Califano to the President (Nov. 13, 1966) (on file with author).
[11] Lyndon B. Johnson, "Memorandum of Disapproval of the District of Columbia Crime Bill," November 13, 1966. Online by American Presidency Project.
[12] Memorandum from Levinson to Jones (Dec. 27, 1967) (on file with author).

individual rights."[13] Again, Fortas appears to have assisted the president by providing his rationale for policy action. assisted in providing the president with his rationale for policy action.

In 1968, President Johnson again called on Justice Fortas for assistance with law enforcement issues in Washington. Peaceful demonstrations following the assassination of Martin Luther King, Jr. in April of that year turned into riots as some took advantage of the chaos and began destroying and looting property. The president asked Special Counsel Larry Temple to take the legal steps which would allow him to deploy U.S. Army personnel within the district to restore order.[14] As Temple recalls, "Justice Fortas and Deputy Attorney General Warren Christopher and I met and prepared the legal documents used by President Johnson directing the Secretary of Defense to provide the requested military support for local law enforcement."[15] The resulting executive order, which Johnson signed on April 5, gave the Secretary of Defense broad authority to use military force to quell the violence.[16] This episode represents one of the clearest disregards for separation of powers on Justice Fortas' part. As a sitting justice, he participated in the drafting of an executive order. In doing so, Fortas went beyond advisory opinions and took an active part in the exercise of executive power. Such an action would have presented a clear conflict of interest had anyone within the city challenged the constitutionality of the order in the courts.

Advisory Role in Foreign Policy

Despite his domestic legal expertise, Fortas played an even larger advisory role on matters of foreign policy, especially with respect to Vietnam. The president's records are rife with references to the justice's contributions to strategy in the conflict. On November 5, 1967, in a top-secret memo, Fortas outlined his positions on a number of considerations in the war, ranging from public opinion to the ultimate mission of the intervention and the continuation of the bombing.[17] Attached to Fortas' original

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[13] Lyndon B. Johnson: "Statement by the President Upon Signing the District of Columbia Crime Bill.," December 27, 1967. Online by American Presidency Project.
[14] Larry Temple, email to the author, December 1, 2016.
[15] Ibid.
[16] Lyndon B. Johnson, "Executive Order 11403—Providing for the Restoration of Law and Order in the Washington Metropolitan Area," April 5, 1968. Online by American Presidency Project.
[17] Memorandum from Fortas to the President (Nov. 15, 1967) (on file with the author).

handwritten memo, however, is a note which hints that the administration wished to keep him at arm's length. In this note, National Security Advisor Walt Rostow instructed the justice to write his comments and then "let the White House garage know when you have finished and someone will pick up the document and bring it back to the White House Situation Room."[18] It seems Rostow was conscious enough of the potential appearance of impropriety that he wished to keep Fortas out of the White House itself on this particular occasion. Nonetheless, Fortas' thoughts on the war were evidently common knowledge among top advisers. Four months later, McGeorge Bundy wrote to the president that "those who favor a bombing halt are unanimous in believing that Abe Fortas is quite right to warn against any empty dramatic gesture."[19] Indeed, Fortas was present at some meetings on the war, including a meeting between President Johnson and General Westmoreland, during which the justice questioned whether they should be using the term 'ceasefire.'[20]

Fortas'~~s~~ involvement in crafting the administration's Vietnam policy is especially troubling in light of his actions pertaining to the war in his capacity on the Supreme Court. Whereas the justice working in the White House raised questions about advisory opinions, the White House advisor working on the Court may have jeopardized judicial independence in the most fundamental sense — the expectation that "court decisions are reached freely, without regard for the political preferences of members of the other branches."[21] Fortas routinely voted to decline review of cases challenging the war as not having been constitutionally declared, though in doing so he joined nearly every justice save for William O. Douglas,[22] who later recalled, "Abe, architect of our Vietnam policy, sat in the five cases raising the question of the constitutionality of the war."[23] Fortas also sided with the majority in *United States v. O'Brien*, holding that denying a war protester the right to burn his draft card was a reasonable

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[18] Ibid.
[19] Memorandum from Bundy to the President (Mar. 27, 1968) (on file with author).
[20] Notes of the President's meeting with General Westmoreland, 4/6/68, Tom Johnson's Meeting Notes File, Box 3, LBJ Library.
[21] [21] Gerald Rosenberg, "Judicial Independence and the Reality of Political Power." *Review Of Politics* 54 (3): 371.
[22] Rodric Schoen, "A Strange Silence: Vietnam and the Supreme Court" *Washburn LJ* 33 (1993): 278-286.
[23] William O. Douglas, quoted in Kalman, *Abe Fortas: A Biography*, 311.

regulation of free speech.[24] Taken together, these actions raise serious questions as to whether Justice Fortas allowed his involvement in the executive branch to influence judicial decision-making. Nevertheless, he did write the majority opinion in *Tinker v. Des Moines*, ruling on First Amendment grounds that high school students could not be disciplined for wearing black armbands to protest the war.[25] In contrast to *O'Brien* and the cases he voted to decline, Fortas's position in *Tinker* suggests that his personal stake in planning the war did not entirely cloud his judgment on constitutional questions surrounding it. In any case, given the secrecy of court proceedings, it is nearly impossible to determine with any degree of certainty the motivations behind the rulings of any given justice. Regardless of whether Fortas' personal stake in the administration's policy proved decisive in any of the cases he heard, it must have been a consideration.

