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BILL MOYERS JOURNAL

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TRANSCRIPT:

February 19, 2010

BILL MOYERS: Welcome to the Journal. That famous definition of a cynic as someone who knows the price of everything but the value of nothing has come to define this present moment of American politics. The power of money drives cynicism into the heart of all levels of government. Everything — and everyone — comes with a price tag attached; from a seat at the table in the White House to a seat in Congress to the fate of health care reform, our environment and efforts to hold Wall Street accountable.

On the right and the left and in the vast middle more and more Americans doubt that representative democracy can survive this corruption of money.

Last month, the Supreme Court carried cynicism to new heights with its decision in the Citizens United case. A case, you will recall, spun from a legal dispute over the airing on a pay-per-view channel of a documentary attacking Hillary Clinton. The decision could have been made very narrowly. Instead, the conservative majority of five judges issued a sweeping opinion that greatly expands corporate power over our politics.

Since then, in at least two separate polls an overwhelming majority of Americans say they want no part of the court's decision; they want even more limits on the power of money in elections. But candidates, special interests, and their campaign consultants are gearing up to exploit the court's gift in the fall elections. Media outlets are licking their chops at the prospect of all that extra money spent on buying airtime.

If you want to know just how corrosive this flood of money may turn out to be, look to the decision's potential impact on our court system, where as you know, integrity, independence and fair play count the most when it comes to preserving faith in our system. In 39 states, judges have to run for election. That's more than eighty percent of the state judges in the country.

The Citizens United decision means those elected judges are even more susceptible to the corrupting influence of cash, because many of their decisions in civil cases directly affect corporate America, and a significant amount of the money judges raise for their campaigns comes from lobbyists and lawyers.

There's now a crooked sign hanging on every courthouse in America reading "Justice for Sale." It was already apparent ten years ago. That's when I collaborated with public television's "Frontline" and the Center for Investigative Reporting on a documentary, produced by Steve Talbot and Sheila Kaplan, about the impact of money on judicial elections.

In the ten years before our report, candidates for high court judgeships in states around the country raised \$85 million dollars. In the decade since, the numbers have more than doubled to over \$200 million dollars. In this extended excerpt, you'll see how money crept into judicial elections in three states — Pennsylvania, Louisiana and Texas — and you'll get a stark foreshadowing of what could come now that the Supreme Court has announced the sky's the limit. You'll also hear from two Supreme Court justices who went on to participate in the Citizens United decision, one of

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OUR POSTS

April 16, 2010
Financial Regulation & Regulatory Capture...

YOUR COMMENTS

"Can the government set up a regulatory system that won't end up controlled by Wall Street? Yes,..." - *Sumsanity*

whom wrote the majority opinion. He sings a very different tune now from the one he sang for our cameras eleven years ago.

We begin in Wilkes-Barre, Pennsylvania.

BILL MOYERS: District Attorney Peter Paul Olszewski knows that if he wants to become a judge, these days he has to campaign like a politician- on television.

ASSISTANT DIRECTOR: Action.

ED MITCHELL, MEDIA CONSULTANT: As District Attorney, Peter Paul Olszewski considers it his duty to fight crime. Okay. You've got to look a little more animated, Peter, okay?

ASSISTANT DIRECTOR: And action.

ANNOUNCER: District Attorney, Peter Paul Olszewski considered it his duty to fight crime-

BILL MOYERS: To pay for his expensive T.V. ads, Olszewski has to raise lots of money. And where does the money chase take him? To the very lawyers who may one day appear before him in court.

LAWYER: And I look forward to that first time that I'm standing before you, and I have to say, "Your Honor." I really am! You know that would be the greatest thrill!

BILL MOYERS: Judge Tom Burke is already on the court. To hold off a strong challenger, he reckons he'll need to raise \$250,000. That means a lot of time at country-club fundraisers.

JUDGE TOM BURKE: You choose to enter a campaign, and one of the first things that you realize is this is all about selling yourself over the next 6 to 12 months.

HELEN LAVELLE, MEDIA CONSULTANT: It's almost like an impulsive buy at a supermarket, you know? That's how people vote, based on emotion. We have spent an inordinate amount of time-

BILL MOYERS: A quarter of a million dollars enables Judge Burke to afford a high-priced media consultant and commercials that are ready for primetime.

HELEN LAVELLE: Am I concerned with having the most cinematic music that I can possibly have behind the radio spot? Am I concerned about what the light looks like when our candidate walks into a courtroom? Am I concerned about how he looks, that we present him the way he should be seen by the voters, as a dignified, wonderful, humble, hardworking, incredible, deserving-of-your-vote kind of guy? Yes, I do. They are emotional ways, emotional angles that I go in. And yes, people do vote based on that.

ANNOUNCER: Every day, Judge Tom Burke brings a lifetime of experience to his Luzerne County courtroom. As a father of five, he's concerned for the future of our children. As your judge, Tom Burke is committed to seeing that those in his courtroom are held accountable for their actions. Vote for Judge Tom Burke.

JUDGE FRED PIERANTONI: Hey, thanks for coming out, Mr. Capp. I appreciate that.

BILL MOYERS: Meanwhile, back in the pack, the challengers must hunt for voters the old-fashioned way, handshake by handshake. Municipal Judge Fred Pierantoni, a descendant of coal miners, does his fundraising with frankfurters.

JUDGE FRED PIERANTONI: After this election, I won't touch a hot dog for at least six months.

BILL MOYERS: The proceeds from his fundraisers are modest, and he can afford only the most basic — and noisy — campaign commercial.

