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FIRST AMENDMENT AND CAMPAIGN FINANCE REFORM AFTER CITIZENS UNITED

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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FIRST AMENDMENT AND CAMPAIGN FINANCE REFORM AFTER CITIZENS UNITED

WEDNESDAY, FEBRUARY 3, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:08 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Watt, Scott, Delahunt, Johnson, Baldwin, Cohen, Jackson Lee, Sensenbrenner, King, Jordan, and Gohmert.

Also present: Representative Smith, ex officio.

Staff present: (Majority) David Lachmann, Subcommittee Chief of Staff; Elizabeth Kendall, Counsel; and Paul Taylor, Minority Counsel.

Mr. NADLER. Good morning. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

I will start by recognizing myself for an opening statement.

Today's hearing examines the Supreme Court's recent decision in the case of *Citizens United v. FEC*. It is a case which poses a great threat to the integrity of our democratic system.

The subcommittee will examine the Court's reasoning, the scope of the decision, its likely impact and what options Congress may have at its disposal remaining to deal with the problems we are likely to encounter now that the Court has declared open season on democracy.

One of the things that strikes me, and I am sure that my colleagues on the other side of the aisle who are constantly assailing judicial activism will agree, is the extent to which an extraordinarily activist Court reached out to issue this decision.

The justices answered a question they weren't asked in order to overturn a century of precedent which they had reaffirmed only recently. The only real change has been one of Court membership.

The Court sought to decide the case on the broadest constitutional grounds when it could easily have resolved the question on much narrower grounds.

Finally, the Court substituted its judgment of what constitutes corruption in politics for that of the democratically representatives in the Congress and in most of the State legislatures who have ac-

tually participated in the process and who understand firsthand the corrosive effect of money in politics. The absence of Justice O'Connor, the only former legislator on the Court, may have made a real difference in this case.

Chief Justice Roberts' concurrence in particular was a virtual manifesto for the judicial activists looking to overturn—looking for an excuse to overturn longstanding precedent even when those precedents weren't properly before the Court.

It can be considered a warning shot and it bodes ill for the future and certainly ill for stare decisis in the future. His opinion hardly reads like the words of an umpire who is simply following precedent in deciding cases as narrowly as possible.

In fact, it certainly doesn't sound like the man who presented himself to the Senate at his confirmation hearings. In fact, it certainly raises questions as to the truthfulness of his testimony at the confirmation hearings.

Justice Stevens stated the basic issue clearly in his dissent, "The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

"In the context of election to public office, the distinction between corporate and human speakers is significant. Although they may make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by non-residents, their interests may conflict in fundamental respects with the interests of eligible voters.

"The financial resources, legal structure and instrumental orientation of corporations raises legitimate concerns about their role in the electoral process. Lawmakers have a compelling constitutional basis, if not a democratic—if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races."

I would even wonder, in light of the majority's finding that a corporation and a natural person are the same, et cetera, what this means for our antitrust law.

Is it against the Constitution for Congress to decree, for example, that corporations may be too big, that they must be broken up under certain circumstances, without having found them guilty of serious felonies?

We couldn't impose a death penalty on an individual just because we didn't like his or her influence. Are we now going to face that with corporations? That is the implication.

Former Justice O'Connor discussed the threat to the integrity of the judiciary in a recent speech at Georgetown University Law Center. She said, "This rising judicial campaigning makes last week's opinion in *Citizens United* a problem for an independent judiciary. No State can possibly benefit from having that much money injected into a political campaign." And she was, of course, referring specifically to a judicial political campaign.

So now that corporations, including those controlled by foreign interests, have the same rights as any voter, what is in store for our democracy? What other rights will the Court confer on corpora-

tions? Perhaps one day we will have Exxon as a colleague here in Congress. Many would say we already do.

And what can Congress, within the bounds set by the Court, still do to control the influence of the monied aristocracy in our political process?

I look forward to the testimony of our witnesses on this very important issue, and I yield back the balance of my time.

The Chair now recognizes the distinguished Ranking Member for 5 minutes for an opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Guess what? I don't agree with his analysis at all. And prior to the——

Mr. NADLER. Right. Yes.

Mr. SENSENBRENNER [continuing]. Prior to the Supreme Court's decision in *Citizens United v. FEC,* Federal law prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech expressly advocating the election or defeat of a candidate for Federal office.

Those formerly illegal electioneering communications were defined as any broadcast, cable or satellite communication that refers to a clearly identified candidate for Federal office and is made within 30 days of a primary or 60 days of a general election.

The Supreme Court concluded that these laws constituted an outright ban on speech backed by criminal sanctions and in clear violation of the First Amendment.

In particular, the Court stated that under that unconstitutional law, the following acts would be felonies: The Sierra Club runs an ad within the crucial phase of 60 days before the general election that exhorts the public to disapprove of a congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a presidential candidate in light of that candidate's defense of free speech.

The Court concluded that these prohibitions are classic examples of censorship and appropriately struck down the law. Now we are going to hear about all sorts of attempts to undercut the Supreme Court's ruling by statute.

But the Supreme Court in its decision made clear that any alternative regulations that produced a chilling effect on free speech would also be unconstitutional, including any alternative that requires lengthy legal proceedings to determine what sort of speech a corporation can or cannot engage in during Federal elections.

As the majority wrote, "It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short time frames in which a speech can have influence. The speaker's ability to engage in political speech that could have the chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor perhaps the resources to carry on."

So in expressing its appropriate concern for alternative regulations that would chill free speech, the Court has already gone a long way toward pouring cold water on a lot of proposals made by opponents of the decision to further limit free speech.

The hysterical cries in some quarters, maybe here today, regarding the Supreme Court's decision are in stark contrast to the everyday unconstitutional—uncontroversial, I am sorry, democratic elections that have been held in 26 States representing 60 percent of the Nation's populations that already allow corporate independent expenditures in State elections.

The result will be no different when the same rules are applied that were already applied in 26 States in their State elections when they are applied to Federal elections.

The *Citizens United* case has also caused some opponents of the decision to focus their attention on another piece of Federal legislation called the Fair Elections Now Act, which would use tax dollars to fund congressional campaigns in what amounts to a hundreds of millions of dollars taxpayer bailout of politicians.

This solution to what opponents call the problem of free speech is a red herring, since corporations will still be able to make independent expenditures regardless of how their candidates fund their campaigns.

This would also make the White House red-faced, as President Obama became the first presidential candidate in history to forego public financing in the general election because he expected he could raise millions more without it, and did.

With those concerns in mind, I look forward to hearing from all of our witnesses today and yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I normally ask that other Members submit their statements for the record.

I understand that a number of Members have asked that they be able to deliver an opening statement, and I will recognize them as they seek recognition, but first I will recognize the distinguished Ranking Member of the full Committee, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman, for recognizing me.

In 2002, Congress passed Federal campaign finance restrictions that I, along with most Republicans, opposed because we felt they were unconstitutional.

That legislation limited how much money corporations, nonprofits and unions could spend on television ads that support or oppose a Federal candidate 30 days before a primary election and 60 days before a general election.

Corporations, nonprofits and unions are simply collections of individuals who have pooled their financial resources to pursue common goals. The law Congress passed severely limited these groups' ability to voice their political opinions.

Last month the Supreme Court held that the political speech restrictions in that law are unconstitutional under the First Amendment.

As the Court stated, political speech is "indispensable to decision-making in a democracy," regardless of whether the speech comes from an individual or from a corporation. In other words, free

speech is free regardless of whether it is exercised by one person or collectively by 100 people.

The law the Supreme Court struck down also exempted media corporations from those restrictions. This gives the national media's well established bias free reign during elections while muzzling the voices of many citizens.

The national media largely criticized the Supreme Court's ruling. The New York Times called it disastrous and the Washington Post called it dangerous.

An exception was my hometown newspaper, the San Antonio Express-News, which pointed out the unfairness of campaign finance laws restricting the free speech of all organizations except the media.

As the Express-News stated, while the media could make endorsements right up to the day of an election, all other organizations were restricted in their opinions. As the editorial explained, it makes no sense to restrict speech prior to an election, arguably the period when the exercise of political speech is most important.

The national media should acknowledge that free speech is free regardless of whether it is exercised by newspaper editorial boards or by everyday Americans.

As the Supreme Court determined, the views expressed by media corporations often "have little or no correlation to the public support" of those views. As such, other corporations should be treated no differently than media corporations.

Finally, some opponents of the Supreme Court's decision in support of free speech, including the President, claim the decision would open the floodgates to foreign influence in American elections. Not true, as someone said recently.

The Supreme Court's decision actually kept in place current laws that prohibit foreign corporations from influencing American elections.

Under current law, a foreign national may not directly or indirectly contribute to a candidate or party or pay for a broadcast, cable or satellite communication that refers to a Federal candidate before an election.

Current Federal Elections Commission regulations, untouched by the *Citizens United* case, also provide that a foreign national may not direct, control or indirectly participate in the decision-making process of any corporation, labor union or political committee in its election-related activities. Obviously, the floodgates to foreign influence can't be opened if the dam is still in place.

The Supreme Court's decision rightly restores to Americans the right to voice their opinions during an election and sends a strong message to future congresses that attempt to limit free speech. I hope this Congress hears that message loud and clear before considering President Obama's call to reinstate unconstitutional restrictions on free speech.

Mr. Chairman, on the way to yielding back, let me say I am trying to get to the House floor, so I will miss at least part of the witnesses' testimony, and that I regret. And I will yield back.

Mr. NADLER. I thank the gentleman.

Does any other Member seek recognition?

The gentleman from Iowa?

Mr. KING. Thank you, Mr. Chairman. And I will make this just a brief statement. I echo the statement made by the Ranking Member of the full Committee and the Ranking Member of the Constitution Subcommittee.

I would make this point, that I think was the most important point, which is we have gone along since 2002 without hearing a complaint that, at least I recall from the Democrat side of the aisle, about the corporate speech of the major news media.

And the major news media in this country has actively been seeking to influence elections. I can recall a newspaper that was very involved in a presidential race in Iowa, and when I looked at the returns county by county, and it looked like it reflected the distribution of that newspaper almost exactly.

And when I wrote a letter to the editor and said, "This is the result of what you have been doing by your partisan and unobjective approach," the editor's response to me was, "I hope so. It was my intent to influence the election."

And I think we all have some kind of experience in that fashion. It is hard to convince the American people, Mr. Chairman, that the news media has not been involved in seeking to influence elections most aggressively.

And so I do not understand the aversion to allowing corporate speech in a broader category than those people that have full access to the news media and can spend their dollars more effectively than perhaps any other corporate structure.

And in addition, I would point out that I think there is something we might get to see here that is a difference. I don't think it is going to be a dramatic change with the Supreme Court decision that immediately makes a shift.

But when I start thinking about corporations that have taken positions supporting legislation that is anathema to their corporate interests, and I wonder why—and it is because they are trying to mitigate the legislative damage that might be brought upon them.

And the cap and trade legislation is a—I think an excellent case in point where the balanced scales of all of those entities that were against it began to be convinced that something was going to pass, so they lobbied for their carve-outs, and slowly a cap and trade bill passed the House of Representatives.

And I believe that, on balance, it is against the interests in this country, and we have that disagreement, Mr. Chairman. But my point is corporations now under this decision, *Citizens United*, may be more bold in their involvement.

They may decide they want to engage in this speech within that 60-day window more aggressively, and perhaps that will be a way that legislation that I believe is bad for America is prevented from coming to passage.

So it is going to be a very interesting hearing. I appreciate you holding this. I appreciate being recognized. And I yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

I now yield—I now recognize, rather, the gentleman from South—North Carolina.

Mr. WATT. Thank you. Thank you for elevating me back to North Carolina. Don't say South Carolina.

Let me thank the Chair for holding the hearing first, and I am looking forward to the witnesses' testimony. I have not read the case, and I come down kind of between the Ranking Member and the Chair in my initial reactions to this.

I have a lot of ambivalence on this issue. Some of you have heard me say on prior occasions that I learned more about the First Amendment and free speech in one experience than I learned from my constitutional law classes in law school when my senior law partner sent me to a county to represent some Native Americans who had been demonstrating with tomahawks and other native paraphernalia.

And I got there and, of course, they had been arrested for various things—resisting arrest, parading without a permit, this and that. And I got there and found that what they were demonstrating about was that they didn't want to go to school with black kids.

And so I rushed back several counties over to my law office and confronted my senior law partner about why he would send me, an African American, to represent the Native Americans who were demonstrating against going to school with black kids, and he looked at me without even hesitation and said, "Don't you believe in the First Amendment?"

I think I learned something there that kind of permeated the law firm that I came out of, that even when you disagree with what people are saying, you have to tolerate it and shore yourself up and keep moving if you really believe in free speech.

And I guess it was out of that experience that our law firm went on to represent the Ku Klux Klan in several demonstration cases, even though we were vigorously opposed to everything they stood for.

So I take the First Amendment and free speech very seriously, but I do want to make three quick points about this argument. First of all, I think it is a mistake for any of us to treat this as a partisan divide. It is not a partisan issue.

You know, sometimes this Democratic President may benefit from it. Sometimes prior Republican Presidents may have benefitted from it. So you know, speech is not Republican or Democratic. It is speech. It is First Amendment right. And we need to keep the partisan rhetoric out of this discussion. I think that is a serious mistake that some of my colleagues are making.

Second, I am concerned that while I am a strong, strong believer in free speech and the First Amendment, that the courts—or the Supreme Court seems to have equated speech and money as if they were one and the same. Speech is one thing. Money, just because you have it, doesn't necessarily give you any greater free speech rights.

Next, I am concerned that the Supreme Court seems to define the rights of corporations as being identical to the rights of individuals. And I would like to hear the panel's evaluation of that issue.

And finally, I have some very serious concerns that the Court has engaged systematically on taking over prerogatives that the legislative branch should be able to exercise, and that these people who say that they don't believe in legislating from the bench have been the ones who seem to be most guilty of doing exactly that.

I can't even remember, Mr. Chairman, how I voted on McCain-Feingold, to be honest with you. I haven't gone back to check. Remember, I had some serious reservations about it, about the free speech aspect of it, and I may have resolved those concerns to vote for it.

Mr. NADLER. I think you may have voted for McCain and against Feingold, or maybe the other way around. [Laughter.]

Mr. WATT. Might have been. But I don't know that that is the issue. I think this is a serious issue, and we need to treat it so, and that is why I came today, to listen to this outstanding panel. Maybe I will have a more fixed opinion by the end of the day about where I come down on this very delicate issue.

But maybe that sounds like I am somewhere between the Chairman and the Ranking Member, who seem to be—seem to have pretty vigorous opinions, opposite sides. So I am here to listen, and I appreciate the Chairman indulging me.

Mr. NADLER. Thank you.

Does anyone else seek recognition? Very good.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing at any time, although I do not intend to call a recess unless we are interrupted by a vote.

We will now turn to our panel of witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turns begin will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

Our first witness is Professor Laurence Tribe, who is the Carl M. Loeb University Professor at Harvard Law School, where he has taught since 1968. He has argued numerous times before the Supreme Court, where he also served as a law clerk to Justice Potter Stewart.

He received an A.B. summa cum laude from Harvard College and a J.D. magna cum laude from Harvard Law School.

Monica Youn—and I hope I am pronouncing that correctly—Monica Youn is the director of the Campaign Finance Reform and Money in Politics Project of the Brennan Center for Justice. She served as counsel of record for the center's Supreme Court amicus brief in *Citizens United v. FEC.*

Prior to joining the Brennan Center, she worked in private practice and also served as a law clerk to Judge John T. Noonan, Jr. in the United States Court of Appeals for the Ninth Circuit. Ms. Youn received her J.D. from Yale Law School, her master in philosophy from Oxford University, where she was a Rhodes Scholar, and her B.A. from Princeton University.

Sean Parnell is president of the Center for Competitive Politics. Previously, Mr. Parnell was vice president for external affairs at the Heartland Institute in Chicago.

Prior to joining Heartland, he worked on political campaigns in Iowa, managed a successful congressional campaign, and served as finance director for a U.S. Senate race. Mr. Parnell received a degree in economics from Drake University.

Don Simon is counsel to Democracy 21. He is currently a partner at the firm of Sonosky Chambers Sachse Endreson & Perry, LLP where he specializes in litigation and administrative law.

From 1995 to 2000 Mr. Simon served as executive vice president and general counsel of Common Cause. In that capacity, he directed the legislative and legal programs for the reform organization. Mr. Simon received his B.A. magna cum laude in 1975 from Harvard College and his J.D. cum laude from Harvard Law School in 1978.

I am pleased to welcome all of you. Your written statements in their entirety will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less, although I am a little loose with the gavel on time.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses.

[Witnesses sworn.]

Mr. NADLER. Let the record reflect the witnesses answered in the affirmative.

You may be seated.

I now recognize Professor Tribe for an opening statement.

TESTIMONY OF LAURENCE H. TRIBE, CARL M. LOEB UNIVERSITY PROFESSOR, HARVARD LAW SCHOOL, CAMBRIDGE, MA

Mr. TRIBE. Thank you. Chairman Nadler, Members of the Committee, I am honored by your invitation that I testify this morning.

And with my prepared statement entered into the record, I will just touch briefly on where I believe the Court went wrong, why it matters, what Congress should do about it and why Congress needs to act quickly.

Where did the Court go wrong? In my view, the majority and concurring opinions are no match for Justice Stevens' 90-page dissent. He shows convincingly, even to someone who is a strong free speech believer, as I am, that the majority reached far beyond the issues actually presented, failed to justify tossing aside decades of precedent, and profoundly distorted both the original meaning and the evolving understanding of free speech.

Why does it matter? When ideological groups or corporate PACs collect and spend the money of those who want to support or oppose particular candidates—examples like the Sierra Club or the NRA or other PACs—corporations can focus hundreds of thousands of dollars on campaign ads, and that is exactly as I believe it should be, if that is how people want to spend their money on politics. That is how much—what they want to spend.

But when entire corporate treasuries become available for electioneering, even though the shareholders who own that money never entrusted it to management to use in that way, the amount that can be used to drown out individual voices artificially multi-

plies exponentially, given the trillions of dollars in corporate profits that suddenly become available.

A company like Exxon Mobil just needs to threaten that it will spend whatever it takes to defeat a candidate who fails to toe the line, and it can greatly improve the odds of getting its way.

Indeed, just the perception that that is going on breeds a degree of cynicism and distrust that can kill meaningful political participation and endanger viable self-government.

What should Congress do about it? First, I think Congress should start by guarding American elections from direct or indirect manipulation by foreign entities and foreign funding.

The majority in *Citizens United* emphasized that it didn't have that case before it. But of course, that didn't stop it from reaching out to decide lots of questions it didn't have before it.

The fact that it carefully tiptoed up to the water's edge and not beyond I think is a strong signal that the majority agreed with the Stevens dissent that the tradition of guarding against foreign influence in American politics would trump the majority's abstract theory that the identity of who is speaking or bankrolling speech makes no First Amendment difference. But the existing restrictions on foreign influence are riddled with loopholes and need to be tightened.

Second, I think Congress should enact legislation giving States permission to do what would otherwise violate the commerce clause—namely, protect their own State elections from manipulation by businesses and dollars from other States. That is something that many of the 39 States that elect their judges might well want to do.

Third, acting again under its commerce power, Congress should protect corporations—let me repeat that, protect corporations—doing business with government from being pressured to pay if they are going to play. It should do that by prohibiting such companies from spending money in connection with candidate elections.

Nearly 75 percent of the 100 largest publicly traded firms are Federal contractors. But there is no need for Congress to limit its protection of unfettered commerce to the Federal level because you do not need the Federal spending power to justify such a law.

It can be justified the way the Supreme Court has justified Hatch Act and other protections for employees whose employers or unions might otherwise pressure them into supporting causes that they do not endorse.

