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How the US Supreme Court Forever Sold Its Gavel: Behind the Scenes Legal Machinations

Citizens United v. Federal Election Commission

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"Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to allow themselves to change the law." – ***Former US Supreme Court justice, John Paul Stevens***

This week almost all media failed in their duties, as did the US Supreme court a decade ago, to bring you the true and most important- and unreported- story of this generation in American election politics.

It is now ten years since the United States Supreme Court vacated its duties regarding the US constitution, particularly regarding election law. The American voter now steamrolls towards another mega-money election as a result of this legal skullduggery- *if not treason*– willfully created by a divisive majority within a constitutionally ambivalent Supreme Court.

Supreme Court justices rarely, if ever, speak within their carefully crafted written opinions in a manner that incorporates strong emotion. One of the most notable exceptions in decades came with eloquence and outrage from the pen of thirty-five-year veteran court justice, **John Paul Stevens**. The dissent he authored can, in review, be considered as a scathing indictment of the modern court. Steven's dissenting opinion on the landmark **CITIZENS UNITED v. FEDERAL ELECTION COMMISSION**, better known as *"Citizens United,"* tells the story of the cunningly crafted sell out by this third branch of government and of… *the day the US Supreme court made corporations into people.*

This week marks that day on Jan 21, 2010, when the incredible decision in *Citizens* became public. Steven's decades on the SCOTUS bench had spanned seven presidencies and nine national elections and witnessed dramatic changes in American social history and the make-up of the court itself. While reading his fifty-seven-page dissent, written at his request on the behalf of Sotomayor, Breyer, and Ginsburg, there is almost a desperation within the incredibly well-crafted reasoning and legal precedents that he presents. His becomes a chronicle of the final vestige, via *Citizens*, of any remaining independence or constitutional respect by the court.

In reading Steven's dissent, one feels his words as a howl of outrage only restrained by the written word. Stevens' dissenting opinion exposes that this court has implicitly sold its soul and its legacy to the same corporate masters as the corporately controlled US Congress and the Presidency.

The story provided within Steven's bold dissent shows why the results of *Citizens United* were far more divisive than the mere decision itself. For, within this story is the

behind the scenes legal machinations of a court thus forever steeped in corporate influence; a court that first dutifully stepped up to court bench with one set of intentions. These had nothing to do with the US constitution or justice.

More importantly, Stevens' dissent is the prescient story of why this court, in its current make-up this term will now, this very month rule- *very predictably*– on six of the biggest landmark cases in many years. The American citizen should be greatly concerned since Steven's dissent was more important than a mere examination; his dissent foretold the America of this day. One beholden *only*to corporate interests.

As Steven's so succinctly and satirically suggests as the implicit ludicrous ruling in *Citizen's United,*

"*Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech. "*

The Immaculate Conception

To comprehend the ultimate constitutional treason by America's highest court it is also necessary to follow the chronology of legislation and precedent of the previous court decisions in the cases of *First National Bank of Boston v. Bellotti* (1978*), Buckley v Valeo* (1976), *Austin v. Michigan Chamber of Commerce,*(1990), *McConnell v F.E.C.* (2003) and the congressional legislation contained in the Tillman Act, The Taft- Hartley Act, the Federal Election Campaign Act[FECA] and section 203 of the Bi-Partisan Campaign Reform Act [BCRA].

Prior to the SCOTUS conceiving America's soon to be born corporations, way back in 2008, a small pro-republican conservative lobbying firm knows as *Citizens United* had then produced and wanted to show a documentary about Hillary Clinton. They attempted to do so within weeks of the Democratic convention on local broadcast television. In keeping with multiple previously established congressionally legislated laws restricting this type of coercion, the D.C. District Court, ruled that this was a violation of the 2002 BCRA (specifically sect.203) also known as the McCain-Feingold Act. Regulations, then, prohibited corporations and unions from funding *"electioneering communications"* about a political candidate within 30 days of a primary or 60 days of a general election.