ANNOUNCER: Over 25,000 cases in 7 years. Assistant district attorney 5 years. District justice 7 years. Judge Pierantoni. The experience you want. Pierantoni, the people's judge.

VIRGINIA MURTHA COWLEY: Going on the bus? My name is Virginia Murtha Cowley. I'm running for judge.

BILL MOYERS: Virginia Cowley is also short of funds. Her hopes depend on kinfolk and the public's sweet tooth.

VIRGINIA MURTHA COWLEY: My name is Virginia Murtha Cowley. I'm running for judge. Here's a lucky cookie to remember me by.

COWLEY'S MEDIA CONSULTANT: There are really just a couple of points that I'd like to hit in the commercial that need to come out of your mouth. One of them is, "Virginia is one tough cookie."

ANNOUNCER: People are talking about Virginia Murtha Cowley for judge.

MAN: Virginia is one tough cookie.

VIRGINIA MURTHA COWLEY: Protecting our children, our senior citizens, keeping our neighborhoods safe. That's what this job is all about.

ANNOUNCER: Vote Virginia Murtha Cowley -- Judge.

VIRGINIA MURTHA COWLEY: What it has become is the ability to buy the seat. If you can- if you have a half a million dollars, you can basically go out there and get your name on T.V. so many times that you will have bought yourself a job for the rest of your life.

BILL MOYERS: True enough, the winners for the two open seats are the candidates who raised the most money and made the most expensive T.V. commercials. It's a system that disturbs even the winning media consultant.

HELEN LAVELLE, MEDIA CONSULTANT: Other people who are in my profession will be ready to kill me. I don't care. I don't. I think that the amount of money flowing around out there to get people judicial seats is obscene. It's unfair, and people are ending up with a chance to be on a bench who have no business being there. I really believe that we are in a system where elections can be bought. It's sad.

BILL MOYERS: That's what concerned the Pennsylvania Supreme Court, so they appointed a commission chaired by Philadelphia attorney Jim Mundy to investigate the election process.

JIM MUNDY, PENNSYLVANIA SUPREME COURT COMMISSION: When we made the quantum leap to media campaigns in judicial elections, we lost perspective. And now you see contributions of a \$1,000, \$2,000, \$5,000, \$10,000, \$15,000, \$25,000. I think that changes the whole ballgame now.

BILL MOYERS: It takes over a million dollars these days to get elected to Pennsylvania's Supreme Court, and there are no limits on how much an individual can give. This group, a business lobby, is raising money to bankroll candidates for the court.

BILL COOK, PRES., PENNSYLVANIANS FOR EFFECTIVE GOVERNMENT: We actually got involved in judge campaigns back in 1989. And we realized from our old Civics 101 that there are three stools of government. One is the executive, obviously, the legislature, both of which we play very well in. And in Pennsylvania, the odd-numbered years are the judicial elections. In '93, '95 and '97 we got involved in Supreme Court campaigns.

BILL MOYERS: Having fared well with the state legislature, Bill Cook's outfit is now determined to elect a state Supreme Court which would be sympathetic to business interests.

BILL COOK: And there are issues that we want the legislature to pass, that we want the governor to sign into law. And we would certainly like to have justices find those issues constitutional when they come before them.

BILL MOYERS: The perception that special interests are buying favor with judges prompted the Pennsylvania Supreme Court to conduct a public opinion poll.

JIM MUNDY, PENNSYLVANIA SUPREME COURT COMMISSION: What we found is that people believe that money buys judicial favor. Eighty-nine percent believe that most of the time, some of the time, or all of the time judicial decisions are affected by monetary contributions. If we had no other data than that, we would know we had a problem.

BILL MOYERS: The concern that each of you express was in particular about campaign contributions to judicial races. Why do you see that as a threat to independence and neutrality?

JUSTICE ANTHONY KENNEDY, U.S. SUPREME COURT: In part, it's because the campaign process itself does not easily adapt to judicial selection. Democracy is

raucous, hurly-burly, rough-and-tumble. This is a difficult world for a jurist, a scholarly, detached neutral person to operate within.

Now, when you add the component of this mad scramble to raise money and to spend money, it becomes even worse for the obvious reason that we're concerned that there will be either the perception or the reality that judicial independence is undermined.

JUSTICE STEPHEN BREYER, U.S. SUPREME COURT: And independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts. Law and the facts do not include deciding according to campaign contributions. And if that's what people think, that threatens the institution of the judiciary. To threaten the institution is to threaten fair administration of justice and protection of liberty.

BILL MOYERS: New Orleans, Louisiana. In the city they call "The Big Easy," money has been known to buy elections. And that's exactly what's got a lot of people worried that justice, too, might be up for sale.

ANNOUNCER: For 25 years, Chief Justice Pascal Calogero has set the standard for what a judge should be-

BILL MOYERS: Up for reelection last year, the chief justice of the Louisiana supreme court was targeted by a business group, the Louisiana Association of Business and Industry, known as LABI. They considered his voting record on the court anti-business.

GINGER SAWYER, POLITICAL DIRECTOR, LABI: We don't pick our opponents lightly when we make selections of people to target for replacing on the bench. The primary way to make the selection was tracking all the decisions the Supreme Court has made over the last 25 years. So we drew from the 25-year history 50 cases and determined how each one of the judges had voted on the merits of those cases.

Chief Justice Pascal Calogero had a 3 percent voting record. Now, that's totally unacceptable, to the business community's way of thinking.