Fourth, I think Congress should give more meaningful protection to those who buy shares in for-profit companies or funds not in order to influence elections but in order to earn a profit. The *Citizens United* majority insisted that the procedures of corporate democracy could do the job. But the dissent showed how inadequate those procedures are at present.

The majority said fine but "the remedy is to consider and explore other regulatory mechanisms." I think Congress should take the Court up on its invitation and should adopt reforms requiring shareholder pre-approval for campaign expenditures by for-profit business corporations and by making it easier for dissenting shareholders to sue for corporate waste. My prepared statement spells that out in more detail.

Fifth, to protect both shareholders and voters, the disclaimer and disclosure requirements that the Court upheld 8–1 in *Citizens United* have to be tightened so that money cannot be funneled through shells with innocuous names like Citizens for Good Health and Clean Energy when the real source is Novartis or Mobil Oil.

And the CEOs of for-profit corporations that bankroll either positive or negative ads should have to own up to their responsibility under oath and certify on camera the business purposes of their political expenditures.

I see the light is on, but if I could go on for a few seconds, I would appreciate it, Mr. Chairman.

Sixth, even after *Citizens United*, the law bars corporate contributions to candidates and electioneering expenses that are coordinated with their campaigns. But the rules defining coordination are hopelessly fuzzy and loophole-ridden.

So a lot of de facto contributions can sneak under the wire as if they were independent. Waiting until the FEC acts is like waiting for Godot. Congress needs to codify the rules itself.

Seventh, public financing needs to be explored, things like the Fair Elections Now Act, but that is a far reach in terms of ever ultimately solving the problem, and we can't afford to wait.

That is the key point I want to leave with you. Why do we need to act now? The reason is that unless Congress adopts reforms like these before the November elections, large business interests, including those indirectly funded from overseas, may give us a Congress pre-selected with a view to opposing these various reforms, and then it will be too late to do what is needed to hold back the potentially distorting corporate flood.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Tribe follows:]

PREPARED STATEMENT OF LAURENCE H. TRIBE

***Citizens United* v. *Federal Election Commission*: How Congress Should Respond**

Prepared Testimony of Laurence H. Tribe*

House of Representatives Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights and Civil Liberties

Hearing on the First Amendment and Campaign Finance Reform After *Citizens United*

February 3, 2010

Mr. Chairman and Members of the Committee,

I am grateful for your invitation to testify on an issue vital to the integrity of our democracy and to government of the people, by the people, and for the people. I appear as a representative of no institution or group but simply as someone who loves this country and its Constitution, having studied, taught and written about constitutional law for over 40 years, to students as varied as President Obama, Chief Justice Roberts, and Solicitor General Kagan, each of whom has, of course, played some role in arguing, deciding, or responding publicly to, the momentous decision of the United States Supreme Court in *Citizens United*.

I should add that I appear not as someone who reflexively rejects the application of the First Amendment to corporate speech but, on the contrary, as one who has strongly supported the First Amendment claims of corporate entities like the bank in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), and like the non-profit advocacy group, Massachusetts Citizens for Life, in *FEC v. MCFL*, 479 U.S. 238 (1986), the two primary precedents on which the Supreme Court majority in *Citizens United* purported to rely. Indeed, I think that the statute *as applied* to Citizens United's release of the film *Hillary* in theaters, on DVD, through video-on-demand, and in promotional ads – assuming (doubtfully) that the statute should even have been construed as

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applicable on those facts – would violate the First Amendment, making analysis of the statute's *facial* validity (and thus its validity in the context of ordinary business corporations) wholly unnecessary, as the four dissenters noted. In that regard, I would draw an important distinction for First Amendment purposes between for-profit business corporations, with respect to which I believe the statute is constitutionally supportable, and MCFL-like advocacy groups that happen to be incorporated, with respect to which I believe it is not.

Finally, I appear as someone whose initial response to *Citizens United*, see http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/, although highly critical of the majority's *methodology* in reaching out so broadly and with so little respect for Congress or for its own precedents, was more measured in assessing the likely *impact*, as a practical matter, of this latest in the Court's series of decisions dismantling the architecture of campaign finance reform. I was, for example, at least somewhat reassured by the reminder in the majority opinion that, although "26 States do not restrict independent expenditures by for-profit corporations," the "Government does not claim that these expenditures have corrupted the political process in those States." (Slip op. at 41.) But the majority's notion of what constitutes "corruption" turns out, on examination, to be so crabbed and unrealistic as to be uninformative, as the dissenting opinion persuasively demonstrates. (Slip op. at 56 – 70.) Beyond that, reassurances based on how the world looked to corporations before *Citizens United* are of necessarily limited relevance in the post-*Citizens United* world, a world in which the expectations shaped by the legal culture are bound to shift as that culture assimilates the New Politico-Corporate Order. Moreover, the stakes are vastly greater when we are speaking about elections that determine the composition of the U.S. House, the U.S. Senate, and the White House than when we focus on state and local elections alone. And the corporate resources at hand are truly staggering: The Fortune 100 companies, for instance, earned revenues of $13.1 trillion during the last election cycle. *See* Supp. Brief for Appellee in *Citizens United* at 17.

One danger is that business corporations, armed with treasuries of almost unimaginable magnitude, may choose to deploy what is essentially other people's money in strategic ways that can critically reshape the political landscape of the entire Nation. Such corporations are not necessarily limited to any particular geographical region and so could prowl the country to find a

House district or a Senatorial race in which their now unlimited expenditures might swing the balance. Democratic strategist Steve Hildebrand has been quoted as saying, "No question, if you are looking at a strategy about how you buy a Senate seat, where is the cheapest place to go? The rural states, where $5 million can buy you a Senate seat and is nothing for a company like ExxonMobil."

There are, of course, business considerations that might deter any number of companies from taking full advantage of the opportunities opened up by *Citizens United*. At least when the money behind a controversial political ad can be readily traced to its corporate source – which may well require more effective disclosure laws, as I'll indicate below – those who launched it might alienate customers they can ill-afford to turn away. But, depending on the magnitude of the potential gains discounted by the improbability of achieving them with a given political communication, that might be a gamble worth taking – especially to companies strongly affected by the regulatory environment in the financial, insurance, health care, or energy sectors, among others. To be sure, none of us can be *certain* that *Citizens United* will unleash dangers this extreme, but the risks seem real enough to take very seriously.

The situation would be strikingly different if the First Amendment, rightly understood, truly put us in this awful box. Following the Constitution does sometimes entail hard choices and unpleasant consequences. But it would be passing strange if the First Amendment, so central to our system of self-government, compelled us to choose between free speech and democratic integrity. In my view, the First Amendment imposes no such dilemma. For the more closely I have studied the opinions in *Citizens United* and reflected not just on the decision's likely consequences but on its dubious reasoning, the more I have found myself agreeing with virtually every point made in the masterful dissent of Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor. I cannot improve on the concluding sentences of their painstakingly thorough 90-page dissection of the majority and concurring opinions: "At bottom, the Court's opinion is . . . a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While

American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."

It is no secret, of course, that the only thing that changed between the Court's decision in *McConnell v. FEC*, 540 U.S. 93, 204-07 (2003), which *upheld* the McCain-Feingold ban on independent electioneering communications by corporations, and the decision in *Citizens United*, which *struck down* the identical ban, was the retirement of Justice O'Connor and the appointment of Justice Alito in her stead. I was present when Justice O'Connor reflected on that reality a week ago Tuesday at a conference at Georgetown Law School. The sorrow was evident behind the twinkle in her eye when she quipped, "Gosh, I step away for a couple of years and there's no telling what's going to happen." The majority could point to no changed circumstances in the world outside the Court to justify its radical departure from principles of *stare decisis*. Those principles of respect for precedent are principles that nobody views as absolute, but they cannot be cast aside on grounds as flimsy as those offered by the *Citizens United* majority without enormous cost to our legal institutions and indeed to the rule of law itself.

As I've said, I agree almost completely with Justice Stevens' dissenting analysis of what *did* happen in this case and of what it is likely to mean. I certainly agree with him that the "Court's . . . approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the [First] Amendment was meant to serve." (Slip op. dissent at 85.) My only reservation – and it's an important one – is with the pessimism reflected in his next sentence, in which his dissent forecast that the Court's decision "will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process."

What I hope to accomplish in my testimony today is to show that "limited measures to protect against corporate domination" in fact remain possible and worth enacting even in the constitutional universe constructed by the five majority justices in *Citizens United*. I intend to show that, despite the blow they struck against the interests of ordinary citizens and genuine self-government, they did *not* entirely foreclose meaningful avenues of legislative relief short of constitutional amendment.

1. Limiting Foreign Influence Over American Elections

To explore those avenues, a good place to begin is with a matter around which considerable confusion has swirled since the announcement of the Court's decision: the ability of Congress in the wake of *Citizens United* to limit the influence of foreign citizens and entities over the political process here in America. The majority opinion written by Justice Kennedy was deliberately opaque, if not entirely silent, on that question. It specifically said: "We *need not reach* the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process [because] Section 441b" – the provision under consideration in *Citizens United* – "is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders." (Slip op. at 47).

Parenthetically, it's worth noting the irony of that cautious and restrained approach to a question the Court didn't decide because it didn't *have* to decide it in order to dispose of the case before it. Such considerations of judicial modesty certainly didn't deter the justices in the Court's majority from deciding all manner of questions they had no need to reach on the facts and procedural history of the case before them, as Justice Stevens showed conclusively. *Citizens United* left no doubt that the Roberts Court is quite willing not only to overturn decades of settled precedent but also to decide a case "on a basis relinquished [in the lower courts], not included in the questions presented to [it] by the litigants, and argued [before the Court] only in response to the Court's [own] invitation." (Slip op. dissent at 4.)

Be that as it may, the Court affirmatively chose to leave unanswered the burning question whether its otherwise wide-ranging holding would reach far enough to sweep away legislative measures designed to limit foreign infiltration into American elections, federal and state. Strongly suggesting that the holding could indeed reach that far was the logic of the majority's entire analysis, an analysis that proceeded from a freshly minted principle that legislatures may never limit speech based on the speaker's identity. That is a principle that Justice Stevens decisively demolished (Slip op. dissent at 28-34), but it's a principle without which the majority's reasoning falls of its own weight. Assuming the Court means to proceed coherently, it's difficult to see exactly how it could explain a decision upholding legislation that excludes

from participation in American political campaigns ads (whether positive or negative) distinguished solely on the basis that they were composed, produced, disseminated, or financed by entities subject to significant influence from abroad – legislation that by definition would limit speech based on the identity of who is responsible for that speech.

On the other hand, if as Oliver Wendell Holmes famously observed, "the life of the law is not logic but experience," then the dry logic that drove the Court's decision in *Citizens United* might well give way to other considerations. Four members of the *Citizens United* majority – all but Justice Thomas – joined with all four dissenters in upholding McCain-Feingold's disclaimer and disclosure provisions, provisions that, as Justice Stevens observed, presuppose the "insight that the identity of speakers is a proper subject of regulatory concern." (Slip op. dissent at 30 n.47.) In nonetheless purporting to leave open the authority of Congress to limit electioneering speech based on the foreign identity of those influencing it, the majority pointedly referenced the statute already on the books in 2 U.S.C. § 441e(a)(1) providing that foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election. And, at least hinting that its decision might have been different if the speech of corporations dominated or strongly influenced by non-citizens was at stake, the majority went out of its way – as I observed above – to note that the statute it struck down was "not limited to corporations or associations that were *created in foreign countries* or *funded predominately by foreign shareholders*." (Slip op. at 47(italics added)). Indeed, the majority twice underscored the central place of the citizen/foreigner distinction in its holding: At the heart of the opinion was this sentence: "If the First Amendment has any force, it prohibits Congress from fining or jailing *citizens,* or *associations of citizens,* for simply engaging in political speech." (Slip op. 33 (italics added).) And the majority underscored the point by noting that it was striking down legislation under which "certain disfavored associations of *citizens* – those that have taken on the corporate form – are penalized for engaging in [otherwise protected] political speech." (Slip op. 40 (italics added).)

Although dissenters sometimes exaggerate the reach of a majority opinion in an effort to dislodge votes or pave the way for future overruling by arguing that the sky is falling, Justice Stevens and his three dissenting colleagues in *Citizens United* carefully avoided reading the

majority opinion as requiring Congress to leave foreign-influenced corporations alone. On the contrary, the dissent went out of its way to treat the majority's explicit decision to leave the matter open as an "acknowledge[ment] that Congress might be allowed to take measures aimed at 'preventing foreign individuals or associations from influencing our Nation's political process.'" (Slip op. dissent at 33 n.51.). Treating that acknowledgement as tantamount to a "confess[ion] that [its] categorical approach to speaker identity is untenable," *id.,* the dissent went on to reinforce its supposition that one or more justices in the majority would vote with the four dissenters to *uphold* a ban on campaign expenditures by foreign-influenced corporations. The dissent stressed how inconsistent any contrary result would be with the premises of the Constitution's Framers, obsessed as they were with the influence of those without any real stake in America's welfare. That was an obsession reflected in our Constitution's explicit ban on the acceptance of any foreign "present, Emolument, Office, or Title . . . without the Consent of the Congress" by anyone "holding any Office of Profit or Trust under [the United States]." Article I, § 9, Cl. 8. It is one thing to affirm that aliens are entitled to fundamental human rights, including the protections of habeas corpus, *see Boumediene v. Bush,* 128 S.Ct. 2229 (2008), and quite another to abandon more than two centuries of history by protecting the "right" of aliens to use the assets amassed in a corporate form to influence the outcome of American elections.

So imagine, for example, congressional legislation that would expand upon the existing § 441e by prohibiting all political advertising, including but not limited to electioneering communications, produced or substantially funded by any corporation more than some minimal percentage (say, 5%) of whose equity is held by foreign nationals, as in the legislation that Rep. John Hall of New York has introduced (H.R. 4517, "Freedom From Foreign-Based Manipulation in American Elections Act of 2010"), or by any entity incorporated outside the U.S. or controlled by a foreign government – a restriction that would obviously reach a broad swath of the largest corporate players in the political game. What would be the likely outcome, before the Supreme Court as currently composed, of a First Amendment challenge to such legislation, assuming that Congress were to take care to build a factual record focused on the way in which foreign interests have come to influence elections in the United States? Even the day after *Citizens United* was decided, I would have guessed, both from what the dissent said about the matter and

from the majority's references to U.S. citizens, that such legislation would probably, even if not unanimously, be upheld.

Today, the basis for such a guess is considerably strengthened. I have in mind the awkward moment during the recent State of the Union Address when Justice Alito visibly mouthed the words "Not true." I'm not particularly interested in the debate over whether the President overstepped when he criticized the Court to its face or whether the Justice overstepped when he evinced a response. No doubt the Justice assumed the cameras were trained elsewhere; he wasn't asking the global TV audience to read his lips. Rather, I'm focusing on *what it is that Justice Alito was (perhaps inadvertently) revealing that he regarded as untrue.* Maybe he was just disagreeing with President Obama's observation that the Court had "reversed a century of law" in its *Citizens United* ruling. Much more likely, however, given the context and the timing, was that Justice Alito regarded the President as mistaken in predicting that the Court's holding would stand in the way of laws aimed at excluding foreign influence from American elections.

On *that* question, Justice Alito is surely the expert – not because he knows his Constitution better than the President, no slouch when it comes to that subject, but because Justice Alito knows what Justice Alito thinks better than anyone else could possibly know it. Add his vote to that of the four dissenters, and you get at least five votes to protect against the evil the President forecast when he spoke of American elections being "bankrolled by . . . foreign entities" rather than being "decided by the American people."

It's commonly said that, in our republic, politics should stop at the water's edge. That has been taken to mean that we should act as "one Nation indivisible" when we speak overseas. But it might be turned around to mean in addition that forces and finances from overseas shouldn't be permitted to influence our elections – any more than foreigners, even those who reside here, are permitted to vote in those elections. So Congress should take Justice Alito at his quietly but distinctly spoken word and should proceed at once to enact legislation having the design and purpose of guarding against such foreign influence. Such a law could take as its starting point the text of §441e and the current FEC regulation prohibiting foreign nationals from participating in the formal "decision-making process" of anyone's "election-related activities," 11 CFR 110.20(i), although it would obviously have to be broader in reach. That would seem to

be a perfect place for Congress to begin limiting the deleterious impact of the change the Court wrought and to take up President Obama's concluding call on "Democrats and Republicans to pass a bill that helps correct some of these problems."

2. Authorizing States to Protect *Their* Elections From Out-of-State Influence

But Congress should not stop there. For one thing, as Justice Stevens observed in his dissent, the problems created by the Court's opinion extend to *state* as well as federal elections. Twenty-six of the 50 states don't restrict "independent expenditures by for-profit corporations." (Slip op. at 41). The other 24 states do, and any of the 50 states might well wish to address the growing problem of corporate influence in *judicial* elections in particular. Some 39 states hold such elections and, according to a group called "Justice at Stake Campaign," state supreme court candidates alone raised over $205 million between 2000 and 2009, more than twice as much as in the preceding decade. In the recent case of *Caperton v. Massey Coal Co.*, 556 U.S. ___ (2009), a 5-4 majority of the Court "accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption." (Slip op. dissent at 68.) "At a time when concerns about the conduct of [state] judicial elections have reached a fever pitch," Justice Stevens warned, the majority's ruling in *Citizens United* "unleashes the floodgates of corporate and union general treasury spending in these races." (Slip op. dissent at 70). It's possible, as he noted, that motions to recuse under *Caperton* "will catch some of the worst abuses," *id.*, but "[t]his will be small comfort to those States that, after [*Citizens United*], may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems." *Id.*

It's not entirely clear to me, however, that *Citizens United* goes quite that far in tying legislative hands. Suppose that a State were to conclude that, in structuring its own judiciary, it wishes to retain elections as a means of ensuring greater *judicial accountability to the State's own citizens and residents*. Many have come to doubt the consistency of that goal with the equally important, and perhaps even more important, goal of ensuring judicial independence. But imagine a State that is unconvinced of the arguments Justice O'Connor and others have made for abandoning competitive head-to-head elections as a means of choosing state and local

judges and moving instead toward merit selection, perhaps supplemented by retention elections. Such a State might nonetheless be concerned to limit the category of those who may affect judicial selection – as well as the selection of all others for public office – to those eligible to vote in that State, a category that would exclude, at the very least, corporations domiciled in other states or largely owned by out-of-state residents.

As Justice Stevens noted in his *Citizens United* dissent, "[i]n state elections, even domestic corporations may be 'foreign'-controlled in the sense that they are incorporated in another jurisdiction and primarily owned and operated by out-of-state residents." (Slip op. dissent at 75 n.70.) If a State were to act on that view by barring electioneering expenditures by out-of-state corporations, whether "foreign" in the sense of §441e or "foreign" only in the sense of being external to the State, a good argument could be made that it would not be the First Amendment that would stand in its way but the Commerce Clause and its correlative principle that States may not, without the consent of Congress, discriminate against or unduly burden out-of-state businesses and residents. If indeed that would be the constitutional objection, then Congress might take a leaf from the book of insurance regulation, where federal law ever since the McCarran-Ferguson Act of 1945 has permitted States to exclude out-of-state interference and competition. *See* 15 U.S.C. § 1011 et seq. *See Prudential Co. v. Benjamin,* 328 U.S. 408 (1946) (upholding congressional power to authorize such state action). In the health care field, many have come to think that this federal legislative permission to Balkanize the country has been unwise and is part of the problem rather than the solution. But what's good for health insurance may not be so good for electoral democracy. Thus I think Congress should at least consider including, in its legislation protecting U.S. elections from foreign influence, a provision permitting states to protect their own elections, judicial and otherwise, from the influence of out-of-state corporate (and perhaps non-corporate) money.