Advisory Role in Rhetoric and Politics

Justice Fortas influenced not only the substance of Johnson's policy but also his rhetoric. The justice's largest contribution to the marketing the president's policies came in the form of extensive help in the drafting of the 1966 State of the Union Address. One of the boxes in the Johnson Library pertaining to the address contains a folder labeled, "1/11/66 8:00 PM – Abe Fortas."[26] Within this folder is a copy of the unfinished speech from one day, before its delivery, with extensive markups from Justice Fortas. The document comprises page after page of scratched-out paragraphs and words added in the margins, interspersed with nearly ten pages of original material handwritten on legal-length notepaper.[27] While little of Fortas' language survived into the final version precisely as he wrote it, he appears to have had a large hand in incorporating the changes he wished to make. In another box, a new draft dated the following day, just before Johnson delivered the speech, carries a note reading, "From the Pres's desk —

[24] *United States v. O'Brien*. 391 US 367 (1968).
[25] *Tinker v. Des Moines*. 393 US 503 (1969).
[26] "1/11/66 8:00 PM – Abe Fortas," Publications, Box 172, WHCF, LBJ Library.
[27] Memorandum for the record, Fortas to the President, Publications, Box 172, WHCF, LBJ Library.

worked on by him, Justice Fortas, and [senior adviser] Clark Clifford."[28] Fortas' work on the address seems to have garnered acclaim among White House staff. In a letter to the justice seventeen days later, Jack Valenti praised a speech on which Fortas worked as "well done" and joked that, "if you keep up with this speech making, I am going to suggest to the President that we get in the Supreme Court business—you are poaching on our territory."[29] Whether the speech in question is the State of the Union or another address from shortly thereafter, it suggests that Valenti regarded Fortas as a great help in communicating the president's goals in at least one instance. Again, Fortas stepped into a role that could have presented a conflict of interest. The 1966 State of the Union covered a slew of policies, from the Great Society and the War on Poverty to military expenditures in Vietnam and excise taxes.[30] Had any of these proposals reached the Supreme Court for review, Fortas' assistance in promoting them could have implied his agreement with them and rendered him incapable of neutral judgment.

Other documents suggest that Justice Fortas was called upon by the Democratic Party to assist the party with electoral strategy. A 1967 memo to Appointments Secretary Marvin Watson, relaying advice from political ally Judge Nathaniel Ealy, urges Watson to work on reorganizing the Democratic National Committee by meeting with "those people we relied on two years ago," mentioning "Abe Fortas" among them.[31] Judge Ealy's suggestion implies that Democratic Party insiders had counted on Fortas for political advice in the past and may have expected they could do so again, even after his appointment to the Supreme Court. In another memo, from March 22, 1968, Walt Rostow writes to the president about a conversation with a Mrs. James E. Cross, who "apparently has talked to Abe Fortas and others about the problem we face in holding and attracting youth in the upcoming election."[32] This memo is dated nineteen days before Johnson announced that he would not seek reelection. Whether or not those involved in

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[28] Memorandum from LBJ Library (Jan. 12, 1966) (on file with author).
[29] Letter, Valenti to Fortas,1/29/66, Name File: Abe Fortas, WHCF, LBJ Library.
[30] Lyndon B. Johnson: "Annual Message to the Congress on the State of the Union.," January 12, 1966. Online by American Presidency Project.
[31] Memorandum from Diane to Watson (Jan. 6, 1967) (on file with author).
[32] Memorandum from Rostow to the President (Mar. 22, 1968) (on file with author).

relaying this message knew that the president would have little personal stake in the 1968 election, and regardless of how much he would have stood to gain from reorganizing the DNC the previous year, both of these documents portray Justice Fortas as a partisan Democrat. While this portrayal in and of itself is far from shocking, given Fortas's background before serving on the Court, the implication that he would work to help ensure the electoral success of the party that appointed him raises questions as to where his loyalty lay as a neutral judge.

Explicit Requests for Advice

The advice administration officials asked from Justice Fortas was perhaps more damning than any advice he routinely gave. Two particular documents crystallize Fortas's role in the White House by indicating just how much the president and his staff expected of the justice. In one memo, dated May 9, 1968, Joe Califano asks Fortas, since he has "had a rare opportunity to see the problems of the Office of the Presidency," to offer his "views as to those areas which should be studied."[33] As examples of possible areas for comments, Califano lists "paperwork and ceremonies… personnel appointments [and] major policy decision-making."[34] Not only does this memo ask a sitting justice for advice on presidential tasks, but it acknowledges that he had some say in presidential policymaking.

On the same day, Califano sent Fortas another memo asking for even farther-reaching policy advice. This time, he asked the justice, at the president's request, for a "memorandum… identifying what you believe to be the ten most significant problems facing this Nation at home and abroad."[35] The request stipulates that the response should contain only Fortas's "personal views, not any staff work," and should be detailed enough "that an issue is clearly defined"—for instance, "rather than a statement that the problem is peace in the world, we would like a statement that the problem is how to deal with the problem of China in the coming decades."[36] In direct language and explicit detail, this memo asked Justice Fortas

[33] Memorandum on problems of the presidency, Califano to Fortas (May 9, 1968) (on file with author).
[34] Ibid.
[35] Memorandum on problems facing the nation, Califano to Fortas (May 9, 1968) (on file with author).
[36] Ibid.

to do precisely what the Justices of the Court had declined to do in 1790 at President Washington's request. The papers at the Johnson Library do not contain Fortas's responses to either of the May 9 memos, but the fact that Johnson and Califano felt comfortable enough to ask him for such advice is enough to give pause to anyone concerned with the separation of powers.