CHIEF JUSTICE PASCAL CALOGERO: I've cast 50,000 votes in 25 years on this court. If you want to go back and look at and pick and choose the cases in which you think that a given vote was wrong or indicated a leaning of some sort, it's very easy.

GINGER SAWYER: He complained that she had hand-picked the issues. Well, certainly I hand-picked the issues. Was I going to let him pick the issues?

BILL MOYERS: LABI had the money. Now all they needed was someone to spend it on.

GINGER SAWYER: The first thing is to find a good candidate. And we really worked for a long time to find Chuck Cusimano. He had been in the legislature. He was a sitting judge in Jefferson Parish. He was an aggressive, vibrant candidate.

WENDELL GAUTHIER, TRIAL ATTORNEY: LABI had previously elected two supreme court justices, had poured a lot of money into their campaigns, and now had determined to get rid of this chief justice who had been fair to both sides all of his life. But the business community now does not care about the credentials or the qualifications of the candidate. They care about one thing: How will you vote? Will you vote with us? And so they chose to go out and get a candidate that would be completely aligned with them.

It used to be that you didn't attack the other candidates. That was especially true in judicial races. Nowadays, it's attack, attack, attack. And that lays at the feet of the business community. They started the attacks, and they just- I mean, they lay it on against the chief justice.

A guy that has given his life to public service in Louisiana, been involved in no scandals and no corruption, and then to have the business community, because of greedy, motivated, selfish interests go after him- it was appalling.

BILL MOYERS: To understand what happened in this campaign to Justice Calogero, there's a story you need to know, a story about a small town called Convent along the Mississippi River in St. James Parish.

This stretch of the Mississippi River between Baton Rouge and New Orleans is known as the "Chemical Corridor." Seven major oil refineries and hundreds of chemical and other industrial sites make this one of the most polluted places in the nation. Locals call it "Cancer Alley."

Governor Mike Foster, a wealthy businessman with a Cajun accent and a "good ol' boy" style, was elected in 1995 on a platform of attracting more industry to Louisiana. In this ad in "The Wall Street Journal," the governor proclaimed that Louisiana is "Bending over backwards" to attract new companies with promises of tax breaks and legal protection from lawsuits.

PAT MELANCON: We've got just about every kind of chemical plant that you can imagine here. Most of these chemicals are either known cancer-causing chemicals or they're suspected to cause cancer in humans.

Right now, I have a father-in-law that's dying of pancreatic cancer. I lost my mother at 57 from cancer. My neighbor died of cancer. The next-door neighbor to us, my aunt behind us, all died of cancer.

BILL MOYERS: Encouraged by Governor Foster, Shintech, a subsidiary of a Japanese company, announced plans to construct a huge \$700 million polyvinyl chloride plant near Convent. The governor was delighted, and his Department of Environmental Quality quickly approved the Shintech plant. Then something unexpected happened. Residents of Convent banded together to try to stop it.

GLORIA BRAXTON: We got sick and tired of being sick and tired. Now, that's bottom line. Enough is enough!

BRENDA HUGUET: If they'd only enforce the laws that's on the books now, we wouldn't have all the problems we have today. But what they're doing is overlooking the problems. Or when they do the inspections, it's covered up.

PROF. OLIVER HOUCK, TULANE LAW SCHOOL: We have plants in Louisiana that discharge into the Mississippi River, single plants that discharge more than all of industry discharges in the state of New Jersey. We have three or four plants that outdo Ohio. I mean, we have world-class pollution here. The contamination levels that go into the Mississippi River are phenomenal. And unlike other states, we drink this river.

BILL MOYERS: Oliver Houck founded the Environmental Law Clinic at Tulane University in New Orleans, where he teaches law. Students at the clinic often provide legal services to people who couldn't otherwise afford it. The state Supreme Court has allowed this student lawyer assistance for almost 30 years under a regulation called Rule 20.

The low-income residents of Convent could not afford to hire lawyers to fight Shintech. Instead, they turned to students at the law clinic.

PROF. OLIVER HOUCK: When Shintech came in, we raised the issue head-on. Is this environmentally just? This is a heavy-polluting plant. It's right in the middle of a community that has already got six other plants overloading it with these same chemicals.

If you look at the levels of contaminants these people are breathing, they're like 100 times what people breathe in the United States. They're more than 20 times what people breathe even in the chemical corridor of Louisiana. I mean, this is just astronomically unfair.

BILL MOYERS: At first, Tulane was apprehensive about challenging a powerful corporation and a popular governor. But the Convent group persisted, and the law clinic finally decided to take on the case.

LISA JORDAN, ACTING DIRECTOR, TULANE ENVIRONMENTAL LAW CLINIC: In the beginning, of course, I had thought that, well, the chances- just objectively, the chances of winning this case — as winning to them meant that the plant wouldn't come at all — were slim, considering everything that was against us in terms of the administration. And as I started going to the meetings, just the level of conviction that they had started actually convincing me, you know, we may- we may actually have a chance here.

PAT MELANCON: We have come together here in the face of a terrible evil, the pollution, contamination, and destruction of the only environment we have.

LISA JORDAN: Pat is extremely smart, extremely savvy. She thinks like a lawyer.

PAT MELANCON: We filed an environmental justice petition. We have also filed a Title 6 administrative complaint, which is a civil rights complaint. And there are perhaps more actions that are going to be filed.

BILL MOYERS: While the students were teaching their clients about the law, the Convent folks were giving the students a lesson in the real world of Louisiana politics.