3. Barring Corporate Electioneering By Government Contractors

Another important corporate category that virtually invites congressional regulation under the Commerce Clause in the electoral context, both with respect to federal elections and perhaps also with respect to state elections, is the category of corporations (and indeed individuals) doing business with government, whether through formal contractual arrangements

or in other ways that make the "pay to play" concern a particularly salient one. Again drawing on the Stevens dissent not as a source of critique of the *Citizens United* holding, with which we are all stuck for the foreseeable future, but as a source of ideas for permissible legislative responses, I would call attention to his point that "some corporations have affirmatively urged Congress to place limits on their electioneering communications" because they "fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded." (Slip op. dissent at 78.)

What can be done after *Citizens United* about a "system that effectively forces corporations to use their shareholders' money both to maintain access to, and to avoid retribution from, elected officials?" *Id.* One promising answer was suggested in *The Washington Post* on January 26 by Yale Law Professors Bruce Ackerman and Ian Ayres. They cited a 2008 Government Accountability Office study finding that nearly 75% of the 100 largest publicly traded firms are federal contractors. If one were to include *state* contractors in the picture, the percentage would obviously be higher still. Ackerman and Ayres point out that federal contractors already are not permitted to "directly or indirectly . . . make any contribution of money or other things of value" to "any political party, committee, or candidate," a provision arguably barring "Big Pharma from launching a media campaign in favor of a candidate who supports its special deals, thereby 'indirectly providing' the candidate something 'of value.'" But, as Ackerman and Ayres note, the statute as currently written "doesn't cover the case in which contractors threaten to spend millions to oppose senators and representatives who refuse their excessive demands." As the Yale professors argue, "[t]he same anti-corruption rationale that may prohibit contractors from spending millions in favor of candidates requires a statutory prohibition on a negative advertising blitz."

Although the professors don't spell out the affirmative basis of congressional authority to shield those who contract with government in this way, it is important to note that the power Congress would be exercising is not just the power to attach strings to its spending under Article I, §8, Cl.1, but the considerably broader power to regulate commerce under Article I, §8, Cl.8. The significance of that point is twofold. First, it shows that Congress has just as much power to

protect businesses that contract with *state* and *local* authorities under this rationale as it has to protect businesses that contract with *federal* authorities. And second, restrictions imposed in order to protect the integrity and voluntariness of commercial transactions are not burdened by requirements of nexus and proportionality that limit the ability of Congress to attach strings to federal spending in order to do indirectly what it could not do directly.

The existing contractor statute, Ackerman and Ayres report, "has never been seriously challenged." Of course, post-*Citizens United*, it would be – as would the broadened statute they recommend, and the even broader statute (extended to *all* government contracts, not just *federal* contracts) that I recommend. But there is sound reason to suppose that the Court as currently composed would uphold such a statute against a First Amendment attack, doing so on the analogy of the Supreme Court decisions upholding the Hatch Act of 1939, 53 Stat. 1147, which prohibited federal *employees* from expressly endorsing candidates in political advertisements, broadcasts, "campaign literature, or similar material" and from playing an active role in political campaigns. *U.S. Civil Service Commission v. Letter Carriers,* 413 U.S. 548 (1973); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). The rationale accepted by the Court in those cases was that such prohibitions, although nominally restricting their liberty, actually *protected* the employees in question from being pressured into speaking on behalf of candidates or causes they did not wish to support (or against candidates or causes they did not wish to oppose).

The government interest at stake there – as in the proposals advanced by Professors Ackerman and Ayer and in the still broader measure I would favor – is the long-recognized interest in protecting those who participate in commerce from being coerced into speech with which they may not agree as a condition of engaging in the contractual or other commercial arrangements they wish to undertake. It is similar to the interest the Supreme Court has insisted on protecting, *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (requiring return of portion of mandatory fee used by union to subsidize political and ideological activity to which individual objects), in the context of unions, which *Citizens United* frees from the same McCain-Feingold restraints that had restricted corporations prior to that decision. *See also U.S. v. United Foods,* 533 U.S. 405 (2001) (striking down rule compelling producers to pay fees to support advertising campaign they had not agreed to fund as part of regulatory scheme). To be sure, this

interest (as vindicated in *Abood* and *United Foods*) has a "freedom of personal conscience" dimension that is absent when money is being extracted from a corporation, but it would be one irony too far for the Court that decided *Citizens United*, carrying the equation of corporations with human individuals to an extreme, to treat these precedents as inapposite on the ground that corporations are too impersonal to have a legally cognizable interest in protection from being pressured into going along ideologically to get along economically. That is indeed a cognizable interest – an interest in "unfettered commerce" – and it is one that applies to *all* employees and contractors, corporate and otherwise, regardless of the level of government with which they do business. This is clearly a broad avenue of possible regulation that merits careful exploration by Congress and fact-finding that would support the governmental interest behind any new restrictions on corporate or union political expenditures.

4. Improving the Protection of Unconsenting Shareholders

As applied to business corporations, the core problem addressed by "pay-to-play" regulation of the sort considered above is, of course, the problem posed when for-profit corporations are in effect compelled to use their shareholders' money for causes that neither they nor their shareholders might actually support. But even where corporate *management* fully supports the causes for which the board of directors or others running the business opt to make independent electioneering expenditures, the problem of coerced and potentially dissenting *shareholders* remains. The *Citizens United* majority recognized that problem – how could it not? – but responded by insisting that there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" (Slip op. at 46 (internal source omitted).) The dissent made short shrift of that argument, noting how ineffectual have been "the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty." (Slip op. dissent at 87.) Moreover, as the dissent noted, "[m]ost American households that own stock do so through intermediaries such as mutual funds and pension plans, . . . , which makes it more difficult both to monitor and to alter particular holdings." *Id.* at 88.

That the majority was unconvinced obviously makes it an uphill battle to build a congressional response on this platform, but Congress may take some comfort from the "little evidence" remark and may proceed to build a stronger evidentiary record. Or, and with greater

promise of success, Congress may build on the universal recognition that existing shareholder remedies are of limited value by requiring shareholder *pre*-approval of some categories of electioneering expenses and/or creating a new federal cause of action for dissenting shareholders of publicly traded for-profit companies, arming those who sue under this new cause of action with both procedural and substantive tools that can reduce the dangers that unwilling shareholders will be compelled to subsidize speech with which they disagree.

The new federal cause of action could be structured to (1) give dissenting shareholders greater incentive to bring meritorious suits by providing that, if a court is persuaded that a challenged corporate electioneering expenditure (not only during the narrow time windows specified in McCain-Feingold but at any time) clearly was not justified by the corporation's business interests, the officers responsible for making the expenditure would (a) not only have to restore to the corporation's coffers an amount equal to the improper expenditure (b) but also be personally liable to the victorious shareholders in an amount equal to double or treble what they would be obliged to return to the treasury, and to pay as well the attorneys' fees incurred by the winning shareholders and possibly statutory damages to boot. To deter purely vexatious litigation, those bringing manifestly meritless suits could be appropriately sanctioned. As I conceive it, the new law should (2) relax the degree of deference afforded to boards and managers by the "business judgment rule," at least in cases where electioneering expenditures are made (either directly or through a contribution to an electioneering entity) from the corporation's treasury without the specific prior assent of a majority of the voting shares. The new law could, as well, (3) shift the burden of proof of business purpose from the shareholders to the corporation whenever such expenditures are made without an explicit and public affirmation by the corporation's CEO that making those expenditures from the corporation's general treasury funds *rather than from a political PAC* advances the business purposes of the corporation, an affirmation that would also serve to notify the viewers of the corporate electioneering communication that what they are seeing reflects a self-interested business decision rather than some public-spirited informational offering.

5. Strengthening Disclaimer and Disclosure Requirements

With the sole exception of Justice Thomas, who deemed insufficient the prospect of as-applied challenges to disclosure and disclaimer rules in circumstances where a substantial risk of harassment can be shown, the Court was unanimous in stressing the importance of corporate transparency in candidate elections and in affirming the facial constitutionality of congressional measures mandating full disclosure of the identity of the corporate funding sources of communications making express reference to candidates for federal office. Simply by way of illustration, Rep. Leonard Boswell's proposed "Corporate Propaganda Sunshine Act," H.R. 4432, would require publicly-traded companies to disclose in filings with the SEC money used to influence public opinion rather than to promote their products and services.

Such disclosure requirements must be crafted in order simultaneously to achieve transparency and yet respect the First Amendment rights of individuals to speak anonymously even in the context of election campaigns. Among the kinds of disclosure requirements I would be inclined to favor would be rules designed to prevent circumvention of existing disclosure laws through the creation of "shell" corporations into which for-profit companies might funnel campaign expenditures – think, for example, of domestic oil companies hiding behind a "Citizens for Better Energy Options" organization, or British or European pharmaceutical companies hiding behind a "Better Health Through Science" front group. I would also favor "stand-by-your-ad" obligations for the corporate officers, including the CEO, of for-profit corporations responsible for directly or indirectly funding, producing, or disseminating particular electioneering communications. Thus, in addition to making the absence of a specific public certification by the CEO that strictly business considerations justified funding the communication from the corporate treasury (rather than from a PAC) serve as the *trigger to shift the burden of proof* from complaining shareholders to management, I would *mandate* such a certification as a matter of SEC regulation of the corporation involved.

6. Tightening Anti-Coordination Rules

I found somewhat ominous the observation by the *Citizens United* majority that"Citizens United has not made direct contributions to candidates, and it has not suggested that the Court

should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." (Slip op. at 43.) Whoa! Some justices have from time to time hinted that the functional equivalence, from their First Amendment perspective, of direct contributions and truly independent expenditures might lead them to strike down limits on the former rather than uphold limits on the latter. For now, at least, I would proceed on the premise that this view will not gain ascendancy in the foreseeable future and that the willingness to uphold various contribution limits (and, in the context of corporate contributions, the willingness to uphold flat prohibitions) as consistent with the First Amendment will persist. On that premise, we should be safe in regarding *Citizens United* as tying the legislature's hands only with respect to truly independent corporate expenditures and in assuming that expenditures "coordinated" with candidates for public office may still be treated as the equivalent of donations and thus restricted.

My understanding is that the FEC's rules for determining *which* expenditures are coordinated as opposed to independent are ambiguous and loophole-ridden to the point of being barely worthy of the label "rules." Congress should not wait until the FEC is a fully staffed and effectively functioning body before itself specifically codifying criteria for determining what counts as an "independent" expenditure. And those criteria, once enacted into law, should almost certainly include a requirement that the CEO of any corporation substantially funding a supposedly independent ad or other communication mentioning a candidate (with or without the "magic words" urging a vote for or against that candidate) swear on pain of perjury that no coordination has taken place.

7. **Public Financing Possibilities**

Finally, of course, it remains possible in theory to redesign the election system as a whole in ways calculated to offset the influence of large contributors and big spenders, corporate as well as individual. The underlying idea of all such redesign is to reduce the imbalance not by restricting or capping Big Money but by balancing it with Little Money, fighting fire with fire, battling the speech of corporate and moneyed interests with more speech by ordinary citizens. Most notable among the public financing initiatives is the "Fair Elections Now Act" (S. 752 and H.R. 1826) introduced by Senators Durbin (D-Ill.) and Specter (D-Pa.) in the Senate and by Reps. Larson (D-Conn.) and Jones (R-N.C.) in the House. The Act would make candidates for

federal office eligible for public funding if they raised enough donations below $100 each and agreed not to accept large contributions or to permit coordinated expenditures from any source. The public funding would include a base operating budget and continued matching of small contributions from the Fair Elections Fund at a rate of $4 in public money for every $1 privately raised.

Other legislation pending in Congress (H.R. 726, the "Citizen Involvement in Campaigns Act"), would be paid for by a refundable federal tax credit that citizens could use to make their own contributions to federal candidates. Professors Bruce Ackerman and David Wu of Yale Law School made a similar proposal in The Wall Street Journal on January 27, 2010 ("How to Counter Corporate Speech"). However promising any of these possibilities might be – and their political viability seems to me very much in doubt – it would be extremely difficult for them to raise enough public money to offset the problem posed by genuinely independent corporate (and union) expenditures of the sort unleashed, with or without "magic words" urging a vote for or against a candidate, by the *Citizens United* ruling.

Public funding of campaigns, whatever its promise, thus is not an antidote to the flood of corporate speech that some fear the Court's latest decision might unleash unless Congress acts and acts promptly. And the need for expeditious action should be underscored: It is at least theoretically possible that, unless Congress responds effectively to *Citizens United* before the November 2010 elections in one or more of the ways suggested here, large business interests, including those based abroad or funded with money from overseas, will so affect the outcome of the forthcoming campaigns for the House and Senate that the lawmakers sworn in next January will have been preselected with a view to their opposition to these very reforms. Should that occur, it will then be too late to make the changes needed to hold back the potential corporate flood.

Mr. NADLER. I thank you.
Ms. Youn, you are recognized.

TESTIMONY OF MONICA Y. YOUN, COUNSEL AND DIRECTOR OF THE CAMPAIGN FINANCE REFORM PROJECT, BRENNAN CENTER FOR JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY

Ms. YOUN. Thank you for inviting me to testify today.

As we all know, Congress is debating a range of policy proposals to mitigate the disastrous potential consequences of *Citizens United*. These proposals, particularly public financing, voter registration modernization, disclosure and shareholder protection, are discussed at greater length in my written testimony.

And I agree with Professor Tribe that it is crucial that Congress act, and act quickly. But whatever legislation Congress ends up adopting, this we know for sure—the new reforms may be on a collision course with the present majority of the Supreme Court.

In the meantime, challenges to other Federal and State campaign finance reforms, including public financing, disclosure laws, PAC requirements and soft money restrictions, are on a fast track to the Supreme Court as well, brought to you by many of the same lawyers that brought *Citizens United*.

In defending these reforms, then, and in enacting new ones, it is crucial that we push back against the faulty factual assumptions upon which the *Citizens United* majority based its decisions.

These five justices were in such a hurry to strike down 60 years of campaign finance safeguards that they couldn't even wait for a factual record to be developed. But by rushing to judgment, these five justices based their decision on nothing more than their own gut instincts about how politics actually works.

These instincts turned out to be, at best, extremely naive, as Senator John McCain put it; at worst, dangerous; and at root, just plain wrong.

This Committee can play a crucial role in setting the record straight by convening hearings that develop the factual record to provide a reality check for the current Supreme Court majority. I want to focus my testimony today on three of these faulty assumptions.

First, the Court assumes that limits on corporate political spending exist because incumbent politicians wish to silence their most effective opposition. In fact, Justice Kennedy goes even farther, stating that these laws violate the First Amendment because the government has "muffled the voices of corporations in politics."

I defy anyone watching the debates in Congress regarding the banks, health care and climate change to say with a straight face that corporations have been unable to express their point of view on these matters either to Members of Congress or to the public at large.

What corporations have not been able to do up until this point is to buy an election, to bring their treasury funds directly to bear in our most sacred of democratic institutions.

Second, the Court assumes that shareholders have oversight over political spending by corporate managers and that disclosure laws ensure that voters know who is paying for our politics.

Once again, this assumption is faulty. First, as a recent Brennan Center report points out, Federal law does not currently require corporate political spending to be disclosed either to shareholders or to corporate boards.

Similarly, voters can't detect corporate political activity since, as Professor Tribe pointed out just now, corporations commonly mask their corporate spending behind misleadingly named euphemisms.

In most of the cases, by the time these groups are unmasked, the election is already over.

But disclosure alone is not an adequate safeguard of our democracy. If you fear burglars, you don't stop locking your doors just because you have invested in a security camera. By the time the damage is detected, it is far too late.

Finally and most disturbingly, the Court assumes that unlimited corporate spending poses no threat of corruption. The Court seems woefully ignorant of the countless examples of influence peddling resulting from corporate independent expenditures.

But you know, this woeful ignorance is not without limit. For example, in the Caperton case, faced with the ugly truth of what corruption looks like in practice, the Court blinked. It pulled back.

Justice Kennedy there voted with the four pro-reform justices rather than with the Roberts bloc because he was unable to deny, faced with the facts, the reality of political corruption, at least in judicial campaigns.

By building a strong factual record on this and other issues, the Committee can ensure that this Supreme Court base future decisions in the area of money and politics, on facts rather than fiction.

Thank you for inviting me to testify.

[The prepared statement of Ms. Youn follows:]

PREPARED STATEMENT OF MONICA Y. YOUN

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Testimony of Monica Youn
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Before the Committee on the Judiciary
U.S. House of Representatives
February 3, 2010

The Brennan Center for Justice at New York University School of Law thanks the Committee for holding this hearing on the First Amendment and Campaign Finance Reform After *Citizens United* and for the invitation to testify.

Since its creation in 1995, the Brennan Center has focused on fundamental issues of democracy and justice, including research and advocacy to enhance the rights of voters and to reduce the role of money in our elections. That work takes on even more urgency after the United States Supreme Court's decision in *Citizens United v. Federal Election Commission* on January 21, 2010. *Citizens United* rivals *Bush v. Gore* for the most aggressive intervention into politics by the Supreme Court in the modern era. Indeed, *Bush v. Gore* affected only one election; *Citizens United* will affect every election for years to come.

By largely ignoring the central place of voters in the electoral process, the *Citizens United* majority shunned the First Amendment value of protecting public participation in political debate. To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses four steps to take back our democracy:

- Promote public funding of political campaigns[1]
- Modernize voter registration[2]
- Demanding accountability through consent and disclosure[3]
- Advance a voter-centric view of the First Amendment.[4]

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[1] Frederick A.O. Schwarz Jr., *Public Financing of Races: If It Can Make It There...*, ROLL CALL, Jan. 28, 2010, *available at* http://www.rollcall.com/issues/55_83/ma_congressional_relations/42688-1.html.
[2] VOTER REGISTRATION MODERNIZATION: COLLECTED BRENNAN CENTER REPORT AND PAPERS (The Brennan Center for Justice 2009), http://brennan.3cdn.net/329ceaa2878946ba17_kwm6btu6r.pdf. Upon request, the Brennan Center is happy to provide hard copies of the report to this Committee and other members of Congress.
[3] Ciara Torres-Spelliscy, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE (The Brennan Center for Justice 2010), http://brennan.3cdn.net/0a5e2516f40c2a33f6_3cm6ivqcn.pdf. Upon request, the Brennan Center is happy to provide hard copies of the report to this Committee and other members of Congress.
[4] Monica Youn, *Giving Corporations an Outsized Voice in Elections*, THE L.A. TIMES, Jan. 10, 2010, *available at* http://www.latimes.com/news/opinion/commentary/la-oe-youn10-2010jan10,0,1203910.story.

This five-vote majority on the Supreme Court has imposed a radical concept of the First Amendment, and used it to upend vital protections for a workable democracy. We must push back against this distorted version of the Constitution. We must insist on a true understanding of the First Amendment as a charter for a vital and participatory democracy. And there are other values in the Constitution, too, that justify strong campaign laws – values such as the central purpose of assuring effective self-governance. The Court blithely asserts that unlimited corporate spending poses no threat of corruption. That is simply not the case. We urge, above all, that this Committee build a record to expose the actual workings of the campaign finance system. Such a record is vital for the public's understanding, and even more to make clear to Justices in future litigation that a strong record undergirds strong laws.

1. The Political Stakes of *Citizens United*

Last week, the Supreme Court's decision in *Citizens United v. FEC* undermined 100 years of law that restrained the role of special interests in elections. By holding – for the first time – that corporations have the same First Amendment rights to engage in political spending as people, the Supreme Court re-ordered the priorities in our democracy – placing special interest dollars at the center of our democracy, and displacing the voices of the voters. There is reason to believe that future elections will see a flood of corporate spending, with the real potential to drown out the voices of every-day Americans. As Justice Stevens warned in his sweeping dissent, American citizens "may lose faith in their capacity, as citizens, to influence public policy"[5] as a result.