The Chief Justice Hearings

Officials within the Johnson administration appear to have been increasingly aware of the liability Justice Fortas created by appearing to be involved in executive matters during his second round of confirmation hearings. On June 26, 1968, President Johnson announced that he would nominate Fortas to move up and replace retiring Chief Justice Earl Warren, and that he would tap Judge Homer Thornberry, an old friend from Texas, to fill Fortas's seat as an associate justice.[37] Suddenly, with a confirmation battle in the Senate, the implications of the justice's relationship with the president became politically relevant. On July 23, Joe Califano wrote a memo to Johnson stating his concerns over the optics of one particular meeting:

> "Abe Fortas asked me my judgment this evening on whether he should be at the luncheon Thursday on the LBJ library. I told him that I thought it would be a mistake for him to be there. Even though it is an off-the-record luncheon, there is always a chance of a leak and I think the opponents of Fortas would use everything they can… I told Abe I would raise it with you to get your view. If you approve, I will call Abe and tell him I think he should not come Thursday."[38]

The luncheon would not have been the first off-the-record meeting Fortas had attended, and yet the scrutiny the justice was receiving as a part of his confirmation hearings evidently made it clear to Johnson just how problematic an appearance of collusion between the two could be. The president checked "Approve" at the bottom of the memo, and Fortas presumably skipped the luncheon.[39] Johnson's

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[37] Kalman, *Abe Fortas: A Biography*, 327-328.
[38] Memorandum Califano to the President (Jul. 23, 1968) (on file with author).
[39] Ibid.

newfound apprehension over appearances, of course, did not materialize from his own moral bearings. A number of senators had begun to question the relationship between Johnson and Fortas. Robert Griffin of Michigan, for instance, decried the Fortas and Thornberry appointments as "cronyism at its worst, and everybody knows it."[40] The allegations worried Johnson so much that he even tried to deny the facts. The president instructed Press Secretary George Christian, "as for Fortas, tell [the press] he never came to the White House. Well, maybe once or twice, but it was Lady Bird who invited [Fortas's wife,] Carol, and Abe just came along to light her cigar!"[41] Though Christian declined to feed reporters this lie,[42] the president's request indicated that he had begun to realize just how deep of a hole he and the justice had dug themselves into. In the days that followed, the administration ramped up its attempts to disassociate itself from Fortas. In a July 26 memo, Joe Califano suggested that the president "delay distribution" of a certain pamphlet "for awhile since it contains a picture of Abe Fortas."[43] The last-minute, retroactive scramble to obscure three years of questionable appearances failed to keep the nomination afloat. On October 1, 1968, Fortas asked Johnson to withdraw his name from consideration for chief justice.[44] In a move indicative of the very closeness that had been such a thorn in the side of his nomination, Fortas wrote part of the statement that the president would issue upon his withdrawal.[45]

Conclusion

Lyndon Johnson and Abe Fortas could not and would not give up the close bond they shared at any point during the latter's tenure on the Court. While a survey of the primary sources available can only provide a fragmentary picture of the relationship between the two, these shards of evidence are undeniably sufficient enough to raise a number of flags so far as the separation of powers is concerned. The necessarily speculative nature of this project need not lessen the implications of the questions it

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[40] Robert Griffin, quoted in Bruce Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* (New York: William Morrow and Company, Inc., 1988), 307.
[41] George Christian, quoted in Murphy, *Fortas*, 307.
[42] Ibid.
[43] Memorandum from Califano to the President (Jul. 26, 1968) (on file with author).
[44] Kalman, *Abe Fortas: A Biography*, 355.
[45] Murphy, *Fortas*, 525.

Capital Punishment in America: Its Flaws, Injustice, and Irrevocability

By Roberto Conlon

Capital punishment is one of the most contentious issues in American society. Capital punishment, also known as the "death penalty," is an abuse of both the resources and the power of the judicial system. The death penalty ought to be abolished for the following reasons. First, the death penalty violates the Eighth Amendment of the United States Constitution which bans cruel and unusual punishment. Second, the chief victims of the death penalty are the poor and minority members whose ability and resources to mount a defense for themselves are dwarfed by the vast advantages of the state. Finally, the death penalty fails to act as a deterrent to other capital crimes.

In 1972, the United States Supreme Court declared in *Furman v. Georgia* in a five to four decision that the death penalty constitutes "cruel and unusual punishment in violation of the eighth and fourteenth amendments".[1] The Supreme Court held that the results of the death penalty were so "harsh, freakish, and arbitrary," so as to violate the United States Constitution. The Furman decision revolutionized the way the death penalty was implemented, because for a brief amount of time, it ended all state sanctioned capital punishment. Further, the Furman decision led to the reversal of numerous death penalty cases in several states .[2]

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[1] Hugo Adam Bedau, The Case Against The Death Penalty, ACLU, (December 11, 2012), http://users.rcn.com/mwood/deathpen.html

[2] THE CA□E AGAIN□T THE DEATH PENALTY, ACLU (2012) https://www.aclu.org/other/case-against-death-penalty.

Capital punishment can be seen as cruel because it harkens back to an era when the public demanded revenge and sought to punish crimes in the most painful manner possible. The common assertion that it can be extended to justify "a life for a life." However, as Mahatma Gandhi argued, putting that adage into practice would render everyone blind and toothless .[3] Moreover, the death penalty can also be described as unusual based on the following two factors. First, the United States is the only western industrialized and democratic country that grants the regional governments of states the power to decide whether they will put someone to death. Furthermore, the death penalty is implemented in an often arbitrary and inconsistent.[4]

The method and manner in which the state carries out executions in brutal, and therefore a barbarous practice. In March of 1997 the state of Florida electrocuted Pedro Medina, a thirty nine year old Cuban immigrant who was had been convicted of murdering a high school teacher. Witnesses to the execution described flames shooting out of Medina's head, the smell of burning flesh, and the appearance that his body was on fire .[5] However, when the medical director was questioned as to the horrific occurrence, she stated there was no evidence that Medina had suffered, and he died a humane death .[6] It is reasonable to believe her contradiction with the witnesses' stories most likely stemmed from her own personal defense of the death penalty rather than hard facts. New technologies of the forms of capital punishment have been put into place such as the lethal injection, but Sarat (author of the previous book mentioned), said that these

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[3] Glen Anderson, Gandhi and the Death Penalty, OLYMPIA FELLOW□HIP O□ RECONCILIATION (May 16, 2010), http://www.olympiafor.org/Gandhi%20and%20the%20Death%20Penalty.pdf.
[4] THE CA□E AGAIN□T THE DEATH PENALTY, *supra* note 2.
[5] Austin Sarat, WHEN THE STATE KILL□: CAPITAL PUNI□HMENT AND THE AMERICAN CONDITION 61 (2002).