LISA JORDAN: You always hear that a committed group of individuals can accomplish anything. And I'd always heard it but, you know, if you don't have the personal experience, you think "Right." And they did. I mean this group accomplished something that no one would ever have given them any chance of accomplishing when this first started, including myself.

PAT MELANCON: Shintech will not locate in St. James Parish!

BILL MOYERS: In 1997, the Environmental Protection Agency ruled in favor of the Convent residents, saying the proposed Shintech factory failed to meet air pollution standards.

PROF. OLIVER HOUCK: Shintech is a great victory, a huge victory. I mean it's a big win. But the Governor's is not about winning like that. The Governor's about making sure that the clinic doesn't get in the way of anything he proposes again. It's revenge time.

GOV. MIKE FOSTER: [COURTESY LOUISIANA PUBLIC BROADCASTING] I can tell you this. I'm going to look differently at Tulane from a perspective of being- of having major tax breaks. If what they're going to do is support a bunch of vigilantes out there, they can make their own law.

PROF. OLIVER HOUCK: So he came down here to New Orleans, and he told, among other things, the Chamber of Commerce and our alumni not to contribute money to Tulane. He went to the state legislature and threatened to introduce legislation to eliminate Tulane's tax exemptions.

If we don't do it, it doesn't get done. They knew that. If they can get us out of the game, it doesn't matter if there's environmental law. It'll just never be applied to them. So this is sweet. They don't have to go to Congress and repeal any law. All they have to do is repeal us.

BILL MOYERS: The governor and his allies did not want the Tulane Law Clinic to stop another Shintech. To restrain the students, they had to convince the State Supreme Court to change Rule 20. Which brings us back to Chief Justice Calogero. The Louisiana Association of Business and Industry sent a letter to the chief justice asking him to revise Rule 20 to restrict the Tulane students. The environmental clinic, they said, is "bad for business."

This put Chief Justice Calogero in an awkward position. He had long supported Rule 20. Back in 1993, when a state agency asked him to change the rule, he refused. But now Calogero was running for reelection under pressure from a well-financed challenger. The Chief Justice desperately needed to prove that he, too, was good for business.

PROF. OLIVER HOUCK: So Calogero was facing his political future. And he can't sit on it anymore. He's got to rule.

BILL MOYERS: And rule he did, this time in favor of changing Rule 20. The court required that a group must prove that 75 percent of its members are indigent and provide evidence that they are living below the poverty line. The effect was to sharply restrict the ability of the Tulane Law Clinic to help citizens take on environmental cases like Shintech. The Governor praised Calogero's Supreme Court for changing Rule 20.

PAT MELANCON: We don't have our access to courts because Rule 20 has made sure the modifications that made sure we can't have access. And so the working poor in this community and in this state do not have equal access to the law and the protections of the law.

PROF. OLIVER HOUCK: The week he cuts the deal — he's a Democrat — 29, I believe, members of the New Orleans business community, leading Republicans, endorse the Democrat. Could be a coincidenceâ€¦

BILL MOYERS: Now the money started flowing from business leaders and corporate defense lawyers, including the attorneys who represented Shintech. In the end, Calogero raised over a million dollars and beat Cusimano by a comfortable margin.

PROF. BILL QUIGLEY, LOYOLA SCHOOL OF LAW, NEW ORLEANS: The Louisiana Supreme Court commissioned a poll about confidence in the judiciary, and they asked people, "Did politics play a role in the judiciary in Louisiana?" And the response was not "Yes" or "No." The first response was laughter because everybody knows that in Louisiana, certainly politics plays a role.

But from the point of view of the people who had lawyers last year and can't get

lawyers next year, this is not about electoral politics. This is about justice. This is about somebody slamming the courthouse door shut, locking it and nailing it shut and excluding a large group of people from ever getting to court.

PAT MELANCON: We know that our legislature and our Governor- we're convinced that these people are bought and paid for by the corporations that buy their campaigns and pay for their campaigns. But what we hoped was that at least we could get a fair hearing in the courts, that at least the judicial branch of government would be open to us, and we'd have equal access to the laws and the protections in the law. But instead of that happening, they're giving all the protections to multi-national corporations, and the citizens are being shut out.

BILL MOYERS: When it comes to the most partisan, expensive, knock-down, drag-out brawl for control of a state Supreme Court, Texas is the heavyweight champion. Twenty years ago it was widely known that Democrats and personal injury lawyers owned the courts here, making Texas the lawsuit capital of the world.

In those days, there were no limits on Texas campaign contributions, and trial lawyers made enormous donations to justices on the bench, who often ruled in their favor.

TOM PHILLIPS, CHIEF JUSTICE, TEXAS SUPREME COURT: A sitting judge, he had taken contributions from a single individual as high as \$120,000 and had several contributions in the \$50,000-plus range from people that did a lot of business with the Texas Supreme Court.

BILL MOYERS: The Texas Medical Association spearheaded a campaign by business to take back the courts. Videos like this were widely distributed to doctors to rally the troops.

ANNOUNCER: In the early 1970s, a handful of the richest, most powerful personal injury lawyers in Texas devised a scheme to seize control of the Texas Supreme Court-

KIM ROSS, LOBBYIST, TEXAS MEDICAL ASSOC.: We aggressively organized physicians across the state to challenge the members of the court, and that was a very aggressive grass-roots campaign called Clean Slate '88. Obviously, politics in Texas is a full-contact, no-pad sport to begin with, and judicial politics at that time even more so. And so we didn't want them to be shy, and we didn't want to be shy in how we conveyed it. So it was- it was anything but a soft sell.