After news of the *Citizens United* ruling sent shock waves through political, legal, and news media circles throughout the nation, some commentators took a jaundiced view, arguing, in essence, that since the political system is already awash in special-interest dollars, this particular decision will have little impact.[6] It is undoubtedly true that heretofore, corporations have engaged in large-scale spending in federal politics –primarily through political action committees ("PACs") and through more indirect means such as lobbying and nonprofit advocacy groups.[7] However, the sums spent by corporations in previous elections are miniscule in comparison to the trillions of dollars in corporate profits that the Supreme Court has now authorized corporations to spend to influence the outcome of federal elections. The difference, in short, changes the rules of federal politics.

Prior to *Citizens United*, a corporation that wished to support or oppose a federal candidate had to do so using PAC funds – funds amassed through voluntary contributions from individual employees and shareholders who wished to support the corporation's political agenda. Such funds were subject to federal contribution limits and other regulations. Now however, the *Citizens United* decision will allow corporations that wish to directly influence the outcome of

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[5] Citizens United, No. 08-205, Slip op. at 81 (Jan. 21, 2010) (Stevens, J., dissenting).
[6] *See, e.g.*, Nathaniel Persily, *The Floodgates Were Already Open*, SLATE, Jan 25, 2010, *available at* http://www.slate.com/id/2242538/; Joseph Sandler and Neil Reiff, *Beware the Fortunetellers*, THE NAT'L LAW J., Feb. 1, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202439595364.
[7] VICTORIA MCGRANE, *Lobbyists on pace for record year*, POLITICO, Dec. 22, 2009, *available at* http://www.politico.com/news/stories/1209/30882.html.

federal elections to draw from their general treasury funds, rather than PAC funds, to support or oppose a particular candidate. This difference is significant enough to amount to a difference in kind rather merely a difference in degree, as demonstrated by the following:

- In the 2008 election cycle, the nation's largest corporation, Exxon-Mobil, formed a PAC that collected approximately $700,000 in individual contributions.[8] Thus, Exxon-Mobil was limited to spending this amount on advertisements directly supporting or opposing a federal candidate. During the same 2008 election, Exxon-Mobil's corporate profits totaled more than $80 billion.[9] Thus, *Citizens United* frees this one corporation to increase its direct spending in support or opposition to federal candidates by more than 100,000 fold.
- During the 2008 election cycle, all winning congressional candidates spent a total of $861 million on their campaigns – less than one percent of Exxon-Mobil's corporate profits over the same period.[10]

Furthermore, corporations have demonstrated that they are willing to spend vast sums of money to influence federal politics. Since corporations have been banned from contributing to candidates and restricted in their campaign spending, their political spending has generally taken the form of lobbying.

- In the same year that it was able to raise only $700,000 for its federal PAC, Exxon Mobil spent $29 million on lobbying.[11]
- In 2008, the average expenditures in a winning Senate race totaled $7.5 million and $1.4 million for the House.[12]
- The health care industry in 2009 spent approximately $1 million per day to lobby Congress on health care reform.[13]
- During the 2008 election, all congressional candidates spent a total of $1.4 billion on their campaigns.[14] This is only 26 percent of the $5.2 billion corporations spent on lobbying during the same two-year period.[15]

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[8] Statistics on Exxon Mobile, Corp.'s Political Spending, Center for Responsive Politics, http://www.opensecrets.org/orgs/summary.php?cycle=A&type=P&id=D000000129.
[9] Exxon Mobile, Corp., 2008 Annual Report 16 at 38 (2009), *available at* http://www.exxonmobil.com/Corporate/Files/news_pub_sar_2008.pdf.
[10] CORPORATE DEMOCRACY: POTENTIAL FALLOUT FROM A SUPREME COURT DECISION ON *CITIZENS UNITED*, *available at* http://www.commoncause.org/atf/cf/{fb3c17e2-cdd1-4df6-92be-bd4429893665}/CORPORATEDEMOCRACY.PDF.
[11] Statistics on Exxon Mobile, Corp.'s Lobbying Efforts, Center for Responsive Politics, http://www.opensecrets.org/lobby/clientsum.php?year=2008&lname=Exxon+Mobil&id=.
[12] Statistics on Average Cost of Congressional Races in 2008, Center for Responsive Politics, http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&Type=W&Display=A.
[13] LEGISLATING UNDER THE INFLUENCE (Common Cause 2009), *available at* http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/COMMONCAUSE_HEALTHCAREREPORT2009-1.PDF.
[14] Statistics on Total Cost of Congressional Races in 2008, Center for Responsive Politics, http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&Type=A&Display=T.
[15] LEGISLATING UNDER THE INFLUENCE, *supra* n.13.

Thus, merely by diverting a fraction of their political spending budgets from lobbying to direct campaign advocacy, corporations could easily outspend the candidates themselves by a factor of many multiples. The same is true even if one factors in party spending:

- The single largest lobbying organization – the U.S. Chamber of Commerce – spent more than $144 million in lobbying, grassroots efforts, and advertising in 2009, compared to $97.9 million spent by the RNC and $71.6 million spent by the DNC.[16] Thus, this single corporate-backed trade association is able to outspend the national committees of both political parties *combined*.
- According to *The Atlantic*'s Marc Ambinder, the Chamber's 2009 spending included electioneering in the Virginia and Massachusetts off-year elections, as well as "sizeable spending on advertising campaigns in key states and districts aimed at defeating health care, climate change, and financial reform legislation."[17]

Even corporations that are reluctant to throw their hat into the ring of political spending may find themselves drawn into the fray just to stay competitive in the influence-bidding arms race this decision creates.[18]

Indeed, despite the campaign finance regulations that – until *Citizens United* – attempted to protect our democracy against overt influence-peddling, there are numerous examples to demonstrate that absent such safeguards, special interests will attempt to use all means at their disposal to insure favorable legislative treatment.

- In 2006, the FEC levied a $3.8 million fine—the agency's largest in history—against mortgage giant Freddie Mac for illegally using corporate treasury funds to raise over $3 million for members of the House subcommittee that had regulatory authority over that corporation. Approximately 90% of those funds directly benefited the chair of the subcommittee.[19]

Moreover, corporate campaign ads may be a much more effective route than lobbying for corporations to pressure elected officials to comply with their agendas. Even the most aggressive lobbying effort cannot exert the same direct political pressure on an elected official that a campaign expenditure can. Such corporate campaigning impacts the political survival of elected officials in a way that mere lobbying cannot. An elected official might hesitate to oppose a corporation on a particular piece of legislation if she knows that the corporation could unleash a multimillion attack ad blitz in her next reelection campaign.

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[16] Marc Ambinder, *The Corporations Already Outspend The Parties*, THE ATLANTIC, Feb. 1, 2010, *available at* http://politics.theatlantic.com/2010/02/the_corporations_already_outspend_the_parties.php.
[17] *Id.*
[18] Supplemental Brief of the Committee for Economic Development as Amicus Curiae in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 10-16 (2009), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_ced_supp_brief_amici.pdf.
[19] Jim Drinkard, *Freddie Mac to Pay Record $3.8 M to Settle FEC Allegations*, USA TODAY, April, 18, 2006, *available at* http://www.usatoday.com/money/companies/regulation/2006-04-18-freddie-mac_x.htm.

Such an example came before the Court just last year in *Caperton v. Massey Coal Co.*[20] In that case, the Supreme Court recognized that large independent expenditures can create actual and apparent bias in the context of judicial elections. In *Caperton*, the CEO of a coal company with $50 million at stake in a case before the West Virginia Supreme Court spent almost $3 million dollars in independent expenditures in support of that candidate's campaign. Writing for the majority, Justice Kennedy, wrote that such large expenditures—expenditures which exceeded the combined expenditures of both candidate committees by $1 million— had "a significant and disproportionate influence on the electoral outcome" and created a "serious, objective risk of actual bias."[21]

In *Citizens United*, the Supreme Court has handed corporate special interests a loaded weapon – whether they ever fire the weapon is, arguably, beside the point. There is every reason to believe that the threat of corporate funded campaign attack ads is likely to distort policy priorities and to allow special interests to dominate federal politics.

Perhaps even more profoundly, the Court in *Citizens United* has given the stamp of constitutional approval to corporate electioneering. The Court has invited corporations into elections, telling them that they have a First Amendment right to spend their vast resources to try to influence the outcome of an election. If even a few major corporations with stakes in current policy battles take the Court up on its invitation, the resulting wave of special interest money could undermine the foundations of our democracy.

2. The Roberts Court's "Deregulatory Turn"

The limits on corporate campaign spending at issue in *Citizens United* represent the fourth time challenges to campaign finance laws have been argued before the Roberts Court, and the fourth time the Roberts Court majority has struck down such provisions as unconstititional.[22] As Professor Richard Hasen has explained, this "deregulatory turn" represents an about-face – by contrast, the Rehnquist Court had generally taken a deferential approach to campaign finance

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[20] 129 S.Ct. 2252 (2009).

[21] *Id.* at 2264-65. Justice Kennedy – the author of both the *Caperton* opinion and the *Citizens United* opinion – attempts to distinguish the holding of *Caperton* as irrelevant to the question raised in *Citizens United:* whether independent expenditures have the potential to corrupt elected officials. He claims that the holding of *Caperton* was limited to the context of judicial elections, where a litigant possesses a "due process right to a fair trial before an unbiased judge." *Citizens United*, Slip op. at 44. Justice Kennedy's reasoning, however, is patently unconvincing. As Justice Stevens' dissent pointed out, in *Caperton*, the Court recognized that "some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes." *Id.* at 69 (Stevens, J., dissenting). If an independent expenditure campaign could create "bias" in an elected judge, then there is no reason to believe that an identical independent expenditure campaign could not create equivalent "bias" if deployed on behalf of a legislative candidate. Although Justice Kennedy is willing to uphold litigants' due process to an unbiased judge, he gives no weight whatsoever to the electorate's constitutional interests in elected officeholders who have not been bought and paid for with special interest dollars.

[22] *Randall v. Sorrell*, 548 U.S. 230 (2006); *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007); *Davis v. FEC*, 128 S.Ct. 2759 (2008).

reform regulations enacted by federal and state lawmakers.[23] However, now that Chief Justice Roberts and Justice Alito have replaced Chief Justice Rehnquist and Justice O'Connor on the Supreme Court, the newly constituted majority has moved with stunning haste to dismantle decades-old safeguards intended to limit the effect of special interest money in politics. Indeed, as Justice Stevens wryly noted, "The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court."[24]

With *Citizens United*, the current Supreme Court's majority's hostility to campaign finance law has become apparent to even the most casual observer. At oral argument in *Citizens United*, Justice Antonin Scalia exemplified the majority's unwarranted suspicion of long-standing campaign finance reform safeguards, assuming in his questions that such safeguards represented nothing more than incumbent self-dealing:

> Congress has a self-interest. I mean, we – we are suspicious of congressional action in the First Amendment area precisely because we – at least I am – I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don't think so.[25]

Justice Kennedy also speculated during oral argument that "the Government [could] silence[] a corporate objector" who wished to protest a particular policy during an election cycle.[26] Similarly, in the *Citizens United* opinion, Justice Kennedy simply assumed, without any factual basis, that Congress' motives were invidious, stating of the law at issue, "[i]ts purpose and effect are to silence entities whose voices the Government deems to be suspect."[27] And Chief Justice Roberts famously expressed his impatience with campaign finance safeguards, striking down regulations on corporate electioneering in the *Federal Election Commission v. Wisconsin Right to Life* decision, saying "Enough is enough."[28] The Court has used its skepticism of congressional motives – based not on facts or a record below but on the instincts of a majority of justices – to justify its utter lack of deference to legislative determinations in this arena. Such a cavalier dismissal of Congress' carefully considered legislation ignores the years of hearings, record, debate and deliberation involved in creating these reforms.

Unfortunately, *Citizens United* will not be the Roberts Court's last word on the issue. Seeking to take advantage of the majority's deregulatory agenda, the same coalition of corporate-backed groups that filed the *Citizens United* lawsuit have launched an armada of constitutional challenges to state and federal reforms, now advancing rapidly toward the Supreme Court.[29]

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[23] Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1064 (2008).
[24] *Citizens United*, Slip op. at 23 (Stevens, J., dissenting).
[25] Transcript of Oral Argument at 50-51, *Citizens United*, No. 08–205 (Sept. 12, 2009).
[26] *Id.* at 52.
[27] *Citizens United*, Slip op. at 23.
[28] *See* 551 U.S. at 478.
[29] *See* David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, at A11, *available at* http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse; *see also* Marcia Coyle, *Opinion Roils Dozens of Cases*, THE NAT'L LAW J., Feb. 1, 2010; Mike Scarcella, *D.C. Circuit's First Shot at Citizens United*, THE NAT'L LAW J., Feb. 1, 2010.

These challenges include attacks on public financing systems, campaign finance disclosure requirements, "pay-to-play" restrictions on government contractors and lobbyists, and "soft money" restrictions on political parties and political action committees. Challengers seek to use the First Amendment as a constitutional "trump card" to strike down any reform that attempts to mitigate special interest domination of politics. Several of these challenges will be ripe for decision by the Supreme Court within the year.

This Committee has an important role to play in helping to create a factual record that would correct unfounded assumptions about money and politics embedded in the Court's decisions, and could be useful in defending both new and existing reforms against judicial overreaching. In addition, we urge the Committee to endorse several reforms to counter the impact of Citizens United – supporting public financing of congressional and presidential elections; enacting federal voter registration modernization legislation; and enacting federal legislation that requires shareholder approval for corporate political spending, as well as effective disclosure of such spending.

3. Surviving Strict Scrutiny: Creating A Record For Reform

Legislative repair of our system of campaign finance safeguards will be extraordinarily challenging because the Court has awarded its deregulatory agenda the imprimatur of the First Amendment. Since the Court has granted corporate political spending First Amendment protection, it has now indicated that it will treat restrictions on such corporate political spending as burdens on political speech, justifying the application of strict scrutiny. This standard requires that if a challenged regulation is to pass constitutional muster, the government must demonstrate that it be "narrowly" tailored to advance a "compelling state interest." This is a high bar to meet – indeed, as Professor Gerald Gunther famously noted , such a non-deferential standard of review is often considered "'strict' in theory and fatal in fact."[30] However, campaign finance reform laws have survived the application of strict scrutiny in the past,[31] and will continue to survive even the skepticism of the Roberts Court if one key condition is realized: an adequate factual record evidencing the real threat to democracy that stems from special interest domination of politics as well as the efficacy of campaign finance reform regulations in mitigating such threats.

It was the absence of such a developed factual record that allowed the majority in *Citizens United* to enact into constitutional doctrine their own untested assumptions about money in politics. In *Citizens United*, the Supreme Court took the relatively narrow case before it – whether the 90 minute video-on-demand *Hillary: The Movie* should be deemed a corporate campaign advertisement or not – and drastically expanded the issue, requesting reargument on the constitutionality of decades-old restrictions on the use of corporate treasury funds to directly support or oppose candidates. Moreover, the Court required parties and *amici* to brief

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[30] Gerald Gunther, *The Supreme Court 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[31] As Professor Adam Winkler has pointed out, in cases between 1990 and 2003, where strict scrutiny was applied to campaign finance laws, such laws survived the application of strict scrutiny in 24 percent of cases. *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 845 (2006).

these broad issues on an expedited basis, allowing them no time to develop and present a factual record regarding the influence of money in politics.

Accordingly, as was pointed out by BCRA's congressional sponsors, in deciding this landmark case, the Court lacked a developed factual record on key factual issues, including (1) whether corporate independent expenditures posed similar risks of corruption as direct corporate donations to parties and candidates;[32] (2) whether disclosure requirements can adequately ensure that voters and shareholders can track the uses and abuses of money in politics; and (3) what benefits and burdens have resulted from the real-world functioning of campaign finance regulations.[33] Rather than remanding to the district court for development of these central factual issues, the majority simply enacted its own assumptions about political and financial behavior into law, as we explain at greater length below.

The Brennan Center urges this Committee – perhaps jointly with other interested Committees – to hold hearings to create a record demonstrating how the Supreme Court majority has distorted the political reality of how money in politics threatens to erode democratic values. Making such a record – and shining the public spotlight on the faulty assumptions that underlie the Court's deregulatory agenda – would prove valuable for the defense of existing reforms and the enactment of new democratic safeguards, for the development of constitutional doctrine, and for the public's understanding of money in politics. While Congress cannot directly repair the damage done by the Court's distortion of the First Amendment, hearings like those we suggest could provide a critical forum to demonstrate that the approach taken by this Court is a dead-end for democracy and to point a better way forward.

A. Connecting the Dots between Corporate Political Spending and Corruption

In oral argument in *Citizens United*, Justice Alito noted that:

> [M]ore than half the States, including California and Oregon, Virginia, Washington State, Delaware, Maryland, [and] a great many others, permit independent corporate expenditures for just these purposes? Now have they all been overwhelmed by corruption? A lot of money is spent on elections in California; has – is there a record that the corporations have corrupted the political process there?[34]

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[32] Although Justice Kennedy's opinion claims that the 100,000 page factual record in *McConnell v. Federal Election Commission* contains no evidence of "quid pro quo" corruption, and only "scant evidence" that independent expenditures even ingratiate, Citizens United, Slip op. at 45 (citing *McConnell v. Federal Election Comm.*, 251 F.Supp.2d 176, 555–557 (D.D.C. 2003) (opinion of Kollar-Kotelly, J)), this claim is somewhat disingenuous. However voluminous the factual record in *McConnell*, that case is not on point since it focused on two different issues – the constitutionality of restrictions on "soft money" contributions to political parties and the use of so-called "sham issue ads" to circumvent regulations on corporate electioneering.

[33] Supplemental Brief of Amici Curiae Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 9-10 (2009), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_mccain_supp_brief_amici.pdf.

[34] Transcript of Oral Argument at 50.

The *Citizens United* majority did not wait for these questions to be answered. Instead of remanding to a lower court for a factual determination on the nexus between corporate independent expenditures and political corruption, the *Citizens United* majority simply assumed that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[35] By reaching this conclusion, the Supreme Court has constitutionally enshrined what Senator John McCain has described as the Court's "extreme naïveté"[36] regarding the influence of corporate money in politics. Even in the absence of a developed factual record, examples from the real world of money and politics cast doubt upon the Court's premature conclusion:

- In a 2006 house election in California, a group headed by Indian gaming tribes spent $404,323 in independent expenditures in support of the successful candidate. This independent expenditure by a single special-interest group equaled 29% of the total expenditures made by the candidate herself.[37]
- Also in California, Intuit, a software corporation that distributes the "Turbo Tax" software program funneled $1 million through a group called the Alliance for California Tomorrow, which spent the $1 million on independent expenditures in support of a state controller who opposed the creation of a free-on-line tax preparation program for California residents.[38] The candidate himself spent only slightly more than $2 million on his own campaign.[39]
- In a 2000 Michigan senate race, Microsoft used the Chamber of Commerce to fund $250,000 in attack ads against a candidate. Because the tax code does not require trade organizations such as the Chamber to disclose the identity of its donors, Microsoft's involvement in the election would be unknown but for a newspaper article that exposed its contribution.[40]

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[35] *Citizens United*, Slip. Op. at 45.

[36] *See* Reid Wilson, *Supreme Court Sharply Questions Ban on Corporate Spending*, THE HILL, Sept. 9, 2009, *available at* http://thehill.com/homenews/campaign/57887-court-sharply-questions-ban-on-corporate-spending.

[37] CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE 40 (2008), *available at* http://www.fppc.ca.gov/ie/IEReport2.pdf.