[6] Sarat, *supra* note 5, at 62.

new technologies, such as the lethal injection, are to make the death penalty more palatable and cosmetically pleasing to the public eye. In summary, despite its prevalence, no expert can state with certainty that death by lethal injection is painless. The death penalty, both cruel and unusual, thus violates the Eighth Amendment of the United States Constitution.

Americans believe that criminal justice prosecutions function fairly and render a just result. In reality, however, the death penalty is applied in an unjust manner, such as the way lower-income criminals and minorities are targeted by the state. Too often, the poor are disproportionately targeted for death penalty prosecutions by the state. The poor are often at the mercy of underfunded, overworked, and overwhelmed public defenders who cannot match the resources of the state (ACLU).

Furthermore, in 1990, the United States General Accounting Office, in analyzing twenty eight death penalty cases supporting the idea that prosecutors are more likely to seek the death penalty when the victim is black. found that race was an important factor ("The Effect of Race, Gender, and Location" 171). The Baldus Study, which also examined race in death penalty prosecution, analyzed Georgia's capital punishment records. The study showed that prosecutors were 70% more likely to seek the death penalty when the defendant was black and the victim white. On the other hand, if the defendant were white and the victim black, the state of Georgia sought the death penalty in 19% of the cases ("Legal and Empirical Analysis 400-406). Another case that illustrates the role of race in death penalty prosecution is the Clarence Brandley case. Brandley, a black janitor from Texas, was charged with the murder and rape of a seventeen year old white high school junior. During the investigation, Brandley was told, that of the two janitors, he would be the one who would hang because he was black ("The Case Against the

Death Penalty"). Further, the prosecutors at the time of the trial struck all blacks from serving on the jury, clearly violating the ruling of a previous case, *Batson v. Kentucky* [7]. During the appellate process, Brandley's attorneys discovered that 166 of the 309 exhibits that might have held the key to exoneration or a successful appeal had disappeared. Years later, after new evidence emerged, Justice Perry Pickett of the Texas Criminal Court of Appeals stated that the "he court unequivocally concludes that the color of Clarence Brandley's skins was a substantial factor which pervaded all aspects of the state's capital prosecution." This statement by Justice Pickett stresses that Clarence Bradley was more likely to be given the death penalty and to be denied his basic constitutional rights simply because he was black. After nine years on death row, Clarence Brandley was freed [8].

Additionally, capital punishment is awarded disparately depending on the defendant's class and socioeconomic status, with poorer defendants receiving the death penalty more often than the rich. The lack of proper funding leads to a substandard quality of legal defense for the poor ("The Death Penalty in America" 300-301)[9]. A Houston case which illustrates substandard defense is the Macfarlane Case. In that case, the lead attorney, with many years of legal experience, slept throughout the prosecution's case and admitted that capital murder cases are dull. A second attorney, appointed to assist the attorney who slept, disclosed that he had spent no more than four to six hours on a trial in which a man's life was at stake [10].

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[7] Je□□e L. Jack□on, Sr., Je□□e J. Jack□on, Jr., & Bruce Shapiro, Legal Lynching 69 (Denis Gaynor & John McFarlane, EDITION?., 2001).
[8] *Id.*
[9] Hugo Adam Bedau, The Death Penalty in America 300-301 (Hugo Adam Bedau ed., 3rd ed. 1982).
[10] Je□□e L. Jack□on, Sr., Je□□e J. Jack□on, Jr., & Bruce Shapiro, Legal Lynching 40-41 (Denis Gaynor & John McFarlane, EDITION?, 2001)

Supporters of capital punishment argue that the fear of the death penalty acts as a deterrent. This belief is referred to as the deterrence theory. This belief is referred to as the deterrence theory argues that those who premeditate murder will be less likely to carry out the murder if they fear the death penalty as the ultimate punishment. Beginning in the early twentieth century, American researchers compared murder rates in states in which capital punishment had been abolished to those states that continued to implement the death penalty. The research showed that the states that had abolished the death penalty did not have a higher murder rate, suggesting flaws in the theory. However, numerous studies have shown that the murder rate did not rise in states that abolished capital punishment ("The Case Against the Death Penalty")[11]. Conversely, the murder rate did not decline when a state reintroduced the death penalty [12]. Sociologist, Thorstein Sellin, researched murder rates in the Midwest and New England regions and found that the homicide rate between the years 1940 to 1955 yielded no correlation to whether or not the state allowed capital punishment)[13].The "individual who commits a homicide is not thinking of what his ultimate punishment will be" [14]. Interestingly enough, certain states that reintroduced capital punishment after the Supreme Court reversed *Furman* in the subsequent *Gregg v. Georgia* saw an increase in murders; those that did not reinstate the death penalty did not ("The Death Penalty" 138)[15]. Overall, there is legitimate controversy as to the effect of implementing or abolishing the death penalty on murder rates

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[11] The Case Against the Death Penalty, https://www.aclu.org/other/case-against-death-penalty (last visited April 24, 2017).