BILL MOYERS: TEXPAC hit the Supreme Court like a Texas twister. In one year alone, 1988, five of the nine justices were swept from office, replaced by TEXPAC-supported judges.

1ST JUSTICE: I wouldn't be on the Texas Supreme Court if it wasn't for the help that the medical community gave me.

2ND JUSTICE: I would like to thank all of the participants of the Clean Slate Coalition.

KIM ROSS: The initial sweep surprised us and was exhilarating, of course. To have pulled it off with five out of six, you know, was exhilarating. And I think it redefined judicial politics, at least for this era.

ANNOUNCER: Who should be chief justice? Prominent Democrats endorse Republican Tom Phillips-

NARRATOR: Tom Phillips was elected as part of Clean Slate '88, running as a Republican and a campaign finance reformer.

ANNOUNCER: And only Phillips has said no to big money with strict limits on campaign contributions.

CHIEF JUSTICE TOM PHILLIPS: When I ran for my first term, I put a voluntary limit on campaign contributions and tried very hard to get support from as broad a base of people as possible.

PROF. ANTHONY CHAMPAGNE, UNIVERSITY OF TEXAS: Tom Phillips has a serious interest in reform, and yet he is probably the best judicial fundraiser in the world. I think he's probably raised more money in his judicial career than any other judicial candidate. So he's sort of caught up in a bad situation where he feels this is improper and distasteful, but the fact of the matter is, this is something that has to be done under the current system.

BILL MOYERS: Phillips was not alone in wanting reform. Justice Bob Gammage, a

Democrat, found himself playing by rules he didn't like.

BOB GAMMAGE, FORMER JUSTICE, TEXAS SUPREME COURT: As a candidate, I spent a disproportionate amount of my time on the telephone making calls, going to fund-raising events. That's the way the system is geared.

BILL MOYERS: Like many politicians, he employed one of the most effective campaign techniques, the negative ad.

BOB GAMMAGE: The more money you have, the more you're permitted to run positive. The less money you have, the more you have to go to the negative. I had less money than any of them. My ads were almost totally negative. I don't like to do that, but I had no choice. I had to penetrate the media markets.

BILL MOYERS: In 1995, he and Phillips formed a bipartisan alliance to reform campaign finance laws. They persuaded the legislature to pass a reform law limiting contributions to \$5,000 per person. But campaign costs continued to skyrocket. Hospitals, insurance companies, banks, developers together were spending millions of dollars on Texas Supreme Court races.

CHIEF JUSTICE TOM PHILLIPS: In 1990, I had a very expensive election. I think it was \$2.6 million. Had I unilaterally disarmed, I probably would be on the street today practicing law.

BILL MOYERS: While Tom Phillips stayed in the money race, Bob Gammage called it quits in 1995 after one term. The system, he says, is just too corrupt.

BOB GAMMAGE: People don't go pour money into campaigns because they want fair and impartial treatment. They pump money into campaigns because they want things to go their way. Why else would the contributors be there? They have interests to pursue. They have agendas to pursue. In some cases, they have ideologies to pursue. They're not just bland, benign philosophies. They want results.

BILL MOYERS: The consumer rights group Texans for Public Justice studies the impact of money on court decisions. Director Craig McDonald cites dozens of examples where campaign contributions create the appearance of impropriety.

CRAIG MCDONALD, DIR., TEXANS FOR PUBLIC JUSTICE: We would never allow umpires in a baseball game to be paid by the baseball players. Yet in Texas we allow the Supreme Court justices to be paid, if you will, from the very parties who are appearing before them to be judged.

It's the big law firms who appear there consistently, the corporations and the corporate PACs with cases before the judges. And judges at the Supreme Court level are almost completely reliant on these sources for their seats on the bench. And there are many cases that raise your eyebrows.

BILL MOYERS: It's a problem that troubles two U.S. Supreme Court Justices. Let me just give you some statistics from a poll conducted by the Texas state supreme court and the Texas bar association, which found that 83 percent of the public think judges are already unduly influenced by campaign contributions; 79 percent of the lawyers who appear before the judges think campaign contributions significantly influence courtroom decisions, and almost half of the justices on the court think the same thing. I mean, isn't the verdict in from the people that they cannot trust the judicial system there anymore?

JUSTICE ANTHONY KENNEDY, U.S. SUPREME COURT: This is serious because the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral. And when you have figures like that, the judicial system is in real trouble.

BILL MOYERS: We actually talked to a lobbyist in Texas who boasted that he had succeeded in reshaping the philosophy of the Texas supreme court through an all-out political campaign and very large donations. I mean, what does that say?

JUSTICE STEPHEN BREYER, U.S. SUPREME COURT: I think it shows that if you have one group of people doing it, you'll get another group of people doing it. And if you have "A" contributing to affect a court one way, you'll have "B" trying the other way, and you'll have "C" yet a third way. And pretty soon you'll have a clash of political interests.

Now, that's fine for a legislature. I mean, that's one kind of a problem. But if you have that in the court system, you will then destroy confidence that the judges are deciding things on the merits. And if people lose that confidence, an awful lot is lost. They've got to have fair decisions.

JUSTICE ANTHONY KENNEDY, U.S. SUPREME COURT: In the political context, "fair" means somebody that will vote for the union or for the business. It can't mean that in the judicial context or we're in real trouble.

BILL MOYERS: What does it mean?