[38] *See* Campaign Finance Reports for Intuit and Alliance for California Tomorrow, *available at* http://cal-access.ss.ca.gov/default.aspx; Dennis J. Ventry Jr., *Intuit Uses Clout to Stymie State Innovation*, SACRAMENTO BEE, Oct. 6, 2009, *available at* http://www.sacbee.com/1190/story/2233219.html.

[39] Campaign Finance Reports for Tony Strickland's Candidate Committee, *available at* http://cal-access.ss.ca.gov/Campaign/Candidates/Detail.aspx?id=1005462&session=2005.

[40] HIDDEN RIVERS (Center for Political Accountability 2006), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932 at 13; JOHN R. WILKE, *Microsoft Is Source of 'Soft Money' Funds Behind Ads in Michigan's Senate Race*, WALL STREET JOURNAL, Oct. 16, 2000.

- There is also ample reason to believe that in states that allow corporate independent expenditures, this loophole is used to circumvent contribution limits. For example, independent expenditures skyrocketed after California enacted contribution limits for the first time. According to a report by the state's Fair Political Practices Commission, in the six years after the enactment of these limits, independent expenditures increased by 6,144% in legislative races and 5,502% in statewide races.[41]

Fortunately, the Court has left a door open for Congress to craft narrow regulation over corporate expenditures so long as such regulation is based on a strong factual showing of the relationship between such expenditures and corruption. Despite its assumption regarding corruption and independent expenditures, the Court in *Citizens United* indicated that it would be "concern[ed]" "[i]f elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle."[42] Thus, a potential response to *Citizens United* is for Congress to convene hearings to investigate the link between corporate independent expenditures and the creation of political debt.

There is precedent for such a record. As demonstrated by the Court's decisions in *McConnell v. Federal Election Commission*[43] and *Caperton*, the Supreme Court is willing to find that corporate political spending and independent expenditures can lead to actual or apparent corruption where there is a strong factual record demonstrating such a connection. In *McConnell*, the court upheld Congress's soft money ban because of the strong record of soft-money influence peddling created by Congress in enacting BCRA. Similarly, in *Caperton*, the Court, shocked by the sordid factual record before it, was unable to deny that large independent expenditures can give rise to corruption. A developed factual record demonstrating the clear connections between corporate political spending and corruption of our elected officials can inject some much-needed reality into the Court's naïve view of money in politics.

B. Demanding Accountability Through Consent and Disclosure

Another troubling assumption adopted by the *Citizens United* majority is the adequacy of disclosure laws to safeguard democratic values against subversion. Justice Kennedy's argument that limits on corporate political spending are unnecessary is premised upon his unsupported assumption that disclosure laws allow both the electorate and corporate shareholders make informed decisions and give proper weight to different speakers and messages.

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First

[41] CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, *supra* n. 38.
[42] *Citizens United*, Slip Op. at 45.
[43] 540 U.S. 93 (2003).

> Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[44]

Unfortunately, Justice Kennedy's vision of transparency and free flow of information bears no relation to what occurs in real life.[45] In fact, in today's political environment, corporations regularly hide behind false names to disguise their true identity and agenda:

- In a recent Colorado election, a group called "Littleton Neighbors Voting No," spent $170,000 to defeat a restriction that would have prevented Wal-Mart from coming to town. Another group called "Littleton Pride" spent $35,000 in support of the prohibition. When the disclosure reports for these groups were filed, however, voters discovered that "Littleton Neighbors" was not a grassroots organization but a front for Wal-Mart — the group was, in fact, exclusively funded by Wal-Mart. Behind a grassroots facade, Wal-Mart was able to outspend "Littleton Pride," a true grassroots group, by a 5:1 ratio.[46]
- As the record in *McConnell* demonstrated, corporations commonly veil their political expenditures with misleading names — the "The Coalition-Americans Working for Real Change" was a business organization opposed to organized labor and "Citizens for Better Medicare" was funded by the pharmaceutical industry.[47]

The majority's assumption that corporate political spending must be disclosed to shareholders or the public at large is similarly incorrect. Under current laws regulating corporations, nothing requires corporations to disclose to shareholders whether funds are being used to fund politicians or ballot measures, or how the political money is being spent.[48] In short, corporate managers could be using shareholder funds for political spending, without the knowledge or consent of investors.

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[44] *Citizens United*, Slip Op. at 55 (citations omitted).

[45] For example, independent expenditures – the very type of political expenditures unleashed by *Citizens United* – are underreported in most states. As one report explained, "holes in the laws – combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws – results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public." Linda King, INDECENT DISCLOSURE PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (National Institute of Money in Politics 2007), https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1.

[46] Def.'s Response Br. to Pls.'s Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

[47] *See* 540 U.S. at 128, 197.

[48] *See* Jill Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006) ("Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls.").

1. Giving Shareholders a Voice

The Brennan Center has proposed a remedy to this disclosure gap in our recently-issued report *Corporate Campaign Spending: Giving Shareholders a Voice*.[49] We suggest two specific reforms: first, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require managers to report corporate political spending directly to shareholders.

These requirements will increase corporate accountability by placing the power directly in the hands of the shareholders, thereby ensuring that shareholders' funds are used for political spending only if that is how the shareholders want their money spent. Moreover, the disclosure requirement serves valuable information interests, leaving shareholders better able to evaluate their investments and voters better-equipped to deliberated choices at the polls. The report includes model legislation toward to effectuate the proposed reforms, and we urge Congress to consider this legislation as soon as possible.

2. Empowering Voters Through Disclosure

After the Supreme Court's decision in *Citizens United*, the importance of disclosure to the health of our democracy cannot be overstated. Unfortunately, there is currently a sustained and unrelenting wave of legal challenges aimed at eliminating disclosure of independent expenditures. Indeed, the *New York Times* recently quoted the attorneys who brought the *Citizens United* suit as stating that disclosure was their next target in a ten-year strategy to eliminate campaign finance regulations.[50] The Supreme Court has already granted *certiorari* in *Doe v. Reed*, a case brought by the same lawyers who brought *Citizens United*, and the case will be fully briefed this spring.[51] Although that case, which involves the disclosure of ballot petition signatures, does not implicate campaign finance disclosures directly, the plaintiffs advance a broad conception of a right to anonymous speech which would clearly undermine campaign finance disclosure regimes.

To be sure, *Citizens United* upheld BCRA's disclosure requirements against the plaintiffs' challenge, and expressly affirmed the importance of disclosure as a means of "'provid[ing] the electorate with information' about the sources of election-related spending." [52] Even while upholding these disclosure requirements, however, the majority opinion dropped several hints that could provide opponents of disclosure with a roadmap to a successful constitutional challenge to these laws.

First, the Court sent a subtle message that evidence of harassment or retaliation might be a sufficient foundation for a successful challenge to disclosure laws.[53] The majority specifically remarked that examples of harassment against contributors to various initiatives were "cause for concern," but noted that Citizens United had demonstrated no record of harassment.

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[49] *See* Torres-Spelliscy, *supra* n. 3.
[50] *See* Kirkpatrick, *supra* n.28.
[51] *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, __ S.Ct.__, 2010 WL 144074 (2010) (No. 09-559).
[52] *Citizens United*, Slip op. at 52 (quoting *Buckley v. Valeo*, 424 U. S. 1, 66 (1976)).
[53] *Id.* at 54-55.

However, to strike down valuable disclosure laws on constitutional grounds in order to guard against harassment would be using "a sledgehammer rather than a scalpel."[54] A better tailored approach would use more robust anti-harassment laws to protect the constitutional interests of both contributors and the public at large.

Second, the Court sent a worrying signal for supporters of disclosure in holding that requiring corporations to form a PAC for corporate political expenditures was so burdensome as to constitute a ban on political speech.[55] Many of the PAC restrictions that the Court found to be unconstitutionally burdensome – appointing a treasurer, keeping records, and making detailed reports of expenditures – are nothing more than disclosure requirements under another name. The Court assumed the existence of an unconstitutional burden despite the absence of any factual record demonstrating any "chill" or other harm. Using this same rationale, the Court could potentially find that compliance with disclosure laws is burdensome in practice and therefore unconstitutional as applied, while upholding the principle of disclosure in theory.

A vision of the First Amendment which privileges secrecy and anonymity over transparency and accountability has no place in our representative democracy. To defend existing laws and enact new reforms, a factual record is needed. Specifically, we must push back against arguments that disclosure requirements chill speech as a matter of course, or are necessarily unduly burdensome.

C. Combating the Majority's Myth of Government Censorship

Finally, as indicated by Justices Scalia and Kennedy's questions at oral argument, the *Citizens United* majority appears to be under the impression that the true purpose of campaign finance disclosure laws is to silence potential critics who might otherwise be able to use corporate resources to criticize governmental policy and decisionmakers.

> The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.[56]

Not surprisingly, the Court cites no evidentiary basis whatsoever for its conclusions on government censorship. Accordingly, there is no support for the Court's assumption that regulations on corporate political spending had in any way "silenced" any corporation from effectively expressing its "opinions" regarding any policy, candidate, or any other matter. As Justice Stevens wryly notes in dissent:

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[54] *Id.* at 7 (Stevens, J., dissenting).
[55] *Id.* at 21.
[56] *Citizens United*, Slip. Op. at 38-39 (citations omitted).

> While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.[57]

In short, the majority bases its censorship analysis on nothing other than the personal views of five justices.

Congress can play an important role by developing a factual record regarding the means available to corporations seeking to advance a political agenda, short of direct electoral support for or opposition to a particular candidate. Moreover, Congress can combat the myth that campaign finance regulations are means for incumbent politicians to insulate themselves against challengers. Indeed, as Solicitor General Kagan pointed out at oral argument and as a Brennan Center study has demonstrated, the available evidence shows that campaign finance reforms such as contribution limits and public financing appear to benefit challengers rather than incumbents.[58]

4. Enhancing First Amendment Values by Empowering Voters

A. Public Funding of Political Campaigns

The Court in *Citizens United* reaffirmed that "it is our law and our tradition that more speech, not less, is the governing rule."[59] The Court thus reiterated the "more speech" principle on which the Court upheld the presidential public financing system in *Buckley v. Valeo*. The *Buckley* Court broadly approved of public funding programs, finding that they represent a governmental effort, "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[60] By making it possible for candidates to run a viable, competitive campaign through grassroots outreach alone, public funding programs decrease the need for deep-pocketed supporters. Candidates can proudly run "clean" elections, leaving voters assured that their interests – rather than special interests – will be faithfully represented.

Public funding programs also have the potential to promote meaningful electoral participation by a diverse range of citizens. Systems that award multiple matching funds for small contributions, like that proposed in the *Fair Elections Now Act*, introduced by Rep. John Larson, as well as the public financing system in New York City, amplify the voices of actual citizens, and can be an effective counterbalance to unrestrained corporate spending. Moreover, by

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[57] *Id.* at 90 (Stevens, J., dissenting).

[58] *See* Transcript of Oral Argument at 50-51; Ciara Torres-Spelliscy, Kahlil Williams, Dr. Thomas Stratmann, ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS (The Brennan Center for Justice 2009). To aid legal development in this area, Brennan Center will release two scholarly reports this spring: the first will focus on the real-world impact of public financing systems upon competitiveness, diversity, and fundraising behavior; and the second will provide an in-depth analysis of the New York City multiple matching funds system, the nation's longest running and most successful public financing program. We hope that these two reports will provide valuable substance to the policy debates surrounding the benefits of campaign finance reform, and we would welcome Congressional hearings on these issues.

[59] *Citizens United*, Slip Op. at 45.

[60] *Buckley*, 424 U.S. at 92-93.

encouraging candidates to seek donations from a large number of voters, such programs encourage broad participation in the election process.

Ever since public financing systems were enacted, they have faced constitutional challenges brought by those who claim that their First Amendment rights are violated when the state awards funds to qualified publicly-financed candidates.[61] Courts, agreeing that public financing furthers First Amendment values, have consistently upheld such systems against constitutional challenge.[62] Recently, however, a new slew of challenges have been launched. These new challenges claim that the Roberts Court's 2008 decision in *Davis v. FEC*, 128 S.Ct. 2759 (2008), has cast doubt on this previously well-settled area of the law. As a result, lawsuits challenging the public funding programs in Connecticut and Arizona are pending before the Second and Ninth Circuits respectively; and two new challenges were recently launched in Wisconsin, once again by the same opponents of reform who brought the *Citizens United* lawsuit.[63]

B. Voter Registration Modernization

Bringing new eligible voters into the political process is another "more speech" solution to *Citizens United*. This can be accomplished by bringing our voter registration system into the 21st century, an initiative which, in the words of Attorney General Eric Holder, would "remove the single biggest barrier to voting in the United States."[64] Indeed, if today's system were modernized, it could bring as many as 65 million eligible Americans into the electoral system permanently – while curbing the potential for fraud and abuse.

Voter registration modernization ("VRM") necessitates that the government automatically and permanently register all eligible citizens, and provide failsafe mechanisms to ensure same-day registration. A bipartisan coalition actively supports federal VRM legislation, and states from around the country are currently moving to implement the idea. A dozen states have already

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[61] Matching fund provisions, that disburse additional money to participating candidates when they are targeted by independent expenditures or high spending opponents, have been particularly targeted. These mechanisms, usually known as matching funds, are used to incentive participation in public financing programs while still preserving public monies.

[62] *See North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 2008) (affirming denial of preliminary injunction against North Carolina's public financing system for appellate judicial elections); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding system for elections); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993) (upholding Rhode Island's public funding system).

[63] Matching fund provisions were struck down at the district court level in Connecticut and in Arizona. *See Green Party v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. Aug. 27, 2009), *argued* (2d Cir. Jan. 13, 2010); *McComish v. Brewer*, No. CV-08-1550 (D. Ariz. Jan. 20, 1010), *appeal docketed* (9th Cir. Jan. 26, 2010). In Wisconsin, recently-filed lawsuits challenge the mechanism by which Wisconsin's program distributes money to participants and the reporting requirements of the system. *Wisconsin Right to Life v. Brennan*, 09-cv-764 (W.D. Wi. 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D. Wi. 2009).

[64] Eric Holder, Attorney General, Remarks at the Brennan Center for Justice Brennan Legacy Awards Dinner on Indigent Defense Reform (Nov. 16, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html.

adopted internet registration; at least nine have implemented parts of automated registration; eight others have permanent registration; and another eight have Election Day registration.

Voter registration modernization would help us live up to our ideal of being a nation governed with the consent of the governed. We should aspire to get as close to full registration of eligible voters as possible. If enacted, voter registration modernization could be the most significant voting measure since the Voting Rights Act.

Conclusion – Advancing A Voter-Centric View of the First Amendment

Perhaps the most troubling aspect of *Citizens United* – worse than its political implications, worse than its aggressive deregulatory stance – is that the Court embraces a First Amendment where voters are conspicuously on the sidelines. At the start of the *Citizens United* opinion, Justice Kennedy correctly noted that "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[65] As the opinion proceeded, however, it became evident that the majority was in fact taking a myopic view of campaign finance jurisprudence, one that focuses exclusively on campaigns – candidates, parties and corporate interests – at the expense of the voting citizenry.[66] The Court's ultimate judgment held, in effect, that whatever interest is willing to spend the most money has a constitutional right to monopolize political discourse, no matter what the catastrophic result to democracy.

This aspect of *Citizens United* – like many others – constitutes a break with prior constitutional law. The Court has long recognized that "constitutionally protected interests lie on both sides of the legal equation."[67] Accordingly, our constitutional system has traditionally sought to maintain a balance between the rights of candidates, parties, and special interests to advance their own views, and the rights of the electorate to participate in public discourse and to receive information from a variety of speakers.[68]

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[65] *Citizens United*, Slip Op. at 23.

[66] The Court's central concern was that "[t]he Government ha[d] 'muffle[d] the voices that best represent the most significant segments of the economy.'" *Id.* at 38. *See also id.* at 35-37 (finding differential treatment of media corporations and other corporations troubling); 38-40 (worrying that "smaller corporations may not have the resources" to lobby elected officials like larger corporations); 43 ("'It is well understood that a substantial and legitimate reason, if not the only reason . . . to make a contribution . . . is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.'" (quoting Kenndy, J., dissenting in *McConnell*, 540 U. S. at 297)).

[67] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 590 (1957) (noting "delicate process" of reconciling labor union's rights with value in promoting "active, alert responsibility of the individual citizen in a democracy").

[68] *See, e.g.*, *Shrink Missouri*, 528 U.S. at 390 (balancing candidate's and political committee's claims with threat that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"); *Federal Election Commission v. Mass. Citizens for Life*, 479 U.S. 238, 257-58 & n.10 (1986) (balancing nonprofit organization's interests with importance of protecting "the integrity of the marketplace of political ideas" necessary for citizens to "develop their faculties"); *Federal Election Commission v. National Right to Work Comm.*, 459 U.S. 197, 560 (1982) (balancing corporate

It is crucial that this Committee, and Congress, recognize the Roberts Court's one-sided view of the First Amendment as a distortion – one which threatens to erode First Amendment values under the guise of protecting them. In truth, our constitutional jurisprudence incorporates a strong First Amendment tradition of deliberative democracy – an understanding that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate. This is why our electoral process must be structured in a way that "build(s) public confidence in that process," thereby "encouraging the public participation and open discussion that the First Amendment itself presupposes."[69]

In this post-*Citizens United* era, a robust legislative response will be critical. It is similarly imperative, however, that we reframe our constitutional understanding of the First Amendment value of deliberative democracy. In the longer term, reclaiming the First Amendment for the voters will be the best weapon against those who seek to use the "First Amendment" for the good of the few, rather than for the many.

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interests against the value of promoting "the responsibility of the individual citizen for the successful functioning of that process").

[69] *Shrink Missouri*, 528 U.S. at 400.

Mr. NADLER. I thank you.

Mr. Parnell is recognized.

TESTIMONY OF SEAN D. PARNELL, PRESIDENT, CENTER FOR COMPETITIVE POLITICS, ALEXANDRIA, VA

Mr. PARNELL. Thank you, Chairman Nadler, Ranking Member Sensenbrenner, Members of the Subcommittee. Thank you for inviting me to testify today.

To begin, I would like to address the issue of so-called unlimited corporate spending. A review of recent political spending in other areas by incorporated entities shows that the lack of statutory limits on spending has not led to corporations emptying their treasuries in support of political agendas.

For example, in the 2002 election cycle, the Republican and Democratic Parties raised approximately $300 million combined in soft money from businesses, unions and other organizations during a period when after-tax corporate profits totaled over $1 trillion.

Corporations also failed to avail themselves of their amassed wealth in the 2004 election cycle when so-called 527 groups spent approximately $612 million in connection with all elections. Most of the 527 funding in 2004 came from individuals, ideologically oriented and issue-driven groups, and unions.

Looking only at Exxon Mobil, which appears to be the popular villain of the day, lobbying expenditures in 2008 totaled roughly $29 million, while they earned over $45 billion in profits that year.

And finally, an internal memo regarding Exxon Mobil's giving to public policy groups in 2002 States that they gave only $5.1 million to such groups. In 2002 Exxon Mobil had annual profits of approximately $11.46 billion.

Simply put, in the past, business corporations, unions and ideologically oriented groups have had ample opportunities to pour unlimited amounts of money into the American political system through soft money, 527 groups, lobbying and public policy groups and have shown very little interest in putting more than a tiny fraction of their resources into these efforts.

While the *Citizens United* decision does not pose nearly the threat to America's political system as detractors claim, there may, in fact, be some legislation that ought to be considered in light of this ruling.

When considering policy responses, however, it is important to note that there are some things which it is clear that Congress simply cannot do in light of the *Citizens United* decision and other rulings on campaign finance and the First Amendment.

Among the options that are unlikely to be permitted by the courts would be any sort of tax levied on the exercise of the constitutional right, as proposed in H.R. 4431, or the enactment of legislation that would simply restore pre-*Citizens United* status quo through the back door, such as H.R. 4435, a bill that would apparently forbid publicly traded company from being listed on stock exchanges if they engage in independent expenditures.