And, that was, supposedly, that. However, here is where the plot begins.

It took a divisive court just two years to craft a path that would allow the view of five co-conspirator justices to outvote the other four. In doing so, this majority pushed the Supreme Court to interfere with more than a century of ongoing, well crafted, and established election law and thus rule in favor of corporations. In overturning the appellate court's affirmation of the lower court's decision in *Citizens United v. FECthese five justices effectively ruled*that corporations, including those that are for-profit, can spend unlimited amounts of money on *"electioneering communications."*

Communications, in all its forms, is the keyword. Stevens:

> "A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express

> distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, banning all corporate contributions to candidates."

The Tillman Act was a natural populist reaction to the run-away laissez-faire capitalism of the late 19th century that had, similar to this day, taken over functional control of the presidency and congress. But this legislation was just the beginning. Although it stood virtually unchanged for decades, congress slowly defined, if not watered down, the Tillman Act with new legislation to allow more and more corporate campaign funding to enter elections. However, congress maintained essential corporate restrictions each time.

Stevens, referring to this past, cites a report by the 1906 59th congress and its initial legal response to the rational in creating the Tillman Act:

> "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favour of the general purpose of this measure. It [the Tillman Act] is in the interest of good government and calculated to promote purity in the selection of public officials."

He adds to this comparison President Roosevelt's 1905 annual message to Congress when he too bolstered the need for these protections, declaring:

> "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts."

The Taft-Hartley Act of 1947 is of special significance to the eventuality of *Citizens* since at that time as well, more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions but independent ones.

Despite this, corporations quickly circumvented Taft- Hartley and the Labor Management Relations Act [LMRA] of 1947. Notes Stevens*, "The bar on contributions 'was being so narrowly construed' that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means."*

Corporate regulations were ultimately defined within the Federal Election Campaign Act (FECA) of 1971 which was eventually slightly modified in 1974 as a reaction to Watergate. This was a comprehensive attempt by Congress, both the House of Representatives and the United States Senate, to regulate how the candidates for the presidency and Congress raised campaign money and reported those funds. FECA provided regulation of the four greatest concerns: 1) the size of contributions to political campaigns, 2) the source of such contributions, 3) public disclosure of campaign finance information, and 4) public financing of presidential campaigns.

Stevens points out how entrenched were the many existing corporate election regulations even before FECA:

> "By the time Congress passed the Federal Election Campaign Act (FECA) in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that... in Buckley,424 U. S. 1**, no one even bothered to argue that the bar as such was unconstitutional."** [Emph. Added]

Four years later, in *Austin*, 494 U. S. 652, the court next articulated whether corporations could be barred from using general treasury funds to make independent expenditures in support of, or opposition to, candidates. Even at this time, the matter was very easily settled in keeping with the already referenced precedents. In recognizing the importance of *"the integrity of the marketplace of political ideas"*in candidate elections, the court noted the obvious: that corporations have *"special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets,"*—that allow them to spend prodigious general treasury sums on campaign messages that have *"little or no correlation"*with the beliefs held by actual persons. So, *Austin,* too, prevailed.

For more than twenty years Austin remained established law and was repeatedly affirmed in the subsequent court decisions, most importantly in apparent finality within *McConnell*, 540 U. S. 93. Here, the court upheld very similar provisions that were eventually challenged in *Citizens United.* McConnell was also a reaction to a corporate challenge to section §203 of the BCRA whichCongress had crafted in response to a problem created by the challenge in the Buckley *case*. The *Buckley* Court had incorrectly construed FECA's definition of prohibiting *"expenditures"* narrowly to avoid any problems of constitutional vagueness, holding it applicable only to *"communications that expressly advocate the election or defeat of a clearly identified candidate."*

Congress passed §203 of the BCRA to address this circumvention, once again prohibiting corporations and unions from using general treasury funds for electioneering communications that *"refe[r] to a clearly identified candidate."*