JUSTICE ANTHONY KENNEDY, U.S. SUPREME COURT: To begin with, we have to ask, is it fair for the electorate to try to shape the philosophy at all, without campaign contributions? Is this a proper function? I am concerned about that. I do not think that we should select judges based on a particular philosophy as opposed to temperament, commitment to judicial neutrality and commitment to other more constant values as to which there is general consensus.

BILL MOYERS: The historian Plutarch said in "The Roman Republic," quote, "The abuse of buying and selling votes crept in, and money began to play an important part in determining elections. Later on, this process of corruption spread to the law courts and then to the army. And finally, the Republic was subjected to the rule of emperors."

JUSTICE ANTHONY KENNEDY, U.S. SUPREME COURT: There must be a recommitment, a rededication to the Constitution in every generation. And every generation faces a different challenge. We weren't talking about this 30 years ago because we didn't have money in elections. Money in elections presents us with a tremendous challenge, a tremendous problem, and we are remiss if we don't at once address it and correct it.

BILL MOYERS: That was eleven years ago. The flow of corporate money to judicial elections was then just a trickle, on its way to becoming a river which would soon become a flood. Since our report in 1999 for example, nine justices currently serving on the Texas Supreme Court, have raised nearly \$12 million dollars in campaign contributions.

The race for a seat on the Pennsylvania Supreme Court last year was the most expensive judicial race in the country, with more than four and a half million dollars spent by the Democrats and Republicans.

Now, with the Supreme Court's Citizens United decision, that corporate muscle just got a big hypodermic full of steroids.

Here to talk about the Supreme Court decision and judicial elections is a journalist well-schooled in the law. Jeffrey Toobin is himself a lawyer and a former assistant United States attorney who covers legal affairs as a staff writer at the "New Yorker" magazine and is senior legal analyst for CNN.

For the "New Yorker," Toobin has profiled those two Supreme Court justices I interviewed for "Frontline:" Anthony Kennedy and Stephen Breyer, as well as Chief Justice John Roberts in this article headlined, "No More Mr. Nice Guy."

He's also the author of this bestseller, "The Nine: Inside the Secret World of the Supreme Court," the latest of his five books on politics and the law.

I've said this before in the name of full disclosure and I'll say it again: I have known Jeff Toobin since he could barely reach this tabletop. Welcome back to the Journal.

JEFFREY TOOBIN: Hi, Bill.

BILL MOYERS: You just heard Justice Kennedy interviewed 11 years ago when he said to me, "Big problem. You know, this problem of money and judicial elections." And now he's just written the majority opinion Citizens United, taking the lid off of what corporations and unions can spend in elections. Do you think he has any understanding of the implications for judicial elections of the decision he just wrote?

JEFFREY TOOBIN: Well, I think he understands it. But what the Constitution is always about is balancing interests that sometimes conflict with each other. And under his interpretation and that of four other justices, he says that corporations have these close to absolute free speech rights, so even though that may lead to additional corruption of our elections, that's what the Constitution commands. But that's not the whole story here. And in fact, the government has regulated political speech by corporations for 100 years, since 1907. So it's not like free speech is an on-off switch. We have lots of people in our society who have some free speech rights, but not complete rights. Students, prisoners, government employees. They all have some free speech rights and not others. Corporations. But to participate in the political process, there have been limits for decades. And that hasn't been a problem until now.

BILL MOYERS: What do you think this recent decision means for judicial elections in

particular?

JEFFREY TOOBIN: Well, I think judicial elections are really the untold story of Citizens United, the untold implication. Because when the decision happened, a lot of people said, "Okay. This means that Exxon will spend millions of dollars to defeat Barack Obama when he runs for reelection." I don't think there's any chance of that at all. That's too high profile. There's too much money available from other sources in a presidential race. But judicial elections are really a national scandal that few people really know about. Because corporations in particular, and labor unions to a lesser extent, have such tremendous interest in who's on state supreme courts and even lower state courts that that's where they're going to put their money and their energy because they'll get better bang for their buck there.

BILL MOYERS: Well I know you don't read minds, but is Kennedy unaware of what this could mean for, well, he just said the integrity of our judicial system?

JEFFREY TOOBIN: Well, he's more aware than practically any justice on the court because just last year he wrote an opinion about the abuse of money in judicial elections.

BILL MOYERS: That was the West Virginia case where he said a Supreme Court judge in West Virginia must recuse himself, remove himself, from deciding a case involving a campaign contributor who'd given \$3 million to the judge's campaign.

JEFFREY TOOBIN: Right. I mean, the facts in that case were so egregious that the court, which really doesn't like to get involved in specific races, couldn't look away. It was so awful. As you said, there was a \$50 million judgment against a coal company.

The CEO of that coal company, knowing that case was coming up for appeal, knowing how divided the court was, put \$3 million of his own money into supporting one candidate. That candidate won. That candidate was the deciding vote in the case. And the losing side said, "Look. This is a violation of the law, violation of due process of law." And the Supreme Court, in an opinion by Justice Kennedy, said the appearance of that justice in that case was just so bad, even though they couldn't prove he'd been effectively bribed, they overturned the case.

BILL MOYERS: What Justice Kennedy said, by the way, it's just one line in the Citizens United case. He said that "It's important for the judge to recuse himself. But it's also important that we not limit the political speech of the person who is contributing to his campaign." So he's making some kind of distinction there.

JEFFREY TOOBIN: Well you know, again, apparently, to use a famous phrase associated with the Supreme Court, you know, he knows it when he sees it. Like, what's too much of a campaign contribution? You know, when does the money get so egregiously out of whack that you have to, the judge has to recuse himself? But, you know, the logical extension of that argument is that they should all recuse themselves, and obviously we can't have a system like that. So that's why, though the West Virginia case is illustrative, recusal is only an answer in a handful of cases. It's a systemic problem, not an individual problem.