[12] Jerold L. Jackson, Sr., Jerold J. Jackson, Jr., & Bruce Shapiro, Legal Lynchin 29 (Denis Gaynor & John McFarlane, EDITION?, 2001)

[13] *Id.*

[14] Jerold L. Jackson, Sr., Jerold J. Jackson, Jr., & Bruce Shapiro, Legal Lynching 31-32 (EDITOR'S NAME?, EDITION?, 2001)

[15] Author's name???, The Death Penalty in America 300-301 (Hugo Adam Bedau ed., 3rd ed. 1982).

when a state implements the death penalty and when the state has abolished it. A strong argument can be made that murderers act irrationally, impulsively, and fail to consider the consequences of their actions.

Capital punishment is an issue that divides Americans in all levels of society. Allen Tanner, a criminal defense attorney in Harris County, Texas who is board certified in criminal law and certified to try death penalty cases, states that the death penalty violates the Eighth Amendment. Prosecutors target the poor and minority defendants members when seeking the death penalty. Often the state prosecutes people who are borderline intellectually disabled. In Tanner's experience, the accused "often lacks mental capacity to aid in his or her defense" (Tanner)[16]. Judge Vanessa Velasquez, a respected Hispanic district court judge who has sat on the bench for almost a decade and has prosecuted two death penalty cases, states that in her experience "the state has not targeted the poor and minority members"(Velasquez)[17]. Instead, she argues that people find themselves in the position of being defendants in capital murder cases due to their own actions. She prosecuted two cases in which the state sought the death penalty. She freely admits to the painful and difficult nature of the decisions with which she has had to grapple as both a prosecutor seeking the death penalty and a judge presiding over a death penalty cases.

The United States Constitution, as the supreme law of the land, does not provide the right to vengeance. Those convicted of capital murder should be punished without their lives being forfeited. The death penalty targets the poor, minorities, and those that might be mentally challenged. It does not prevent another murder.

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[16] Personal Interview with Michael Tanner, (April 23, 2014).
[17] Personal Interview with Vanessa Velasquez, (April 26, 2014)

raises. Without a direct confession from either of these long-dead men, no one can prove conclusively that they allowed each other's desires to dictate policy within their respective branches. What is certain, however, is that they crossed what should have been a dividing line between the executive and the judiciary with alarming regularity. Moreover, Johnson was cognizant of this interplay between branches and saw nothing wrong with it. As Joe Califano wrote years later,

> "For his part, the President was convinced that, faced with the most demanding job in the free world, he was entitled to any advice and counsel he wished; given a mandate to revolutionize the social and economic structure of the nation, he had a right to any and all information and advice, independent of traditional standards of constitutional government — especially when the ends were so worthy… and the means of his opponents were so nefarious."[46]

Even if they did so with the best of intentions, Johnson and Fortas failed to keep within the expected bounds of their respective offices. In violation of centuries of tradition, a sitting justice advised a president on matters which did not constitute a concrete case or controversy, and there is no telling whether his personal stake in administration policies threatened his independence as a judge. In evaluating any public servant's legacy, it is imperative to learn not only from his finest moments, but also from his worst. Johnson's relationship with Fortas is one of the latter. The two old friends may not have irrevocably damaged their offices, but they did compromise the ability of the executive and judicial branches to serve as an independent check on each other. To this extent, their relationship should serve as a cautionary example in the discussion over just how much institutional impropriety the American public can accept in pursuit of even the noblest ends.

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[46] Califano, *The Triumph and Tragedy of Lyndon Johnson*, 313.

An Examination of Affirmative Action at UT

By Danny Li

On October 26th, 2016, the Young Conservatives of Texas, a student group at the University of Texas, held a simple bake sale with a controversial message. Instead of merely assigning prices to various baked goods, the group set prices based on the race and gender of the customer. The Young Conservative members' alleged goal was to generate discussion on "the disastrous policy that is affirmative action." The lowest prices were attributed to the racial groups that the Young Conservatives perceived as benefiting the most from affirmative action. Within hours, hundreds of students mobilized in both support and opposition of the policy; furious debates erupted across campus, the bake sale quickly made local and state headlines. In response, University President Gregory Fenves released a statement asserting his support for students' freedom of speech. While the bake sale at the University of Texas at Austin seemed rather unorthodox, the same tactic had previously been used by several university student groups across the nation. Students at Purdue University, the University of California at Los Angeles,and University of California at Berkeley all held similar bake sales with the same goal of attacking affirmative action as a policy and generating discussions.[1] Although contentious and inflammatory, the Young Conservatives' bake sale effectively underlined how the issue of affirmative action remains a fragile and difficult subject to approach and discuss.

Affirmative action refers to the general set of policies geared toward combating discrimination.[2] In higher education institutions, affirmative action refers to admission policies

[1] McGee 2
[2] Affirmative Action in the Work Force" 7

purposed with improving the academic opportunities of historically suppressed or underrepresented groups, including women and minority racial groups. Although affirmative action was initially instituted as a temporary measure within colleges and universities to provide equal opportunity, it quickly became a long-term effort to reach equal representation of all racial and eventually gender groups.[3] However, affirmative action has frequently been criticized and questioned for its constitutionality.[4] Opponents of the policy argue that affirmative action unintentionally creates an admission system resembling the quota system, meaning that universities guarantee admission to set numbers of racial groups and females each year. Consequently, the policy is counterproductive since it creates an unfair opportunity that excludes the more represented groups already being admitted in larger numbers, such as white males.[5] Supporters of affirmative action counter these arguments by noting that without policies like affirmative action, historically underrepresented groups would continue to be excluded from higher education. In a 2013 New York Times article, several charts highlight the minority percentage makeup of incoming student bodies from 1990 to 2011 in universities that banned the usage of affirmative action.[6] In every single chart, the gap between the total number of college-aged minorities within the states at the time and the enrollment numbers of those minorities in universities was significant, with some as high as thirty-eight percent. Most of the charts also demonstrated how the enrollment numbers of minority students sharply dropped after