*St*even's points out the rock-solid conference of these many past precedents and legislation by next referring to the corporate challenge to election laws in *McConnell,* which was so easily dispatched by the court:

> "...in McConnell..., we found the question '**easily answered'…** We have repeatedly sustained legislation aimed at **'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'**

In total, the subsequent decision in *Citizens* is shown by Stevens again and again as an incredible violation of established law and sound constitutional reasoning. Inciting *Bellotti,* which the majority used as a primary rationale to overturn *Citizens,* Steven's shows without a doubt that the majority completely turned Bellotti on its head to serve their unfathomable reasoning,

> "...it could not have been clearer that Bellotti's holding **forbade** [the] distinctions between corporate and individual expenditures like the one at issue [in Citizens]. The Court's reliance is odd…the opinion [Bellotti] **squarely disavowed the proposition for which the majority cites it [in Citizens].**

This is, of course, an outrageous reading of Bellotti by the majority. Stevens also points out that the *Bellotti* Court confronted a dramatically different factual situation from the one in *Citizens.* Calling the majority's logic in *Citizens* further into question, Stevens adds:

> "Austin and McConnell, then, sit perfectly well with Bellotti. Indeed, all six members of the Austin majority had been on the Court at the time of Bellotti**, and none so much as hinted in Austin that they saw any tension between the decisions."**

Reiterating respect for the aforementioned long list of historical precedent, Stevens continues:

> "Continuously for over 100 years...[the court has ruled against]threats to electoral integrity... posed by large sums of money from corporate or union treasuries. Time and again, we have recognized these realities in approving measures that Congress and the States have taken. **None of the cases the majority cites [in Citizens] is to the contrary."**

Stevens points out that, at the time *Citizens United* brought its lawsuit, the only types of speech that could be potentially regulated under BCRA §203 were*: (1) broadcast, cable, or satellite communications; (2) capable of reaching at least 50,000 persons in the relevant electorate; (3) made within 30 days of a primary or 60 days of a general federal election; (4) by a labor union or a non- MCFL, non-media corporation;(5) paid for with general treasury funds; and (6) "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."*

Hence, Stevens cuts the matter to the bone:

> "So let us be clear: Neither Austin norMcConnell held or implied that corporations may be silenced; the FEC is not a "censor"; and in the years since these cases were decided, corporations have continued to play a major role in the national dialogue**. … the majority's incessant talk of a 'ban' aims at a straw man."**

But this was a court predisposed to fiction, a court that was not interested in correct legal reasoning, precedent, congressional intent, or justice.

Five men had an inside job to do.*So… the Supreme Court Plumbers began their work.*

The Corporate Mid-Wife

"Stare Decisis" (*Latin*): *'Stand by Things Decided'."*

With repeated corporate attempts at increasing their control on US elections thwarted by the court in the public interest, the Plumbers had a problem. To confirm their plot they needed a case to overturn however, *Citizens* had not, as was necessary, petitioned the court for review.

But **Chief Justice John Roberts** saw opportunity buried within Citizens; if he could only get the case before the bench without a request for standing by a petitioner. So, as went one

hundred years of election law precedent, so easily went another two hundred years of procedural precedent along with it.

Roberts' initial problem was the long-established universal court tenet of *Stare Decisis*.

Applied to the SCOTUS, this functionally means, that other than in exceptional circumstances, the court will not provide a review of any law or legislation unless asked to do so by a losing litigant at the lower court and only then if it can show a *"facial"* or specifically constitutional challenge. *'Citizens'* did not *apply to the court nor provide a legally correct facial challenge.*

So, the Plumbers cast these legal obligations to the winds as well.

Citing established law while referring to Stare Decisis, Steven's provides,

> "The appellant, in this case, **did not so much as assert an exceptional circumstance,** and one searches the majority opinion in vain for the mention of any. **That is unsurprising, for none exists.**"

One of the reasons that Stare Decisis is so important is that federal and state legislatures need to operate with the confidence that they can create their own laws within the tenets of the US constitution in an autonomous manner without concern for external intervention by the courts unless constitutionally necessary, i.e., the states do not need court approval before they enact legislation.