BILL MOYERS: What do you think as an attorney and as a journalist about that decision? The Citizens United decision?

JEFFREY TOOBIN: One of the things about what it used to mean to be a judicial conservative was that you believed in judicial restraint. You believed in judges deferring to the elected branches of government, whenever possible.

George W. Bush always used to say, "I want judges who interpret the law, don't legislate from the bench." This was judicial conservatism in an activist mode. Because here, Citizens United was evaluating the McCain-Feingold bill, a big part of it, which was passed by Congress very recently, signed by President Bush.

BILL MOYERS: 2002, in fact.

JEFFREY TOOBIN: Right. It's signed by President Bush. Parts of it had been approved by the Supreme Court before. But the conservative majority said, "We know better." When you had justices like John Marshall Harlan, who was appointed by President Eisenhower, or Justice Potter Stewart, who was also appointed by President Eisenhower, they did believe in backing away from what the legislative branches did.

This seems a much more agenda-driven conservatism, where if the legislature doesn't do what they want and interpret the Constitution the way they want, they are going to impose it. And that's what's so striking about this opinion is that this is exactly what liberals used to be accused of doing, which is rewriting the laws to favor

the side that they want. But here, you have supposed conservatives doing it.

BILL MOYERS This Court did not-- this majority did not have to resolve this case this way? It could have resolved the Citizens United case very narrowly on whether that "Hillary: The Movie" film could have been denied access to cable channels before the election. But the Court reached out and said, "We want this case." And they gave a much broader interpretation to it than they needed to do. Do you think that was Justice Kennedy, or was that the machinations of Chief Justice Roberts?

JEFFREY TOOBIN: I don't want to get too much into the weeds here. But, if you saw how this case was dealt with in internal Supreme Court matters, it was very extraordinary. They argued at once on the narrow issue of, "Does it apply to this one-time, pay-per-view cable possibility?"

And then they asked for re-argument. This court almost never asks for re-argument and they asked for re-argument on the much broader issue of, you know, "Do corporations have free speech rights and does McCain-Feingold violate those rights?" I think John Roberts' fingerprints were all over the change here. And yes, this opinion was written by Justice Kennedy. But I think the moving force behind it was the Chief Justice.

BILL MOYERS: But what do you think was behind his decision?

JEFFREY TOOBIN: I think he thinks that that First Amendment law, when it comes to corporations, has been off in a wrong direction. And he saw this case, wanted to change it, and used this case as a vehicle. I think it means that there are entire areas of the law that he believes need to be changed and need to be fixed and need to be improved.

BILL MOYERS: Irrespective of what he said about precedent?

JEFFREY TOOBIN: You know, I think the words will live in infamy that he said in his famous opening statement in his confirmation, where he said, "I'm just like a baseball umpire. I don't make the rules, I just call balls and strikes." And he talked about his love and respect for the rule of precedent.

CHIEF JUSTICE JOHN ROBERTS: Nobody ever went to the game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath.

JEFFREY TOOBIN: He's got an awfully expansive view of what baseball umpires do. He's acting a lot more like the commissioner of baseball than an umpire. Because if you look at all these areas, he's trying to make big changes. You know, he's now been on the Court for a substantial amount of time, five years.

BILL MOYERS: Almost five years.

JEFFREY TOOBIN: Five years. Abortion rights. Affirmative action and racial preferences. Now, First Amendment rights for corporations. He is interested in dramatic and immediate changes in these areas. Now he doesn't always have five votes. But he's trying to get them every case.

BILL MOYERS: You said in that article that you wrote for the "New Yorker" last year that Justice Roberts is a doctrinaire conservative who in four years on the Court, now five, has served the interest and reflected the values of the contemporary Republican Party.

In practical terms, you said, in every major case he has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and now the corporate defendant over the individual plaintiff. What, ultimately, does a series of decisions that he has guided through the Court by five to four majorities mean for law and politics in this country?

JEFFREY TOOBIN: The Court is subject to presidential and Senate prerogative, and there is always going to be turnover. But if Roberts can keep mustering his majority, it's going to mean it's harder to sue for basically any kind of damages. And a classic example of that is in the environmental movement, where environmentalists in the last completed Supreme Court term lost every single case that was before the justices.

You know, the corporate cases get less publicity, except Citizens United than the abortion cases or the free speech cases. But it is extraordinary how often corporations are winning in this Court. The, you know, anti-trust enforcement is being very much limited by this Court. The regulatory power of the state is being limited by this Court. So, you know, if you look at what the agenda is of the

contemporary Republican Party, it matches completely what the Roberts agenda is at the Supreme Court.

BILL MOYERS: This doesn't surprise you, does it? Because in his private practice Mr. Roberts mostly defended corporations against individuals who had sued them. So it's not surprising that he would turn out to be a good friend on the Court of corporate America.

JEFFREY TOOBIN: No. You know, I guess when I was covering his appointment, one of the peculiar things about Supreme Court appointments is you don't really know a lot about what people believe. Because he hadn't been a judge for all that long. But everyone who knew Roberts well said to me, "Just wait. Just wait and see how conservative this guy is."

BILL MOYERS: Are we naïve to expect that the playing field should be more even than it will be when corporations have First Amendment rights to spend as much money as they want to on either a judicial or a political election?