Another consideration to keep in mind is the Supreme Court's admonishment that "the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers which may be a means to control content. There is no basis for the proposition that in the political speech context the government may impose restrictions on certain disfavored speakers."

This strongly suggests that the courts are likely to be skeptical of laws and regulations that impose burdens only on some disfavored incorporated entities while leaving other favored speakers free of similar burdens.

For example, laws that require for-profit corporations to seek shareholder approval for expenditures, such as H.R.s 4487 and 4537, might be struck down in court because no similar requirement is imposed on unions or other nonprofits.

The pre-*Citizens United* status quo may be gone, but there are several policy changes that Congress should consider, including eliminating the limit on coordinated expenditures between parties and candidates and raising contribution limits for individuals, parties and PACs to fully account for inflation since they were first imposed in 1974.

We at the center believe these measures would be consistent with the First Amendment and are actually likely to draw money out of the newly permitted world of relatively unregulated corporate express advocacy and into the more heavily regulated sphere of candidates, parties and PACs.

I have attached to my submitted testimony a document entitled "After Citizens United: A Moderate, Modern Agenda for Campaign Finance Reform" that provides additional information on these suggestions and others.

Finally, I want to make one comment that was not made at the Senate hearings yesterday and has not been raised by anybody here so far. And that is the subject of book banning.

The United States Supreme Court, when they first heard oral arguments in *Citizens United*, was presented by the deputy solicitor general of the United States with the argument that under campaign finance regulations it was permitted for the government to ban books.

That is, I would hope, a matter of some interest to the Subcommittee on the Constitution, Civil Rights and Civil Liberties.

It is speculation on my part, but it is my belief, when people ask why did the United States Supreme Court potentially reach for this decision when it was not presented initially with questions of whether it should overturn *Austin v. Michigan*—but it is my own speculation that the United States Supreme Court, when informed by the deputy solicitor general of the United States that, yes, the Federal Government could under campaign finance regulations ban books—that the Supreme Court simply decided, "If you believe that you have the authority to ban books, we really need to revisit exactly what authority it is that you believe allows you to ban books."

I would be happy to talk about this or anything else during the question-and-answer period or at any other time. Thank you.

[The prepared statement of Mr. Parnell follows:]

PREPARED STATEMENT OF SEAN D. PARNELL

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
(SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES)

The First Amendment and Campaign Finance Reform After Citizens United

Wednesday, February 3, 2010, 10 a.m.
2141 Rayburn House Office Building

Testimony of:

Sean D Parnell
President
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Thank you for the opportunity to testify today regarding the Supreme Court's recent ruling in *Citizens United*. My name is Sean Parnell, president of the Center for Competitive Politics, a nonpartisan, nonprofit organization focused on promoting and protecting the First Amendment's political rights of speech, assembly, and petition.

To begin, I'd like to address the issues of foreign participation in U.S. elections and the idea of "unlimited" corporate spending.

It remains illegal for foreign corporations to spend money advocating the election or defeat of candidates for office. The Supreme Court left untouched 2 USC 441(e), which prevents any foreign national, including incorporated entities, from participating in U.S. elections. Regulations by the Federal Election Commission, also intact after *Citizens United*, serve as an even stronger and more explicit ban on foreign corporations engaging in express advocacy.[1]

As for the idea of "unlimited" political spending by corporations, a review of recent political spending in other areas by incorporated entities shows that the lack of *statutory* limits on spending has not led to corporations emptying their treasuries in support of political agendas.

For example, in the 2002 election cycle, the Republican and Democratic parties raised approximately $300 million combined in soft money from businesses, unions, and other organizations,[2] during a period when after-tax corporate profits totaled over $1 trillion.[3]

Corporations also failed to avail themselves of their amassed wealth in the 2004 election cycle, when so-called 527 groups spent approximately $612 million in connection with all elections.[4] Most of the 527 funding in 2004 came from individuals, ideologically oriented and issue-driven groups, and unions.

Looking only at ExxonMobil, lobbying expenditures in 2008 totaled roughly $29 million[5] while they earned over $45 billion in profits that year.[6] Finally, an internal memo regarding

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[1] See "Debunking the Citizens United Horror Stories: Episode 1: Foreign Corporations" by Brad Smith, January 24, 2010, available at http://www.campaignfreedom.org/blog/detail/debunking-the-citizens-united-horror-stories-episode-1-foreign-corporations

[2] "Soft Money Backgrounder," Center for Responsive Politics, available at: http://www.opensecrets.org/parties/softsource.php

[3] Charles P. Himmelberg, James M. Mahoney, April Bang, and Brian Chernoff, "Recent Revisions to Corporate Profits: What We Know and When We Knew It," *Current Issues in Economics and* Finance, p. 3 table 1, March 2004, Federal Reserve Bank of New York http://www.ny.frb.org/research/current_issues/ci10-3.pdf

[4] "527s: Advocacy group spending in the 2010 elections," Center for Responsive Politics, available at: http://www.opensecrets.org/527s/index.php

[5] "Lobbying: Top Industries (2008)," Center for Responsive Politics, available at: http://www.opensecrets.org/lobby/top.php?showYear=2008&indexType=i

[6] "ExxonMobil shatters annual profit record," January 30, 2009, CBS News, available at: http://www.cbsnews.com/stories/2009/01/30/business/main4764148.shtml

ExxonMobil's giving to public policy groups in 2002 states that they gave only $5.1 million to such groups.[7] In 2002 ExxonMobil had annual profits of approximately $11.46 billion.[8]

Simply put, in the past business corporations, unions, and ideologically-oriented groups have had ample opportunities to pour "unlimited" amounts of money into the American political system through "soft money," 527 groups, lobbying, and public policy groups, and have shown very little interest in putting more than a tiny fraction of their resources into these efforts.

While the *Citizens United* decision does not pose nearly the threat to America's political system as detractors claim, there may in fact be some legislation that ought to be considered in light of the ruling. When considering policy responses, however, it is important to note that there are some things which it is clear that Congress simply cannot do in light of the *Citizens United* decision and other rulings on campaign finance and the First Amendment.

Among the options that are unlikely to be permitted by the Courts would be any sort of tax levied on the exercise of a constitutional right, as proposed in H.R. 4431, or the enactment of legislation that would simply restore the pre-*Citizens United* status quo through the back door such as H.R. 4435, a bill that would apparently forbid companies listed on stock exchanges from engaging in independent expenditures.

Another consideration to keep in mind is the Supreme Court's admonishment that "...the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content... There is no basis for the proposition that, in the political speech context, the government may impose restrictions on certain disfavored speakers."[9]

This strongly suggests that the Courts are likely to be skeptical of laws and regulations that impose burdens upon only some disfavored incorporated entities while leaving other, favored speakers free of similar burdens. For example, laws that require for-profit corporations to seek shareholder approval for expenditures, such as H.R.s 4487 and 4537, might be struck down in court because no similar requirement is imposed on unions or other non-profits.

The pre-*Citizens United* status quo may be gone, but there are several policy changes Congress should consider, including eliminating the limit on coordinated expenditures between parties and candidates, and raising contribution limits for individuals, parties, and PACs to fully account for inflation since they were first imposed in 1974.

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[7] http://www2.exxonmobil.com/files/corporate/public_policy1.pdf

[8] David Koenig, "ExxonMobil set record profit in 2003," January 30, 2004, Associated Press, available at: http://media.www.thebatt.com/media/storage/paper657/news/2004/01/30/News/Exxon.Mobil.Set.Record.Profit.In.2003-592894.shtml

[9] *Citizens United v. Federal Election* Commission, 558 U.S. ___ (2010)

We at the Center believe these measures would be consistent with the First Amendment and are likely to draw money out of the newly-permitted world of relatively unregulated corporate express advocacy and into the more heavily regulated sphere of candidates, parties, and PACs. I have attached to my submitted testimony a document titled "After Citizens United: A Moderate, Modern Agenda for Campaign Finance Reform," that provides additional information on these suggestions and others.

I'd be happy to talk about this or anything else during the question and answer period, or at any other time.

Thank you.

ATTACHMENTS FOLLOW

BLOG

Debunking the Citizens United Horror Stories: Episode 1: Foreign Corporations
Published on January 24, 2010 12:00 PM
Brad Smith
Category: Contributions & Limits, Expenditure

Critics of the Jan. 21 U.S. Supreme Court decision in *Citizens United v. FEC* are trotting out their horror stories with increasing shrillness. In the next few days, we will be making a series of posts with the straight dope.

Today's episode one discusses the biggest horror story of them all: Citizens United will allow foreign corporations — from China! From North Korea! to pour millions into our elections. Democratic Senatorial Campaign Committee Chairman Bob Menendez said so this morning on ABC, and the President himself has made the claim, "even foreign corporations may now get into the act."

Really? No, not really.

Sen. Menedez said that *Citizens United* allows foreign corporations to spend in American elections because "a corporation is a corporation is a corporation." Nonsense. What the Supreme Court said is that you cannot prevent a corporation from speaking simply because it is a corporation. Therefore, they struck down part of 2 United States Code Section 441b. But a separate section of the law, 2 USC 441e, prohibits "foreign nationals" from contributing. This section of the law wasn't even at issue, let alone overruled. Foreign nationals are prohibited from contributing because they are foreign nationals, not because they are corporations. "A foreign national" is defined to include any "partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country."

Now, this does leave open the possibility of a foreign owned company incorporating and locating in the United States, and then spending money here on politics. But the definition of foreign national also includes non-resident aliens. And the FEC's regulations [11 CFR 110.20(i)] provide that:

A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision making process of any person, such as a corporation, labor organization, political committee, or poltiical organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.

That is an extremely broad prohibition on any involvement in decisions on political activity.

So what is left? Well, conceivably a group of foreigners could form a U.S. corporation, then hire some permanent legal resident aliens ("green card" holders) to make decisions about spending its money. That doesn't seem to likely to be a successful strategy (and remember, wealthy aliens who live in the U.S. as lawful permanent residents are already able to make personal expenditures, and even direct contributions to candidates), but suppose it is — suppose a few corporations slip through the cracks?

If this were really a worry, it could be addressed legislatively simply by broadening the definition of foreign national to include corporations with majority foreign ownership. Such a law might also be challenged on Equal Protection or Due Process grounds (aliens located in the United States do have certain rights) but if such a challenge were successful, it would be *that* case, not *Citizens United*, that opens the door to foreign money, and *that* case has yet to be filed, let alone decided.*

So, does *Citizens United* open the door to foreign contributions? No, not really.

*This is the unlikely, worst case scenario I was referring to in this article, which I found very disappointing for the author's decision to ignore my major point, that contributions by foreign corporations are already prohibited by other sections of the law.

This information was found online at:
http://www.campaignfreedom.org/blog/detail/debunking-the-citizens-united-horror-stories-episode-1-foreign-corporations

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Opinion

Campaign finance ruling's likely impact overblown

The Supreme Court's decision striking down limits on corporate spending in election campaigns is unlikely to change the political situation on the ground.

By Stephen R. Weissman

January 28, 2010

Obama will give you $2,500 a year to go to school

Celeb trainer discovers natural strength supplement

Media coverage and commentary have vastly overstated the likely impact on federal election campaigns of the Supreme Court's Citizens United decision, which ruled that corporations have the same right to free speech as individuals. It has also obscured the extent to which members of Congress from both parties had previously opened the door for corporate and union financing in federal campaigns.

As associate director for policy of the Campaign Finance Institute from 2002-09, I wrote a number of studies showing the rise of corporate and union spending, via tax-exempt organizations, in federal elections. My research found that this spending supported media ads and grass-roots mail, phone and other communications that tore down or boosted candidates without using explicit phrases such as "vote for" or "vote against."

Full disclosure of the sources of financing was legally required only for "527" political organizations, which were mostly pro-Democratic and frequently union-backed. In contrast, no one knew for sure who was providing how much to largely pro-Republican "501(c)" trade associations and advocacy groups, such as the U.S. Chamber of Commerce and Freedom's Watch.

A provision in the 2002 McCain-Feingold campaign finance law did prohibit the use of corporate and union funds in one important area: TV and radio ads mentioning candidates 60 days before an election and 30 days before a primary. But this section of the law was basically gutted by the high court's 2007 decision in the Wisconsin Right to Life case, and especially by the subsequent implementing regulations adopted by the Senate-appointed Federal Election Commission.

Thus, during the 2008 Minnesota Senate race between Norm Coleman and Al Franken, the U.S. Chamber of Commerce was legally able to run an ad showing Democratic candidate Franken with duct

tape over his mouth and this narration: "High taxes hurt. But it seems like every time Al Franken opens his mouth, he talks about raising taxes. This from a guy who was caught not paying his own taxes in 17 states. . . . Maybe he shouldn't open his mouth. . . . Tell Al Franken that high taxes aren't very funny [Franken's phone number flashes by]."

With last week's ruling, the justices granted corporations (and implicitly unions) a constitutional license to *explicitly* urge voters to support or oppose candidates in all communications, while interring the remains of the McCain-Feingold restrictions on ads.

Yet this decision is unlikely to change the political situation on the ground very much. Even before the Citizens United decision, business, labor and wealthy individuals (frequently major owners of corporations, such as Sheldon Adelson of the Las Vegas Sands or George Soros of Soros Fund Management) were already able to spend more than $400 million in the 2008 federal elections on communications with content similar to the Franken ad.

Studies by New York University's Brennan Center for Justice have shown that the candidates themselves do not bother much with media ads that actually say "vote for me" or "vote against her," even though they are legally able to use those terms. In the modern campaign era, such blatant appeals are largely, if not entirely, anachronistic. Perhaps corporate and union-financed "express advocacy" will increase somewhat, particularly in grass-roots communications aimed at already committed followers. But the overall size, nature and thrust of corporate and union communications in federal elections is unlikely to be affected by Citizens United.

Some election lawyers who work for candidates and parties have expressed fear that candidates will now "lose control" of their campaign messages to well-financed outside groups. But while there have been a few such cases, they are relatively rare. Candidates and groups draw from the same well of polling and the same web of political consultants. They all have an interest in opportunistically emphasizing whatever it takes to win.

Finally, it is curious to see some of the same Democratic members of Congress who fought -- on behalf of labor union allies -- legislative proposals to rein in corporate and union-financed 527 political organizations now denouncing the Citizens United decision, which essentially ratifies a status quo they worked to protect.

It is also revealing that we heard little from members of *either* party when the Federal Election Commission emasculatedthe McCain-Feingold 60/30-day ad restrictions. Nor was there congressional resistance when the bipartisan FEC adopted a weak public disclosure regulation for such ads, one that does not require their 501(c) nonprofit corporate sponsors, such as the U.S. Chamber of Commerce or Health Care for America Now, to reveal their ultimate for-profit corporate, union and individual donors. Although the court last week upheld disclosure, this regulation still enables Citizens United to hide its donors.

If members of Congress are now serious about searching for new ways to limit the impact of corporate and union spending in elections and improving its disclosure, they should start by reexamining their own behavior.

Stephen R. Weissman, associate director for policy from 2002-09 at the Campaign Finance Institute, a research organization affiliated with George Washington University, writes about Congress and foreign policy.

DAILY KOS

Citizens United: Don't Panic

by Adam B (Adam Bonin, campaign finance attorney at the Philadelphia-based Cozen O'Connor law firm)

Thu Jan 28, 2010 at 06:20:05 PM PST

Yeah, I know, I know, evil corporations are about to flood the political process with all sorts of outlandish expenditures certain to wreck our political discourse and install a thousand-year plutocracy. But before we all dive off the deep end, a quick before-and-after.

Before *Citizens United*:

- Corporations could make direct financial contributions to candidates in 27 states, but not in federal elections.
- In 26 states, corporations could run direct advertising for or against the election of a state/local candidate.
- In all 50 states and in federal elections, corporations could run "issue advertising" against candidates saying "Sen. [X] is wrong on this issue and is a bad person, so call him on the phone and say so," and as long as it didn't say "and you shouldn't vote for him" and wasn't too close to an election, it was legal.

After *Citizens United*:

- Corporations can make direct financial contributions to candidates in 27 states, but not in federal elections.
- In all 50 states and in federal elections, corporations can run direct advertising for or against the election of a candidate.
- In all 50 states and in federal elections, corporations can run "issue advertising" against candidates saying "Sen. [X] is wrong on this issue and is a bad person" as well as "so don't vote for him."

Is this really *that* large of a difference? It's worth noting, by the way, that the tax referenda which were passed on Oregon on Tuesday were largely promoted by direct spending from the SEIU, AFSCME and NEA/OEA treasuries, which Oregon already allowed and are now constitutional everywhere. (Unions are ~~corporations~~ protected by Citizens United too. That said, before *Citizens United* there were legal distinctions between referendum-related speech and candidate-related speech, but not so much anymore.)

Secondly, even for those of us who believe *Citizens United* was the right constitutional result, it's still heartening to see that Congress is already at work on legal and appropriate ways to limit its scope. The Sunlight Foundation's Daniel Schuman is compiling the legislation introduced thus far, and it's an intriguing mix of shareholder empowerment measures and efforts to limit the ability of foreign nationals to circumvent the existing ban on their electoral speech through corporate entities.

As to the latter, it will be interesting to see Congress and the Courts work through the question of whether a one-drop rule is sufficient to constitute a sufficiently compelling state interest in restricting a corporation's speech, or whether some larger level of foreign ownership or control is required. On the former, my friends at the Brennan Center for Justice at NYU Law have some simple proposals for giving shareholders a voice, urging Congress to adopt these three requirements:

- requiring disclosure of political spending directly to shareholders.
- mandating that corporations obtain the consent of shareholders before making political expenditures.
- holding corporate directors personally liable for violations of these policies.

On a separate front, Bruce Ackerman and Ian Ayres suggest extending the ban on federal contractors' direct contributions to federal candidates to include their independent pro-candidate speech as well.

All of this, by the way, is consistent with the President's remarks on *Citizens United* during the State of the Union address. While acknowledging that it did overturn certain precedents, the President never said that the decision was wrongly decided as a matter of constitutional or statutory law -- only that he believed it would lead to bad outcomes which Congress as in a role to ameliorate. And, hopefully, it will.

One final thought: when it comes to content-based restrictions on speech -- the so-called fire in a crowded theater (imminent threat of lawless action) or child pornography – we're dealing with speech which creates a harm which cannot be mitigated by counter-speech, whether because of the timing of the harm or the beyond-the-pale nature of the harm itself. With regards to electoral speech by corporations, there's no evidence that we can't just rebut the well-funded bad stuff with good of our own, just as we've been able to beat down the Michael Huffingtons, Mitt Romneys and Katherine Harrises of the world at the ballot box. Be patient, keep supporting the good guys, and trust the free market of ideas.

ATTACHMENT

After Citizens United

A Moderate, Modern Agenda for Campaign Finance Reform

Prepared by the

Center for Competitive Politics

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Introduction

On Jan. 21, 2010, the U.S. Supreme Court handed down its ruling in *Citizens United v. Federal Election Commission*, dramatically altering the campaign finance landscape for federal candidates. Previously silenced, incorporated businesses and unions as well as many advocacy organizations and trade associations will be able to spend money directly from their general treasuries advocating the election or defeat of federal candidates.

While the full impact of this ruling will be unknown for several years, there is little doubt that the ruling in *Citizens United* places candidates and political parties at a distinct disadvantage to incorporated entities that wish to spend independently. While candidates and political committees remain limited in their ability to raise funds to communicate their message, incorporated entities face no such limit.

This unlevel playing field was noted by Supreme Court Justice Breyer during oral arguments, when he observed that "...the country [would be] in a situation where corporations and trade unions can spend as much as they want... but political parties couldn't... [and] therefore, the group that is charged with responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want..."