Stevens adds:

> "Stare decisis protects…the elected branches to shape their laws in an effective and coherent fashion. Today's decision [Citizens applied Stare Decisis] takes away a power that we have long permitted these branches to exercise."

As an example, in*, FEC v. National Right to Work Comm.,* 459 U.S. 197 (1982), the court had previously unanimously ruled that legislatures are entitled to decide *"that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context.*

Regarding the majority's failures within Stare Decisis, Stevens assesses:

> "… the majority opinion…. says almost nothing about the standard considerations we have used to determine stare decisis value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. "

The motivation of Roberts in bringing Citizen's before the court in violation of Stare Decisis had one primary goal, overturning Austin and by extension BCRA sect 203.

> "The only relevant thing that has changed since Austin and McConnell is the composition of this Court. Today's ruling thus strikes at the vitals of stare decisis…"

In the end, the Court's consideration of *Citizens* said Stevens, with regard to *Austin* and *McConnell,* comes down to *"nothing more than its disagreement with their results."*

Steven's continues:

> "Virtually every one of [the majority's] arguments [in Citizens] was made and rejected in those cases [McConnell, Austin, Bellotti, Buckley] and **the majority opinion is essentially an amalgamation of resuscitated dissents."**
>
> "The only relevant thing that has changed since Austin and McConnell is the composition of this Court."

Now that the Plumbers had their much needed constitutional skeleton key of *Citizen*s finally in hand- *after their wholesale ignorance of Stare Decisis*– it was time for the five to go to work.

Birthin' the Baby

*"Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."- **Stevens.***

Oh, and change it they did, throwing out along with Stare Decisis one of the most basic legal principles: the requirement of a facial challenge: the assertion of an error in the correct application of constitutional law within an appellate court ruling so that it may be brought to the court. *Citizen* never made this facial challenge because it never petitioned the court for review.

So, the plumbers built their own, once again, out of straw.

This is not merely a technical defect in the Court's decision. Stevens continues his attack on the use of *Citizens*by next looking at the purely procedural problems and lack of a facial challenge, that would, without the assistance of the Plumbers, never have been heard by the court. These were serious errors.

Notes Stevens:

> "The jurisdictional statement [of Citizens] never so much as cited Austin. In fact, not one of those questions raised an issue based on Citizens United's corporate status and never sought a declaration that BCRA §203 was facially unconstitutional …**instead it argued only that the statute could not be applied to it because it was "funded overwhelmingly by individuals."**

So, *Citizens* was not asking for Austin to effectively be struck-down; neither was it asking to be considered a person. This was entirely the work of the Plumbers, since:

> **"Citizens United expressly abandoned its facial challenge, (May 16, 2008), and the parties stipulated to the dismissal of that claim."**

Yet, to serve their true purpose of overturning *Austin* the majority incredibly suggested that,

> "even though [Citizens] expressly dismissed its facial challenge, Citizens United nevertheless preserved it—not as a freestanding "claim," **but as a potential argument**in support of "a claim that the FEC has violated its First Amendment right to free speech."

To this, Steven cryptically assesses this reasoning of this irrational, incorrect, and outrageous legal premise, since;

> "There would be no need for plaintiffs to argue their case; they could just cite the constitutional provisions they think relevant, and leave the rest to us."

Therefore;

> "There is no legitimate basis for resurrecting a facial challenge that dropped out of this case 20 months ago."

Making the majority decision all the more divisive, there were other remedies that the majority might have considered if it were not going for the big prize of instead smashing *Austin* by using *Citizen's*. Said Stevens,

> "The Court operates with a sledgehammer rather than a scalpel when it strikes down one of Congress' most significant efforts [BCRA] to regulate the role that corporations and unions play in electoral politics. **It compounds the offence by implicitly striking down a great many state laws as well.**
>
> "It is all the more distressing that our colleagues have manufactured a facial challenge **because the parties** [in Citizens]**have advanced numerous [alternate] ways to resolve the case."**

Stevens continues that the problem goes still deeper, for the Court ignores these possibilities on the basis of pure speculation.

Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court by overturning *Citizens* negated Congress' efforts *"without a shred of evidence on how §203 or its state-law counterparts have been affecting any entity other than Citizens United."*

> "The fact that a Court can hypothesize situations in which a statute might, at some point down the line, pose some unforeseen as-applied problems, **does not come close to meeting the standard for a facial challenge".**

So, the Plumbers, within their ruling that overturned *Citizens*, allowed for a facial challenge that did not exist in order to adulterate the supposed review of *Citizen* while in reality being after *Austin.*

Unbelievably, the work of the Plumbers and their sudden legal acumen would become more egregious than thus far described in Stevens' parable.

Spanked into Life

"The novelty of the Court's procedural dereliction and its approach to stare decisis is ***matched only by the novelty of its ruling on the merits."***

The *Citizens* majority ruling, once it took the form presented by the Plumbers, rested on several premises.

First, the Court claimed that *Austin* and *McConnell* had *"banned"* corporate speech.

Second, it claimed that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation.

Third, it claimed that *Austin* and *McConnell* were radical outliers in the history of First Amendment tradition applied to campaign finance jurisprudence. Stevens, within the next thirty-plus pages of his dissent, thrashes all of these legally irrational contentions to their core, thus exposing beyond doubt that each premise used by the majority is incorrect.

Within his succinct analysis Stevens provides three avenues of thought that the majority could have taken if it had been reviewing *Citizens* and not *Austin* with the reminder that the majority has transgressed yet another *"cardinal"* principle of the judicial process:

> "[I]f it is not necessary to decide more, it is necessary not to decide more," PDK Labs., Inc. v. Drug Enforcement Admin., 362 F. 3d (CADC 2004)

In lieu of this fundamental precedent, Steven highlights two of the narrower grounds of the decision that the majority had bypassed and that would have preserved BCRA and *Austin* while appeasing *Citizens.*

First, the Court might have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an *"electioneering communication"* under §203 of BCRA.

Second, the Court could have expanded the *MCFL v F.E.C.* rulingto cover §501(c)(4) nonprofits that accept only a de minimis amount of money from for-profit corporations since, *"Citizens United professes to be such a group."*

> "…the Court could have easily limited the breadth of its constitutional holding had **it declined to adopt the novel notion that speakers and speech acts must always be treated identically—and always spared expenditures restrictions…"**

Stevens' examples and harsh legal examination is meant to show that there were principled, narrower paths that the court could have taken if the Plumbers had been serious about traditional judicial restraint. To this, Stevens again provides precedent…

> "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 864 (1992).

…to bolster his opinion that:

> "The conceit that corporations must be treated identically… is not only inaccurate but also inadequate to justify the Court's disposition of this case…**I emphatically dissent from its principal holding."**

Steven provides a final, all-encompassing comment on this two-year plot to circumvent BCRA sect 203 and *Austin*by way of *Citizens*.

> "The only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain Austin**, is** [the majority's] **disdain for Austin**."

The Child Grows Fangs

In looking at the future as resultant to *Citizens*, Stevens opined ten years ago;

> "Going forward, corporations and unions **will be free to spend as much general treasury money as they wish …**thus dramatically enhance[ing] the role of corporations and unions—and the narrow interests they represent…in determining who will hold public office."

With this, Stevens foresaw, as all the great justices have done, the future of his America applied to any landmark decision. Long gone, even in mind, are the carefully crafted rulings of a Warren, Powell, Marshall, Black or Douglas.

When the Plumbers ruled to overturn *Citizens,* and effectively BCRA sect. 203 and *Austin*, this set a new precedent. Post-2000 rulings would also help to spawn the advent of the super PACs, which, thanks to the Plumbers and *Citizens*, can accept unlimited contributions from corporations, unions and other groups.