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[3] *Affirmative Action Overview*, National Conference of State Legislatures (Nov. 26, 2016) http://www.ncsl.org/research/education/affirmative-action-overview.aspx.
[4] Andrew Delbanco, *College: What It Was, Is, and Should Be* 72 (Princeton University Press, 2012).
[5] *Affirmative Action: Unequal Protection*, The Economist (Nov. 27, 2016) http://www.economist.com/news/briefing/21576658-first-three-pieces-race-based-preferences-around-world-we-look-americas.
[6] Ford Fessenden & Josh Keller, *How Minorities Have Fared in States With Affirmative Action Bans*, New York Times (Nov. 27, 2016) http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html?_r=0.

the institution of a ban on affirmative action. Supporters for affirmative action continue to contend that affirmative action is an integral measure for underrepresented groups to gain a higher chance of entry in higher education.[7] This, in turn, is significant because affirmative action also serves to strengthen race relations by increasing minority and female representation within United States culture and society.[8]

The arguments in support and opposition of affirmative action have persisted throughout decades, and affirmative action policies have been slowly shaped based upon changing demographics, criticisms, university leaders' views, and public responses. One particular case brought the long-lasting discussion surrounding affirmative action to the forefront of the nation's attention: Fisher v. The University of Texas. In 2008, Abigail Fisher, a white eighteen year-old female, filed a lawsuit against the university, contending that affirmative action had unfairly affected her and caused her to be denied admission to the university. A long and contentious debate ensued as the entire nation fought vehemently for and against the issue of affirmative action.[9]

Much focus must be placed on the University of Texas at Austin's measures, since, as of 2015, the university is only one of two higher education institutions in Texas that reported the consideration of race in admissions, thus implementing one of the most comprehensive affirmative action policies in the nation. Despite convincing and substantial criticism, affirmative action remains an essential and relevant measure for higher education institutions to increase

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[7] Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77.5 N.Y.U. L. Rev., 1195 (2002).
[8] Ford Fessenden & Josh Keller, *How Minorities Have Fared in States With Affirmative Action Bans*, New York Times (Nov. 27, 2016) http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html?_r=0.
[9] 3 *Fisher v. University of Texas*, Oyez (Nov. 27, 2016) https://www.oyez.org/cases/2012/11-345.

student body diversity and grant equal opportunities for historically underrepresented groups which is necessary for the strengthening of race relations, a larger, more pertinent societal issue.

While examining initial developments of an affirmative action policy, the University of Texas at Austin originally developed a three-point plan for racial integration, including the opening up of the admissions process to minorities.[10] However, the integration plan had flaws that needed to be addressed. As *The Texas Book: Profiles, History and Reminiscences of the University* states, although desegregation efforts eliminated the bias in the admissions process that caused minorities to be instantly dismissed from consideration, minority groups were still at a tremendous disadvantage.[11] They tended to be of lower income and lower-class, had less accessibility to preparation materials for college, and thus rendering them with a lower competitive edge than their counterparts. While the number of minority students continued to increase on campus, minority populations were not nearly as large as the administrators had anticipated, and the university became pressured to adopt more comprehensive measures that would guarantee greater numbers of admissions to minorities and women. This problem will remain persistent since low-income students, typically of minorities, not only have a difficult time of getting into college but also finishing college successfully.[12] This has been attributed in part to the substantial deprivation of academic resources that minorities and underrepresented groups experience before coming to the university.

In the 1960s, the University of Texas began its experimentation with affirmative action, a measure that could use race as a factor for consideration in the admissions process to boost all

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[10] Author, *U of T Regents Adopt 3-Step 'Open Door' Policy on Negroes*, Hou□ton Pre□□, June 9, 1955.
[11] Author(s), *Chapter name*, *in* The Texa□ Book: Pro□ile□, Hi□tory and Remini□cence□ o□ the Univer□ity page # chapter begins, page # cited (Richard Holland ed., 2012).
[12] Author, *U.T. Will Admit All Negros On All Levels by 1956*, Fort Worth Star-Telegram, July 9, 1955, at 2.

racial representations. The most prominent example of the university's efforts at the time, Douglas Laycock, a law professor at the University of Virginia and the author of the chapter "Desegregation, Affirmative Action and the Ten-Percent Law" in *The Texas Book*, notes that the University of Texas Law School administrators were the most welcoming of increasing numbers of minorities.[13] As the Texas population gradually became racially diverse, the law school department heads used affirmative action to select the very best students from different racial and ethnic group. The law school, in turn, became an experimental ground for the testing of affirmative action as a working policy.

While the Law School was originally supportive, taking part in the Council on Legal Education Opportunity program to integrate minorities in law studies, it eventually withdrew due to its position that the program serviced students too far below the minimum expectations for law. As a result, the Law School admitted very few African Americans or other minorities during the late 1960s and 1970s. The true issue was that the Law School's experience was typical of the University's experience in general. However, the University became pressured to adopt affirmative action again as a means of desegregation by both its own administration, and the government, which required universities to take steps toward integration of all races.[14] In particular, the faculty and professors were powerful voices for the reinstatement of affirmative action, championing that the policy was effective in increasing racial representation,but, required more stringent guidelines to keep the law school and the university's admissions process competitive.[15]

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[13] The Texas Book citation-- same pages as above, or?
[14] ("Affirmative Action Statement" 1)
[15] *Id.*