In *After Citizens United: A Moderate, Modern Agenda for Campaign Reform,* the Center for Competitive Politics proposes a modest agenda of six proposals that will help to put candidates and parties closer to a level playing field with individuals and corporations engaged in independent expenditures.

We believe these modest steps towards reform can attract broad, bipartisan support because they do not dramatically alter the current system. Many simply update decades-old laws that have failed to keep up with the times, while others allow more Americans to contribute and to give to more candidates.

It is our hope at the Center for Competitive Politics that this reform agenda will not only lead to more modern system of campaign finance regulation that shows greater respect for the First Amendment, but that it will also spur elected officials and the public to re-examine the fundamental premises on which current regulations and restrictions on political speech rest. We are confident that such a re-examination will lead to a better understanding of the First Amendment, and ultimately to further liberalization of speech regulations.

Brad Smith, Chairman Sean Parnell, President

1. Remove Limits on Coordinated Party Spending

Under *Buckley v. Valeo*, individuals and organizations have a right to engage in unlimited spending if they do so independent of a candidate's campaign. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* ("Colorado I"), the Supreme Court clarified that this right extends to political parties. And, of course, in *Citizens United* the Court has now held that incorporated entities including businesses, unions, and trade associations have the right to draw on an unlimited amount of funds for independent expenditures.

At the same time, the law still limits how much political parties can spend in coordination with their candidates, a limitation upheld by the Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* ("Colorado II").

The odd result of these cases is to drive a wedge between parties and candidates. Parties can spend unlimited sums to help their candidates, but only if they do so independently of the candidates —— that is, without sharing information on the candidate's strengths and weaknesses, strategies, plans, polling data, and so forth. Prior to McCain-Feingold, this dichotomy might have made some type of sense, in that parties could accept and spend "soft" money — unregulated funds — to support candidates so long as they avoided "express advocacy" in spending their dollars. Therefore, "soft money" could be spent independently and hard money could be spent in coordination with the candidate.

Since McCain-Feingold, however, national political parties are prohibited from accepting any unregulated contributions. Thus, all party spending is "hard" — regulated and limited, money. There would seem to be no purpose in any longer limiting the ability of political parties to spend unlimited "hard" money in coordination with a campaign. Eliminating this barrier is unlikely to lead to any added spending — it would merely allow parties and candidates to do what parties and candidates ought to do: work together to gain election, and to spend money on the races they deem most important.

Beyond removing a needless barrier that raises the costs of campaigning, allowing parties and candidates to work together may actually increase accountability and confidence in the system. For example, in 2006, when some observers called on Tennessee Republican Senate candidate Bob Corker to denounce certain ads about his opponent being run by the National Republican Senatorial Committee, Corker had to say — truthfully — that he had nothing to do with the ads (nor could he have under the coordination restrictions).

Because most citizens simply do not believe that a candidate cannot somehow instruct his party on advertising, cynicism among the voting public increases when they are correctly told candidates cannot legally ask their own party to stop running a specific ad.

2. Restore Tax Credits for Small Contributions

Prior to the federal tax reform of 1986, taxpayers received a tax credit for political contributions up to $50, or $100 on a joint return. Adjusted for 1978 dollars (the last time Congress adjusted the amounts) it would today be approximately $165, or $330 on a joint return.

Restoring the tax credit at these levels would increase the pool of small donations available to candidates, which would make it easier to raise funds and reduce time spent fundraising. In addition, a tax credit might encourage more people to become involved in the political process and could do far more than contribution limits to restore faith in government.

3. Adjust Contribution Limits for Inflation, Including the Aggregate Limits

The McCain-Feingold bill doubled individual limits on giving to candidates and indexed them for inflation. This increase, however, accounted for barely half of the loss in value of contributions since the limits were first enacted in 1974. Moreover, other limits were not increased at all.

Had all contribution limits been increased with inflation since their enactment in 1974, by the time McCain-Feingold was passed in 2002 the limit for an individual to contribute to a campaign would have been approximately $3,650. The limit for PACs, both what an individual can contribute to a PAC and what the PAC can contribute to a candidate, would have been approximately $18,250.

Similarly, the aggregate limit for an individual in a two year election cycle would have been in excess of $180,000, up from the $50,000 allowed at that time by the law. McCain-Feingold partially redressed the problem, raising the aggregate limit over a two year election cycle to $95,000 and adjusting it for inflation, but this made up a bit less than half the deficit that had been created by the simple lapse of time.

Individual contributions to political parties show a similar story. Originally set at $20,000 per year, the limits were modestly raised and indexed for inflation in 2002. The annual limit on contributions to political parties is currently only $30,400, while it would be closer to $87,760 had it been indexed to inflation in 1974.

Much of the "soft money" problem that served as the justification for McCain-Feingold was, in reality, a hard money problem, created by contribution limits that were unadjusted for inflation, let alone population growth. By adjusting the contribution limits for inflation to match the original amounts set in 1974, much of the political funding that was first called "soft money" and that has since flowed to 527 and 501(c)4 groups to escape the low limits would instead flow back into candidates and political parties.

Restoring the original buying power of the 1974 contribution limits would also have the effect of reducing the demands on candidate time for fundraising while also providing a boost to lesser-known candidates who would be helped by higher limits. It is worth noting that in 2004, a previously little-known state senator from Illinois was able to build an effective campaign organization in his race for U.S. Senate in part because of the higher contribution limits he operated under thanks to the so-called "Millionaires Amendment" (since struck down by the U.S. Supreme Court in *Davis v. Federal Election Commission*). Four years later, of course, that relatively unknown state senator was elected President of the United States.

Higher contribution limits also address what many regard as the problem of self-funding candidates. While a candidate's wealth does not increase relative to contribution limits, the ability of non-wealthy opponents to raise funds to remain competitive would significantly increase.

4. Permit Independent Solicitation and Facilitation of Contribution to PACs

Congress should allow new groups making use of new technologies more leeway than they already enjoy under the Federal Election Campaign Act to empower existing PACs and small donors.

Currently, connected PACs are permitted to solicit contributions from a restricted class of potential donors, such as corporate executives, union members, or donors to a citizen group. Although they may not solicit contributions outside of their restricted class, they are permitted to accept them if someone wishes to donate.

ActBlue is a non-connected political committee that was formed to enable individuals, local groups, and national organizations to raise funds for Democratic candidates of their choice. ActBlue—which has its counterparts on the Republican side of the political spectrum—serves primarily as a conduit for contributions earmarked for Democratic candidates and political party committees. ActBlue lists Democratic candidates' campaign committees on its website, and it solicits contributions designated for those committees on its website's blog and fundraising pages. Viewers may make a contribution designated for a listed campaign committee through ActBlue's website.

ActBlue has in the past sought permission from the Federal Election Commission to solicit funds for the separate segregated funds (PACs) of corporations, labor unions, and associations. This request was largely denied by the Federal Election Commission, although the statutory language does not specifically bar what ActBlue wished to do.

PACs represent an opportunity for citizens to join together and associate themselves with their fellow citizens on specific interests and issues, and to speak with one voice through direct

contributions as well as through independent or coordinated expenditures. Expanding the potential sources of contributions for PACs without upsetting the prohibition on the use of corporate or union treasury funds to solicit beyond the restricted class would add yet another strong voice to the political process.

To strengthen the ability of PACs to compete with unlimited independent expenditures, Congress should clarify the laws regarding separate segregated funds and solicitation of restricted classes by allowing registered political committees that serve as conduits for other political committees to solicit contributions on behalf of the separate segregated funds of corporations, labor unions, and other associations.

5. Adjust Disclosure Thresholds for Inflation

Disclosure, according to the Supreme Court, helps to prevent corruption or its appearance by shedding sunlight on the money supporting candidates. It also can provide voters with helpful voting cues. The donations of interest groups and knowledgeable contributors may send signals to voters at large as to which candidates are worthy of support. And disclosure does not directly limit one's ability to speak. For these reasons, disclosure of contributions and expenditures is one part of the law on which most observers agree.

Disclosure is not, however, without its costs. Foremost among them is invasion of privacy. There are many reasons why people might wish to give anonymously. Some persons, for example, would not want their contributions to the Log Cabin Republicans, an organization of gay Republicans, to be disclosed publicly. Others will prefer to give anonymously in order to avoid retaliations by vengeful politicians. As John McCain himself argued in urging his colleagues to pass the McCain-Feingold law, many people will choose not to speak — and especially not to criticize incumbent lawmakers — if faced with disclosure.

Assuming that some disclosure of campaign contributions is worth these costs, we must still consider the level of disclosure. The Federal Election Campaign Act's (FECA) thresholds for reporting individual donors and independent expenditures have not been adjusted since 1979. As a result, these thresholds, low when enacted, are ridiculously low now: $200 and $250, respectively. It is absurd to believe that donations and expenditures of $200 to $250 pose a danger of corruption and undue influence in the political process. If these numbers had merely kept up with inflation, the threshold on disclosure of individual contributions would now be approximately $600, and the limit on the disclosure of independent expenditures would now be approximately $750.

Beyond the costs in privacy, mandatory disclosure at low levels may actually decrease whatever utility disclosure generally has. These small donations fill page after page in the reports of any

major campaign, making it more difficult and time-consuming to find large donors that may in fact provide "voting cues" to the broader public.

The extensive reporting of small contributions also increases the administrative burden on campaigns of reporting. This both raises the costs of campaigning and places the heaviest burden on small, grassroots campaigns, and on campaigns that rely more on small donors — curious results for the "reform" community to support.

Finally, raising the disclosure threshold may increase the number of Americans willing to contribute more than $200 to candidates, or even contribute at all, once they know their contribution will not become public knowledge and potentially subject them to retaliation.

Adjusting disclosure limits for inflation, as has already been partially done for contributions, would be a modest measure that would pose no danger of corruption and that would have a salutary effect on the system and the privacy rights of individuals, and potentially increase the funds available to candidates who must compete against unlimited independent expenditures in the post-*Citizens United* world.

6. Abolish the Prohibition on Corporate and Union Contributions

Today's corporate world is far different than it was in 1907 when the Tillman Act was enacted into law. It is difficult to see how banning contributions by advocacy groups — whether major organizations formed specifically to promote certain national issues, such as NARAL Pro-Choice America or the National Rifle Association — unleashes "great aggregations of wealth" into our politics. It is even more difficult to see how banning contributions from community groups, regional chambers of commerce, local unions, and local businesses does so.

Lifting the outright ban on corporate contributions does not mean permitting unlimited contributions. Corporate contributions could have the same limits imposed as individual or PAC contributions currently do, including aggregate caps and provisions to ensure that corporate subsidiaries aren't able to evade the cap. The advantages of doing this would be many.

First, operating a PAC is expensive. Many corporations and small trade associations spend as much money operating their PACs as those PACs actually spend on politics. But there are definite economies of scale, so that the expense of complying with PAC regulation tends to favor larger enterprises. Indeed, for many small corporations, the cost of maintaining a PAC and soliciting contributions is not worth the benefit. The same, of course, applies to unions — the repeal would favor small union locals. Current complex reporting requirements could be replaced by a simple statement of contributions at a reasonable point before any election.

The egalitarian effect here would not only come in contributions. Indeed, primarily it would come in the ability of smaller corporations and unions to host candidates and allow candidates to meet with employees and members. Present law blankets such activity, once common, with a web of restrictions and prohibitions. However, a corporation with a large PAC can pay for such activities through the PAC and thereby avoid this added regulation. Smaller businesses cannot. Not only would abolishing the PAC requirement favor smaller businesses, unions, and advocacy groups, it would promote more opportunities for direct worker-candidate interaction.

The Tillman Act also failed to foresee the rise of subchapter-S corporations (S-corp), which are in many cases, and perhaps in most, small businesses owned by a single individual or family. Owners of S-corps often send contributions to candidates from their company accounts, thinking of themselves as small-business owners and not corporations. This causes campaigns to have to return the contribution and explain to would-be contributors that they need to send a personal check instead, which typically means the business owner transfers money from their business account to their personal account, then writes the check using essentially the same funds. Allowing corporate contributions would end the confusion and hassle associated with S-corps.

Another advantage of abolishing the PAC requirement would come in streamlined enforcement. The complete ban on corporate and union contributions means that a violation occurs when the first dollar is spent. The FEC has detailed rules that prohibit, for example, corporate lobbyists from even touching personal checks written to candidates by corporate executives, or that make it illegal for a secretary in a corporation or union office to type a note from an officer to a colleague, urging the latter to make a contribution. These regulations could be largely scrapped, and the minor complaints that come with them flushed out of the system, simply by allowing some minimal level of corporate and union expenditure.

It will be said in some quarters that allowing corporations to spend funds for political activity directly from corporate treasuries is unfair to shareholders, but this argument does not hold water. Corporations are free to use shareholder funds now for any number of things, including activities with political overtones that many shareholders may oppose. This includes lobbying, something nearly all large corporations and many smaller engage in.

For example, a corporation may support the Boy Scouts, which some oppose because of their stance on homosexuality; or it may support Planned Parenthood, which some oppose because of its advocacy of abortion rights. These matters are traditional questions of corporate governance. They are not the province of campaign finance laws.

It should also be noted that replacing the ban on corporate and union contributions with reasonable limits would be harmonious with the *Buckley v. Valeo* admonition that the legitimate

constitutional purpose of limitations is to prevent corruption. It is hard to believe that a contribution from the treasury of a small business is any more "corrupting" than a contribution from a corporate PAC or from the CEO of a Fortune 500 company.

Over 30 states currently allow some corporate contributions. These states include Utah and Virginia, which allow unlimited corporate contributions, and were recently named among the best-governed states in America by the Pew-funded *Governing Magazine*. There is no evidence that states that allow corporate contributions in state races are more "corrupt" or less well governed than other states.

Finally, in an era in which incorporated entities are now free to engage in unlimited independent advocacy, allowing direct contributions would provide businesses, unions, advocacy groups, and trade associations an alternate option to support or oppose specific candidates. Rather than engaging in independent expenditures or contribute to a 527 or 501(c) organization, an incorporated entity might instead chose to contribute directly to a candidate or political party. This would be particularly beneficial for smaller entities, which might not have the funds or sophistication to mount an effective independent expenditure campaign.

Conclusion

Candidates for federal office in 2010 and beyond face a dramatically different campaign environment than that of 2008. Incorporated entities, including for-profit companies, unions, trade and professional associations, and advocacy groups are now free to conduct unlimited independent expenditure campaigns urging the election or defeat of specific candidates.

This new freedom for independent groups comes at a time when candidates, political parties, and PACs are limited to a greater extent than ever before in their own fundraising. Our proposals aim to modernize elements of the campaign finance system while removing some of the limits that put candidates, parties, and PACs at a disadvantage, while not fundamentally altering the general regulatory system that Congress has set in place over the last 35 years.

The six reforms offered here offer the best hope for candidates hoping to compete in the new campaign environment. Because of the modest nature of these reforms, we believe that bipartisan support in Congress and even the support of many in the pro-regulation community can be had for some if not all of these proposals. Restoring and enhancing the ability of candidates to effectively communicate their message to voters in a post-*Citizens United* world will improve our election process, and help to sustain the competitive balance vital to our democratic republic.

Summary for Policymakers

1) Remove Limits on Coordinated Party Spending
   a. Since all party spending is hard money, or regulated money, there is no purpose in limiting party expenditures in coordination with a campaign.
   b. This will allow parties and candidates to do what they ought to do – work together to gain election, and also increase accountability.

2) Restore Tax Credits for Small Contributions
   a. Restoring tax credits on small contributions would dramatically increase the pool of small donations available to candidates, making it easier to raise funds and reduce time spent fundraising.
   b. It would encourage more citizens to become involved in the political process and could do more than contribution limits in restoring faith in government.

3) Increase Contribution Limits, Including Aggregate Contribution Limits
   a. Increasing contribution limits would reduce the need for large donors to give to 527 and 501(c)3 organizations.
   b. It would free up candidate time from fundraising, because fewer large donors would need to be solicited.

4) Permit Independent Solicitation and Facilitation of Contributions to PACs
   a. Enabling more contributions to PACs beyond their restricted class would permit for more participation by citizens in the political process, allowing them to contribute regulated dollars directly to causes they support.
   b. Promotes more opportunities for direct interaction between workers and candidates.

5) Increase Disclosure Threshold
   a. Adjusting the threshold for disclosure for inflation back to 1979 would respect donor privacy and allow the focus to be on large contributions.
   b. Campaigns would shed the administrative burden of disclosing contributions that are in no way corrupting, lifting the burden on campaigns and grassroots groups that rely on small donations.

6) Abolish the Prohibition on Corporate and Union Contributions
   a. Repealing the corporate and union ban in favor of allowing direct corporate and union contributions, subject to limits, would reduce the need to fund independent expenditures or give to 527 and 501(c) organizations.
   b. Promotes more opportunities for direct interaction between workers and candidates.
   c. Streamlines enforcement by weeding out minor complaints from the system while allowing people to focus on larger donations.

The Center for Competitive Politics (CCP) is a 501(c)(3) nonprofit organization based in Alexandria, Va. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication is to promote and defend citizens' First Amendment political rights of speech, assembly, and petition, and to educate the public on the actual effects of money in politics and the benefits of a more free and competitive election and political process. Contributions to CCP are tax deductible to the extent allowed by law.

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Mr. NADLER. I thank the gentleman.

Mr. Simon?

TESTIMONY OF DONALD J. SIMON, PARTNER, SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP, WASHINGTON, DC

Mr. SIMON. Thank you, Mr. Chairman, Members of the Subcommittee. I appreciate the opportunity to testify this morning.

The *Citizens United* decision represents an enormous transfer of power, political power in our country, from citizens to corporations.

Until 2 weeks ago, the financing of Federal elections had been limited by law to individuals and to groups of individuals functioning through political committees.

Corporations had been prohibited from using their corporate wealth to influence Federal campaigns, a policy that dates back to 1907 when Congress first banned corporations from directly or indirectly making contributions in Federal elections.

But now, corporate wealth accumulated in the economic marketplace can be brought to bear directly and without limitation on political campaigns. This will have a major negative effect on the conduct of Federal, State and judicial elections throughout the country.

An avalanche of independent spending by one or more corporations or trade associations, particularly in the form of negative attack ads, and particularly at the end of a campaign, could make it virtually impossible for the candidate to respond and could easily have a decisive impact on the outcome of the election.

Even the threat of such spending is in itself likely to distort the legislative process. Members of Congress will, in effect, have a Sword of Damocles hanging over their heads.

Any wrong vote by a Member on an issue of importance to a corporation or trade association could trigger a multi-million-dollar campaign to defeat the Member. And every Member will be forced, as a practical matter, to consider this consequence in deciding how to vote on legislation.

Now, some have argued that corporations will not take advantage of this new opportunity, that the Supreme Court's decision is really no big deal. These words are comforting, but logic and history suggests otherwise.

During the 1990's, when corporations were able to make soft money donations to the political parties for use in Federal elections, they did so in the tens and hundreds of millions of dollars in each election cycle, until the soft money system was shut down in 2002.

The fact that corporate America had trillion-dollar profits and could have spent even more hardly means that the huge sums they did spend showed a lack of corporate interest in exploiting opportunities to use their wealth to buy access and influence.

Given the ongoing legislative agendas that corporations have here in Congress, and given the huge financial stakes they have in these issues, there is little reason to think companies will not accept the court's invitation to mount campaigns directly for and against candidates.

Serious students of Congress agree with this view. Former Republican senator Chuck Hagel, for instance, said before the decision was issued that allowing corporate spending would be an astounding blow against good government and responsible government.

Longtime Washington observer Norm Ornstein wrote in Roll Call last week, "It is not even the money that might be spent. It is the threat of spending that will alter many equations on Capitol Hill. The impact often will be felt at the margin behind closed doors but with huge effects on policy."