In the many two, four or six-year election cycles since *Citizens United*, the *"dark money"* political nonprofits have increasingly unleashed unprecedented amounts of money in order to influence voters. This has given rise to this massive funding being used to propagate favored candidates at all levels of government including the local judgeships as well as its use to defeat opposition candidates as well.

Underhandedly, post- *Citizens* political party leaders helped establish many of these super PACs, so as to effectively and secretly funnel unreported money from a growing number of well-connected outside groups. This result, as intended by the Plumbers, blurred the lines between super PACs and candidates.

Today, super PACs far surpass national party committees as the top political spending groups. In 2018, the top three outside spending groups were RNC connected super PACs. The Congressional Leadership Fund ($136 million), Harry Reid-connected Senate Majority PAC ($112 million) and the Mitch McConnell-linked Senate Leadership Fund ($94 million) were just three of these election war chests.

Although super PACs must disclose their donors, they can accept unlimited contributions from dark money nonprofits and these *are not* required to disclose their donors. Therefore, a super PAC can simply list the nonprofit as the donor, keeping the identity of the actual sources of funding secret.

Another lasting impact of *Citizens United* is the rising influence of megadonors. In 2010, the top individual donor gave out $7.6 million to candidates and groups. That number shot up in 2012 when Sheldon and Miriam Adelson by themselves gave out nearly $93 million. Aiding these scores of mega-donors was the 2014 *McCutcheon v. FEC* Supreme Court ruling that removed limits on how much an individual donor can give in an election cycle.

Constitutional Measles

In a matter of days, the SCOTUS will reveal its annual court decisions. The docket this year is one of the most important in decades since the issues that the court will decide are some of the most duplicitous in decades. These include DACA, abortion restrictions, gun rights, state funds for religious schools, and two Separation of Powers issues about Trump's finances.

With Steven's saga of *Citizens* and the Supreme Court Plumbers now firmly in mind, American society should be very concerned. The constitution in these upcoming decisions, as was the case with *Citizens,* will not be of concern legally, but merely theologically.

In the past ten years, the make-up of the SCOTUS has turned even further away from constitutional obligations into the realm of the corporately ideological. No longer is there a perceived swing vote as there was with justice Kennedy and the majority now sits firmly in one camp of five-plus justices, a camp that former Chief Supreme Court Justice, Earl Warren would have blasted as he does today in absentia having declared a half-century ago:

> **"…the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."**

But, that was a *long* time ago.

So in conclusion, while considering that the SCOTUS decisions to be rendered in the coming days are- post-*Citizens*– far too predictable, the thus utterly disenfranchised voter might do well to consider this aforementioned parable and the words so carefully crafted by this nation's third longest-serving justice when he said in sardonic finality:

> "[Before Citizens]… **few outside the majority of this Court would have thought [that America's] flaws included a dearth of corporate money in politics."**

Mere months later, as the aftermath of *Citizens* swept the country, United States Supreme Court Justice, John Paul Steven, the second oldest justice in US history at age ninety, retired.

His dissenting opinion, his cutting critique and its implicit indictment of the unconstitutional- if not mercenary- direction of its majority was the very last court opinion to come from this great man's pen.

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Few knew this story. Few understand the true gravity of *Citizens United*. Fewer realize how much this case was the bellwether of an America that the voter must again attempt to overcome in mere months.

The Plumbers of the Watergate failed. They were brought to justice, convicted, vilified and unwittingly toppled a corrupt president who considered himself above the law.

The Plumbers of today, those who walk the hallowed halls of the Supreme Court building, they, however, will continue to whisper with impunity their constitutional heresy from within the obfuscation of their specious and corporatist landmark decisions.

These Plumbers of today? They have already done far more damage than the gang of '72 could have ever imagined.

A president? *Shit...*

These guys took down a constitution...*and a country!*

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