During the following decades, the University conducted a series of trial and error tests to develop a comprehensive affirmative action policy. The Federal Office for Civil Rights' administrators consistently identified shortfalls with the University's racial policies and at times the admissions process for minorities became too lenient or too harsh. Texas flagship schools developed recruiting, financial aid,and retention programs to improve the academic experiences of minorities, increase their chances of admission into the university, and supplement the law in aiding minorities. Through testing of the policy, the University increased racial diversity in its student body during the 1970s as more Hispanics, African American students, and international students, in particular, were being accepted in greater numbers. President Stephen Spurr, who served as active University President from 1971 – 1974, oversaw the drafting of a more defined and comprehensive policy. While Spurr became a prominent President voice in support of affirmative action, President Larry Faulkner, who served as President from 1998 – 2006, acted as a powerful voice against it. Thus, through the Law School, the University of Texas was able to draft an initial affirmative action policy to address the ongoing issue of underrepresented groups of both women and minorities and slowly reform the policy to keep the admissions process competitive. Administrators, including professors, faculty and governing members of the University of Texas, demonstrated consistent support for racial integration and reform that gave power to the development of a wholesome policy.

After a series of experiments with different affirmative action policies, the University of Texas suffered a setback when the Texas Legislature passed a ban on the consideration of race in the admissions process during 1997. However, as Laycock notes, the University of Texas was also mandated to accept the top ten percent of each graduating class, setting the ten-percent law

into effect. The ten-percent law was not as effective in including greater minority representation, and the administration pushed to gain public support for the reinstatement of affirmative action from 1997 to 2005, receiving particularly strong backing from faculty. In 2005, the ban was finally reversed, and the Regents and Dean quickly released measures soon after to supplement affirmative action's reintroduction into the University's admissions process. As a result, the University of Texas became one of two universities in Texas to reinstate and maintain a strong affirmative action program. However, in spite of the strength of the program, the most infamous challenge to the policy sprouted: Fisher v. The University of Texas. Fisher's case brought the legitimacy of affirmative action to the forefront of the nation's attention and its racial implications, greatly influencing the shaping of modern affirmative action policy. The case, however, ended with a ruling in favor of the University, and since its conclusion in 2016, the University has maintained its holistic affirmative action policy and continues to use it as a measure to boost student body diversity .[16]

From the development of its racial integration groundwork to its initial conceptualization and modern development, affirmative action has thrived tremendously as a policy at the University of Texas. This is largely attributed to the unexpected and strong support from administrators at every level, including the Regents,who initially drafted and set the policies, the Law School heads that willingly became an experimental area for affirmative action, and the University's professors, who championed the policy when it was being suppressed across the state. The consistent support from administrators persuasively asserts that successful affirmative action policies can be drafted and implemented on a university scale without harming the typical

[16] Fisher v. University of Texas, 579 U.S. __ (2016).

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admissions process, as the University of Texas was able to manage its goals of increasing diversity and keeping the admissions process competitive well across decades. The University of Texas's policy process has also demonstrated how administrative backing is essential to make the implementation and execution of affirmative action successful but can be easily garnered and bring students benefits in the future.

Citizens United v. FEC: The Role of Soft Money in Contemporary American Politics

By Bailee Ufert

As stated in the First Amendment to the Constitution of the United States of America, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[1] 221 years later, on 21 January, 2010, United States Supreme Court Justice Anthony Kennedy wrote that if the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech[2]. Justice Kennedy wrote this as the author of the majority opinion in Citizens United v. FEC, which has become one of the most polarizing issues in modern America. The 2010 decision revolved around big money in politics and election finance. In a 5-4 decision, the Supreme Court ruled that First Amendment rights extended to corporations and labor unions. In this context, the Court's decision is not limited to, but is predominantly used in connection to, free speech. The nuanced Citizens United decision, however, was only the most recent in a long history of evolving and vexing laws- and its evolution can be seen in its predecessors. Campaign finance in the United States has a long, contentious history, and it has come to a head with contemporary politics.

The prelude to the case began during the 2008 primary election season. A conservative nonprofit called Citizens United was prohibited from airing *Hillary: The Movie* by the United States District Court for the District of Columbia. The decision by the D.C. court was made on the precedent of the 2002 Bipartisan Campaign Finance Reform Act, Section 203, which prohibited political advertisements created or funded by a corporation airing on television or radio within 30 days of a primary election (or within 60 days of a general election).[3] The nonprofit in question then took the case to the Supreme Court, where Chief Justice Kennedy, along with Associate Justices Antonin Scalia, Clarence Thomas, Samuel Alito,

and John Roberts voted in favor of striking down the District of Columbia Court's ruling, thus weakening the 2002 Bipartisan Campaign Finance Reform Act. With this decision, "Super Political Action Committees" (Super PACs) as we know them today were brought to life. This would not have happened without the help of an earlier decision by the D.C. Court in the 2010 case *Speechnow.org v. FEC*. Speechnow.org sued the Federal Election Committee, hoping to remove the $5,000 donation limit placed on political committees. The D.C Court ruled in the nonprofit's favor, agreeing with the group that the donation limit encroached on the First Amendment right to freedom of speech [4]. Political Action Committees expanded and became increasingly more common. These two court decisions forever changed spending in American elections. Virtually unlimited amounts could now be spent by outside groups without a candidate's stamp of approval.

Though the decisions were decided on the precedent of the First Amendment, it is doubtful that James Madison envisioned corporations being the recipients of Constitutional rights when he authored the Bill of Rights. Constitutional interpretation comes with its own dissenting opinions, but American history provides insight into the intentions and motives of the Founding Fathers. Considering the circumstances that led to the American Revolution, it is an indisputable fact that the men who wrote the Constitution favored limited government. . In the colonial era, corporations existed as quasi-government businesses directly run by the crown. It is thus unimaginable that Madison, Washington, Jefferson, or any of their contemporaries would have wanted large businesses to receive the rights guaranteed under the Bill of Rights. Corporations are not people, and affording them constitutional rights borders on judicial overreach.