JEFFREY TOOBIN: Well, that goes for all elections and not just judicial elections. And it's only worse in judicial politics because those races don't get a lot of attention. You know, when in a U.S. Senate race--

BILL MOYERS: Yeah.

JEFFREY TOOBIN: --a lot of people sort of know where the money's coming from and the news media covers it. The news media doesn't even cover these judicial elections very much. So all people see are these horribly distorted campaign ads. And mostly, the effective attack ads. And, you know, one of the things Congress is thinking about doing to try to salvage something out of Citizens United is at least require identification of the sources of the money for ads.

BILL MOYERS: Disclosure of the people who are paying?

JEFFREY TOOBIN: Right. We're all now familiar with the, "I'm John McCain and I approve this message." If you have a system that says, "I'm Lloyd Blankfein and I'm the CEO of Goldman Sachs and I approve this message," maybe that would have some restraining effect on Citizens United.

BILL MOYERS: But they can still put their money, if they don't want to do it explicitly or directly, they can put their money into the Chamber of Commerce, whose spending has been going up and up and up, and they don't identify the sources.

JEFFREY TOOBIN: The sources. And Congress is aware of this problem. I don't know if they can address it, but the issue of straw man and straw sources and covering up where the money comes from. They're aware of it. They're trying to address it. We'll see if they make any progress.

BILL MOYERS: Do you think a bad situation is going to get terribly worse?

JEFFREY TOOBIN: I do. And I think it will be beneath the radar, which is too bad. Because these judicial elections are so bad, but not a lot of people pay attention to them. Interestingly, one person who is trying to draw a lot of attention to judicial elections is Sandra Day O'Connor, in retirement, who has generally stayed away from the criticizing the Court, but was outraged at the Citizens United opinion in for just this reason. Because she knows. She has seen what this does to the judicial process. The money.

BILL MOYERS: Because she was in politics in Arizona before she went to the Court.

JEFFREY TOOBIN: Right. And Arizona actually has a pretty good system for merit selection of judges rather than elections. And conservatives in Arizona are trying to get rid of that system and make it a much more political system.

BILL MOYERS: Do you think that her idea of merit selection for judges, that somehow the governors of the state, with the help of disinterested parties, would pick a group of candidates for the State Supreme Court, do you think merit selection is viable?

JEFFREY TOOBIN: Yeah. And it works well in a lot of states. It's the Missouri plan, sometimes, Missouri has had it, although it's under challenge there. Nothing's perfect. But when you have bipartisan groups of people, screenings, or even governors alone picking judges, it almost invariably produces a better, fairer, more qualified, less partisan judiciary than when voters do it.

BILL MOYERS: But governors are political figures. It doesn't take politics out of the

process, does it?

JEFFREY TOOBIN: And nor should it. And politics is not out of the appointment of federal judges. But there is a tradition of excellence among federal judicial appointees, and I think that's true of Democratic and Republican nominees alike. There's a tradition of eminence in the community that is required before you get that nomination. And I think in states where governors pick, look, nothing is perfect. But-

BILL MOYERS: Oh, no.

JEFFREY TOOBIN: --by and large, it's a better system than elected judges.

BILL MOYERS: Jeffrey Toobin, thank you for being with me on The Journal.

JEFFREY TOOBIN: Great to be with you, Bill.

BILL MOYERS: Over the course of a long career in journalism, I've covered this story of money in politics more than any other. From time to time, I've been hopeful about a change for the better, but truth is, it just keeps getting uglier every year.

Those who write the checks keep buying the results they want at the expense of the public. As a reputedly self-governing democracy, we desperately need to address the problems that we've created for ourselves, but money makes impossible the reforms that might save us.

Nothing in this country seems to be working to anyone's satisfaction except the wealth machine that rewards those who game the system. Unless we break their grip on our political institution, their power to buy the agenda they want no matter the cost to everyone else, we're finished as a functioning democracy.

In this I am sympathetic to the people who show up at tea party rallies asking what happened to their jobs, their pensions, their security — the America they believed in. What's happened, says the political scientist Sheldon Wolin, is the increasing cohabitation of state and corporate power.

This is why I find the supreme court ruling so preposterous and ominous. Five radical judges have taken a giant step toward legitimating the corporate takeover of democracy. "One person, one vote" — stop kidding yourself. As I once heard a very rich oilman tell congress after he paid \$300,000 to the democratic party to get a moment of President Clinton's ear, "Money is a bit more than a vote." The huge sums of money that already flood our elections will now be multiplied many times over, most likely in secret.

Just this week, that indispensable journalistic website Talking Points Memo.com reported that an influential Washington lobbying firm is alerting corporate clients on how to use trade associations like the Chamber of Commerce as pass-throughs to dump unlimited amounts of cash directly into elections. They can specifically advocate or oppose a candidate — right up to election day — while keeping a low profile to prevent "public scrutiny" and negative press coverage. We'll never know what hit us, and like the titanic, we'll go down but with even fewer lifeboats.

That's it for the Journal. Next week: the two powerhouse lawyers who fought each other tooth and claw in Bush versus Gore are back in the courtroom, but this time they're fighting together to defeat California's ban on same sex marriage.

TED OLSON: The right to marry is an individual right, it's not the state's right. It's not a governmental right. It's an individual right.

DAVID BOIES: Because remember, if we recognize them as human, if we recognize them as full citizens, the Constitution guarantees that they have equal protection of the laws. They have the same rights as any heterosexual.

BILL MOYERS: I'm Bill Moyers. See you next time.

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