The surprisingly recent history of campaign finance law has changed frequently, almost in a cycle of regulation and deregulation. In 1907, the U.S government created one of the first regulations concerning campaign finance with the Tillman Act, which prohibited corporations from contributing to political campaigns. After the 1904 election culminated in a victory for Theodore Roosevelt, the new

president was accused of unlawfully accepting corporate donations. In the newly modern era; this was a scandalous claim that the president would have wanted to avoid. In response to the scandal, President Roosevelt called upon Congress in 1905 to ban these types of political contributions.[5] Thus, the Tillman Act came into being, and the rules it outlined were extended to primary campaigns in 1911. Laws regarding campaign finance remained mostly the same until 1943 when the Smith Connally Act banned labor unions from making contributions to federal campaigns, leading to the creation of modern political action committees. During this era, the role of a PACs, political action committees, were to organize and raise money to be donated directly to the candidate. The definition of a political action committee remained consistent, but led to the formation of Super PACs after the Citizens United decision. The concept of transparency regarding elections was regulated beginning in 1971 with the Federal Election Campaign Act.[6] Several changes were introduced with FECA, including limits on television advertising, spending limits for candidates and their relatives, and mandatory disclosures for donations greater than $100. This act was amended in 1974 in response to the Watergate Hotel burglary and the resignation of Richard Nixon. The most important of several changes was the establishment of the Federal Election Committee, a bipartisan commission that oversees and enforces electoral regulations.[7] This was the last of sweeping election reforms until the 2002 Bipartisan Campaign Reform Act and the reversal that came with the Citizens United decision.

In 2012, for the first time in modern American history, it became impossible to ascertain just how much money presidential candidates spent on election campaigns. What is known, however, is that super PACs spent over half a billion dollars. The largest Mitt Romney (R-MA) affiliated super PAC spent $142,655,346. Priorities USA, the super PAC affiliated with Barack Obama and headed by a former Obama White House aide, spent $66,482,084. Super PACs were the second-largest campaign spenders in 2012, just behind joint fundraising by the campaigns and their respective Democratic and Republican National Committees.[8] Compared to 2012, 2016 super PAC expenditures more than doubled. Over one

billion dollars were spent by super PACs in the 2016 election cycle. Just as in 2012, PACs that supported Republican candidates outspent Democratic and third party PACs.[9] Interest groups that spent undisclosed amounts of money, however, were more prominent than super PAC spending. These special interests, classified as business associations or social welfare groups, are typically nonprofits that do not file with the Federal Election Committee. Instead, they submit private tax returns to the Internal Revenue Service. This so-called 'dark money' is typically spent on negative advertising, in much the same way as super PACs. The issues called into question involve ethics and transparency; typically, these interest groups do not officially or publicly disclose their motives, campaign affiliations, or spending amounts. Therefore, it can become difficult for the average member of the American electorate to determine just exactly whom the attack ad they are viewing comes from. This is one example of many that have appeared in the 2012, 2014, and 2016 election cycles. 'Fake news' stories dominated the 2016 news blitz. In many cases, special interest groups that do not disclose spending to the FEC operated one of the many misleading fake news sites that popped up. This opens up plenty of possibilities for the American electorate to be influenced without its knowledge. Should it be permissible? Five justices on the Supreme Court believed so.

The Citizens United v. FEC decision was a landmark; political scientists (and everyday Americans) are still observing its immeasurable effects on political campaigns and its consequences on the interpretation of the First Amendment. Arguably one of the most groundbreaking Supreme Court decisions regarding American democracy and elections, the case has drastically morphed political campaigns.

It is unlikely that the Citizens United decision will be altered or overturned in the near future. A Republican president has taken office, and campaign finance reform has typically been a cause championed by the Democratic party. However, President Donald Trump has criticized super PACs as, "a totally phony deal" and has been known to identify with the political positions of both parties. Though the

president is unpredictable, his picks for the Supreme Court are not.

Current nominee, federal appellate judge on the United States Court of Appeals for the Tenth District, Neil Gorsuch, was tapped by President Trump in the hopes of replacing late Judge Antonin Scalia, a strict conservative constitutionalist. It can be assumed that Judge Gorsuch will rule in much the same way that Judge Scalia would have. Thus, the future of campaign finance is uncertain, but not entirely unpredictable. At least one constant remains: outside funds continue to pour into American elections with limited transparency and no signs of stopping.

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[1] U.S Const. amend I.

[2] *Citizens United v. Federal Election Committee*, 558 U.S 33. 2010.

[3] Bipartisan Campaign Reform Act of 2002, Pub.L 107-155, 116 Stat. 81. § 203.

[4] Speechnow.org v. Federal Election Committee, 36 U.S. No. 08-5223. (2010)

[5] Tillman Act of 1907, 34 U.S.C. §420 (1907).

[6] Federal Election Campaign Act of 1972, 52 U.S.C. § 30101 et seq (1972).

[7] Federal Election Campaign Act of 1972, 52 U.S.C. § 30101 et seq (1972) (amended 1974)

[8 Kevin Quealy & Derek Willis, Independent Spending Totals, N.Y. TIMES, (Nov. 30, 2012), http://www.nytimes.com/elections/2012/campaign-finance/independent- expenditures/totals.html

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[9] Jeremy Ashkenas, Mathew Ericson, Alicia Parlapiano, & Derek Willis, The 2012 Money Race: Compare the Candidates, N.Y. TIMES, (Nov. 26, 2012), http://www.nytimes.com/elections/2012/campaign-finance.html