Now, it is certainly true that some companies may not want their names associated with campaign spending. But they may not be at all constrained from making expenditures indirectly and secretly by giving corporate funds to third-party groups such as the Chamber of Commerce, trade associations or other intermediaries which then spend the money.

These expenditures will be made in the name of the intermediary but designed to further the political interests of the corporate donors who are the true sources of the funds.

It is essential for Congress to move swiftly to enact legislation to mitigate the damage done by the decision. The organizing principle should be to advance legislation that directly responds to the impact of this decision and that can be enacted in time to take effect for the 2010 congressional elections.

With this in mind, Congress should focus on enacting new disclosure rules that would require full disclosure of expenditures, including disclosures of transfers of funds used to make such expenditures; enacting corporate governance provisions that would grant shareholders a voice in the political spending done by their corporations; strengthening existing pay-to-play rules to prohibit government contractors from using corporate funds to make independent expenditures; strengthening existing coordination standards to ensure that independent spending by a corporation is truly independent of any candidate or party and not coordinated in a de facto fashion; addressing the problem created by *Citizens United* which allows a domestic corporation owned or controlled by a foreign national to spend money to influence Federal elections.

Now, let me just take a minute on that. It is true that foreign corporations are still banned by Section 441(e) from making campaign expenditures. But domestic corporations owned or controlled by a foreign corporation or, indeed, by a foreign government are not covered by Section 441(e) and now are no longer subject to a general corporate ban.

So these domestic subsidiaries are free to spend money. Although an FEC regulation does address this situation, it does so, I believe, inadequately, and existing protections should be strengthened and made a matter of statutory law.

Finally, reforming the existing lowest unit rate requirements in order to provide better access to low-cost TV to candidates and parties so they have the resources to respond to corporate spending.

Now, let me just say that this agenda, I think, is notable in its modesty. Each of these reforms I think is fully consistent with the majority opinion in *Citizens United* and most of them, indeed, are invited by the majority opinion.

Final word is that there is one more thing Congress should do, which is to resist any call to raise contribution limits or to repeal the soft money rules. To use *Citizens United* as an excuse to revive the soft money system is nothing less than an argument that one means of corruption justifies the introduction of another means of corruption. Adding to a problem is no way to solve it.

Thank you very much.

[The prepared statement of Mr. Simon follows:]

PREPARED STATEMENT OF DONALD J. SIMON

Testimony of

Donald J. Simon

Partner,
Sonosky, Chambers, Sachse, Endreson & Perry, LLP

Before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Of the House Judiciary Committee

On the First Amendment and Campaign Finance Reform After *Citizens United*

February 3, 2010

Chairman Nadler and Members of the Subcommittee:

I appreciate the opportunity to testify on the impact of the Supreme Court's decision last month in *Citizens United v. Federal Election Commission,* and on the steps that Congress should take in response to that decision and that remain available to the Congress in light of the Court's ruling. Congress should act quickly in order to limit the damage that will result to our political system from the Court's decision.

I am an attorney in private practice but I have been deeply involved in campaign finance reform efforts for more than three decades. I am currently general counsel to Democracy 21, a nonpartisan nonprofit organization with a long history of supporting the nation's campaign finance laws as an essential means to protect against corruption and the appearance of corruption in the political process. Previously, I served for a number of years as Executive Vice President and general counsel to Common Cause. In that capacity, I was part of the effort to develop and enact the Bipartisan Campaign Reform Act of 2002 (BCRA), a portion of which was invalidated by the Court in the *Citizens United* opinion. In addition, I have served as counsel for parties or *amici* in numerous court cases involving the constitutionality of the campaign finance laws, including *McConnell v. FEC* and *Citizens United v. FEC*.

The majority decision in *Citizens United* is the most radical and damaging campaign finance decision in Supreme Court history. It is profoundly wrong.

In order to reach the decision, Justice Kennedy and his four colleagues abandoned longstanding judicial precedents as well as principles of judicial restraint to reach out and decide

an issue which (1) was waived by Citizens United in the court below, (2) was not brought to the Supreme Court by Citizens United on appeal, and (3) could have been avoided by resolving the case on any one of a number of narrower grounds.

Disregarding the cautions that Justices – particularly conservative Justices – usually invoke in the name of judicial modesty, the majority here engaged in breathtaking judicial activism to toss aside a settled legislative policy reaching back more than 100 years to restrict the influence of corporate money in the political process. It is fair to say, as Justice Stevens does in his dissent, that this case was brought by the Court itself.

This overreaching is all the more egregious because it was done by the Court without the benefit of any factual record. Because the constitutionality of the corporate ban was not litigated by Citizens United in the district court, there was no occasion for the government to compile and present a factual record in defense of the law. Accordingly, when the Supreme Court suddenly and unilaterally changed the nature of the case before it, and put the constitutionality of the corporate restriction at issue, there was no record before it to review with regard to that new question. The government was handicapped in its defense of the statute, because it had been denied the right to compile a judicial record that would show how corporate money could be used to corrupt the legislative process and to undermine the confidence that voters have in how elections are conducted and how legislative decisions are made.

Similarly, the majority opinion is cavalier in overruling the Court's precedents. It expressly overrules the *Austin* case, decided 20 years ago, and a significant portion of the *McConnell* case, decided seven years ago. But in practical effect, the Court also reversed the *Wisconsin Right to Life* case, decided just three years ago, because that case upheld the electioneering communication restrictions of BCRA at least insofar as they apply to express

advocacy and its functional equivalent, a position that the Court majority now abandons in *Citizens United.*

This overruling by the Court of three cases – two expressly – is an extraordinary act in itself. But even more so is how the Court took this action without honoring the standards of *stare decisis* that serve to protect judicial precedent and that give stability to the law. Nothing had undermined the validity or vitality of *Austin* and *McConnell.* They had not proved to be unworkable. They were not eroded by other precedent. Legislative reliance on those decisions at both the state and federal levels had been longstanding and important.

Just seven years ago in *McConnell,* the Court said that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." 540 U.S. at 203 (emphasis added). Since 2003 when the *McConnell* Court made this statement and thereby reaffirmed *Austin*, nothing has changed – except the make-up of the Court itself, a point made by Justice Stevens, who said, "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*…." (Op. of Stevens, J. at 23).

This casual abandonment of important case precedent that supported longstanding federal and state legislation which served to safeguard the integrity of the electoral process is a reckless act by the Court, one that will serve only to undermine the Court itself.

The *Citizens United* decision represents an enormous transfer of political power in our country from citizens to corporations. Until two weeks ago, the financing of federal elections in our country had been limited by law to individuals, and to groups of individuals functioning through political committees. Corporations were prohibited from using their corporate wealth to

influence federal campaigns, whether by making contributions or expenditures, a policy that dates back to 1907 when Congress first banned corporations from "directly or indirectly" making contributions in federal elections.

But now, corporate wealth accumulated in the economic marketplace can be brought to bear, directly and without limitation, on political campaigns. As a point of reference, the Fortune 100 companies alone had combined revenues of $13.1 trillion and profits of $605 billion during the last election cycle. (Although not addressed by the opinion, it is almost certainly true that under the Court's reasoning, labor unions are also now free to use their treasury funds to make independent expenditures as well, but their resources are dwarfed by corporate funds.)

The *Citizens United* decision will have a major negative impact on the conduct of federal, state and judicial elections throughout the country. Under this decision, insurance companies, banks, drug companies, energy companies and the like – and their trade associations – will be free to each run multi-million dollar campaigns to directly elect or defeat federal candidates. In addition to TV and radio ad campaigns, these efforts could include direct mail and phone bank campaigns, all urging voters to elect or defeat candidates.

It would not take very much corporate spending in a given election for one or more corporations to have a major impact on a particular House or Senate race. This is particularly true if the spending comes, as it often does with independent expenditures, in the form of negative attack ads. An avalanche of such attack ads funded by corporate wealth, particularly at the end of a campaign, would make it virtually impossible for the candidate to respond, and could easily have a decisive impact on the outcome of the election.

Even the threat of such spending is, in itself, likely to distort the legislative process. As *The New York Times* (January 22, 2010) said in a headline discussing the impact of this case,

lobbyists have gotten a new "potent weapon" to use in influencing legislative decisionmaking. The *Times* story says:

> The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.
>
> "'We have got a million we can spend advertising for you or against you – whichever one you want,' a lobbyist can tell lawmakers," said Lawrence M. Noble, a lawyer at Skadden Arps in Washington and former general counsel of the Federal Election Commission.

Members of Congress will, in effect, have a sword of Damocles hanging over their heads. In the case of an incumbent, corporate spending decisions are likely to be made based on whether a Member voted the right way or the wrong way on issues of importance to the corporation or trade association. Any "wrong" vote by a Member could trigger a multimillion dollar campaign to defeat the Member. And every Member will be forced as a practical matter to consider this consequence in deciding how to vote on legislation.

It would not take many examples of elections where large corporate expenditures defeat a Member of Congress before all Members quickly learn the lesson: vote against the corporate interest at stake in a piece of legislation – whether it is a bill of interest to the banking industry, the defense industry, the insurance industry, the drug industry, or any other – and run the risk of being blindsided by a massive negative ad campaign funded by corporate dollars that would put that Member's reelection in jeopardy. The threat of this kind of retaliatory campaign spending, whether the threat is explicit or implicit, is likely in itself to exert undue influence on legislative decisionmaking, even in the absence of any formal *quid pro quo* relationship between the Member (or his opponent) and the corporate spender.

Former Senator Chuck Hagel (R-NE) understood well the stakes in the case and the impact this decision would have on how government works. He was interviewed for a story in *The Washington Post* before the decision was issued:

> Chuck Hagel, the Nebraska Republican who retired from the Senate last year after serving two terms, said in an interview that if restrictions on corporate money were lifted, "the lobbyists and operators . . . would run wild." Reversing the law would magnify corporate power in society and "be an astounding blow against good government, responsible government," Hagel said. "We would debase the system, so we would get to the point where we couldn't govern ourselves."

While it has long been true that individuals could use their personal wealth to run independent expenditure campaigns to advocate for or against the election of a candidate, the Court's extension of that right to corporations will have both a quantitatively and qualitatively different effect. The resources of large corporations are immense and the economic stakes they have in Washington decisions are enormous. These corporations have ongoing agendas in Washington that they are always trying to advance, and they now have a huge new opportunity to use their considerable financial resources directly in campaigns as a means to advance those agendas.

Some have argued, to the contrary, that *Citizens United* will have no more than a modest impact on political campaigns – that corporations will not be interested in making express advocacy expenditures or that, in any event, there will not be a big increase in corporate spending since corporations have already been able to spend treasury funds on sham issue ads to promote or attack candidates.

Experience shows that this view is not correct.

Indeed, that experience – the corrupt soft money system, closed down in 2002 by enactment of BCRA – demonstrates exactly what happens when the door is opened to influence-seeking corporate money being allowed to enter the political process. The soft money system, in

which corporations were allowed to use their corporate treasury funds to make unlimited donations to the political parties which then spent the money to influence federal campaigns, started as a trickle when the FEC first allowed the parties to raise soft money. But once it became clear that soft money was a way to buy access and influence with federal officeholders, soft money grew rapidly and by the mid-1990's amounted to hundreds of millions of dollars each election cycle, much of it from corporations. By the time the soft money system was shut down in 2002, it had grown to a half a billion dollars in a single election cycle.

Much of this was corporate money injected directly into federal campaigns. Corporations were not shy about making these donations, nor were Members of Congress or the political parties shy about soliciting them. The same arguments being raised about why corporations won't make independent expenditures now – fear of alienating their customers, the ability to run non-express advocacy "issue" ads – also applied to soft money donations then. Yet corporations aggressively participated in the soft money system as a way to buy access and influence with federal officeholders, and the corporate money that flooded into federal campaigns through the soft money system grew at an alarming rate.

The same is very likely true with the ability corporations now have to make independent expenditures. A report by Peter Stone and Bara Vaida last week in the *National Journal* (January 30, 2010) illustrates the danger. The story, called "Wild West on K Street," states:

> All across town, lobbyists and campaign consultants, media consultants, and pollsters discussed how and whether clients should take advantage of the January 21 Supreme Court decision, which ended a ban on direct spending by corporations and unions in political elections. Business groups, increasingly unhappy with President Obama's agenda, are buzzing about the potential for unleashing multimillion-dollar ad drives in the last months of the 2010 elections, while unions are jittery about their ability to match corporate war chests.

According to the story, one Republican strategist "predicted the change would be huge. 'That decision was like a cannon – the shot heard around the political world,' he said, adding that the ruling will take Washington back to 'the Wild, Wild West of spending money.'"

The *National Journal* report states that one Democratic campaign strategist "theorized that companies with fat profit margins might even look at ways to purchase Senate seats. 'No question, if you are looking at a strategy about how you buy a Senate seat, where is the cheapest place to go? The rural states, where $5 million can buy you a Senate seat and is nothing for a company like ExxonMobil.'"

As for the argument that large consumer-oriented companies may resist the temptation to make independent expenditures because of a concern about their public image, or for fear of alienating their customers, that may be true for some companies, and to some extent. But such corporations may not at all be constrained from making expenditures indirectly – and secretly – by giving corporate treasury funds to third party groups like the Chamber of Commerce, trade associations or other intermediaries, which then make expenditures for or against candidates. Those expenditures will be made in the name of the intermediary, but designed to further the political interests of the corporate donors who are the true source of the funds.

According to the *National Journal* report:

> [Republican strategist John] Feehery and others on K Street are likely to advise their clients to direct their money to tax-exempt 501(c)(4) and 501(c)(6) trade groups, which will now be freer to spend member money to explicitly target ads in support or opposition of candidates. These organizations do not have to disclose their donors.
>
> Established business groups, such as the U.S. Chamber of Commerce, which have become more strident about the direction that congressional Democrats and the Obama administration have taken energy, financial services, and health care reform in the past year, are seeing a big opportunity.

Further, the *Citizens United* opinion itself is likely to encourage corporations to exercise their newly discovered "First Amendment free speech right" to make expenditures to influence elections, even if they have not engaged in permissible non-express advocacy spending in the past. The fact that corporations are now unconstrained in mounting full-fledged and overt campaigns against Members of Congress – indeed, have a declared constitutional right to do so – is itself likely to encourage them to engage in such spending. So too, the fact that corporate spenders no longer have to worry about the line between so-called "issue" discussion and express advocacy or its functional equivalent is also likely to encourage an increase in corporate spending.

One of the most disturbing aspects of the majority opinion is its abrupt but unacknowledged re-definition of the "corruption" interest that can be used to support regulation of money in politics. In a series of cases, the Court had previously recognized that the government's anti-corruption interest extended well beyond *quid pro quo* corruption to include "improper influence," "opportunities for abuse," "undue influence," "influence-buying," and the appearance thereof. Indeed, in *Buckley v. Valeo,* the Court said in the context of upholding contribution limits:

> Laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities and of the contributors and the amounts of their contributions are fully disclosed.

The Court also stated in *Buckley*:

> Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

In *Citizens United,* however, the majority opinion rejects the idea – previously accepted by the Court – that undue influence, buying access, or the appearance of corruption constitute the kind of "corruption" that will support the constitutionality of campaign finance rules that seek to deter corruption. The majority opinion indicates that only narrow *quid pro quo* arrangements now meet that standard – precisely what the Court expressly declined to hold in *Buckley,* and what the Court rejected as a "crabbed" view of corruption in *McConnell.*

But it is important to note as well that the majority opinion in *Citizens United* indicates that the Court is not attempting to undermine the constitutionality of contribution limits. The opinion recognizes that "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." The majority opinion further acknowledges that in *Buckley,* the Court "nevertheless sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." Nothing in the *Citizens United* opinion undermines this holding of *Buckley.* Thus, the Court indicated that limits on contributions will continue to meet constitutional standards.

Legislative Remedies

It is important that Congress respond to the Court's radical and erroneous decision in *Citizens United,* and that Congress do so quickly. The organizing principle for such legislation should be to favor proposals that will directly respond to the impact of this decision, and that can quickly pass both the Senate and the House so they can be enacted into law in time to be effective in the 2010 general election for Congress.

There are a range of legislative remedies that should be considered.

• Disclosure. First, the cornerstone of reform should be improvements in disclosure of expenditures and electioneering communications by corporations and unions. It is important to require disclosure not only of direct spending by corporations and unions, but also of their transfers of funds to others, where those funds are then used by the third parties for expenditures or electioneering communications. In other words, disclosure must reach the actual sources of the funding for independent expenditures and electioneering communications.

The Court in *Citizens United,* by a vote of 8-1, strongly affirmed the constitutionality of disclosure not only for express advocacy expenditures, but also for any electioneering communication – any broadcast ad that refers to a candidate within the immediate pre-election time frame. As the Court noted, "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities,' *Buckley*, 424 U. S., at 64, and 'do not prevent anyone from speaking,' *McConnell, supra*, at 201." (Op. at 51).

In particular, the Court reaffirmed its holding in *Buckley* that the governmental interest which supports the constitutionality of disclosure is the interest in "'provid[ing] the electorate with information' about the sources of election-related spending. 424 U. S., at 66." (Op. at 51). The Court stressed disclosure as an appropriate remedy: "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." (Op. at 55).

New rules should ensure there is full disclosure of campaign-related expenditures, the donors who are actually funding those expenditures, transfers of funds to and through third-parties in order to capture the actual source of the funds being used for the expenditures, and new disclaimer requirements on campaign-related ads.

A recent article in *National Journal* by Peter Stone (January 12, 2010) illustrates the reason new disclosure rules must be carefully and comprehensively designed. According to the article:

> Just as dealings with the Obama administration and congressional Democrats soured last summer, six of the nation's biggest health insurers began quietly pumping big money into third-party television ads aimed at killing or significantly modifying the major health reform bills moving through Congress.
>
> That money, between $10 million and $20 million, came from Aetna, Cigna, Humana, Kaiser Foundation Health Plans, UnitedHealth Group and Wellpoint, according to two health care lobbyists familiar with the transactions. The companies are all members of the powerful trade group America's Health Insurance Plans.
>
> The funds were solicited by AHIP and funneled to the U.S. Chamber of Commerce to help underwrite tens of millions of dollars of television ads by two business coalitions set up and subsidized by the chamber. Each insurer kicked in at least $1 million and some gave multimillion-dollar donations.
>
> The U.S. Chamber has spent approximately $70 million to $100 million on the advertising effort, according to lobbying sources. It's unclear whether the business lobby group went to AHIP with a request to help raise funds for its ad drives, or whether AHIP approached the chamber with an offer to hit up its member companies.

The article further stated:

> Since last summer, the chamber has poured tens of millions of dollars into advertising by the two business coalitions that it helped assemble: the Campaign for Responsible Health Reform and Employers for a Healthy Economy.

Thus, an industry trade association solicited huge donations from its corporate members and that money was then funneled to the Chamber of Commerce which had established two "business coalitions" with innocuous names to actually buy the ads.

Assuming these ads had been run as express advocacy ads or as electioneering communications, as they now can be under *Citizens United*, new disclosure rules, in order to be effective, must capture the actual sources of the funding and the role of the Chamber as an

intermediary or pass-through for the funds, not just the generically-named front organizations that ultimately spent the money.

Similarly, existing "stand-by-your-ad" disclaimer provisions should be strengthened to clearly identify the corporation responsible for a broadcast independent expenditure or electioneering communication, and require the corporate CEO to appear in the ad and take responsibility for its contents.

- Foreign nationals. The law which bans spending by foreign nationals to influence U.S. elections needs to be strengthened in the wake of *Citizens United.* Although the existing statute, 2 U.S.C. § 441e, prohibits spending by foreign corporations to influence U.S. elections, it does not prohibit spending by domestic corporations owned or controlled by foreign nationals. An existing FEC regulation restricts the ability of a foreign national to participate in the "decisionmaking process" of a domestic corporation with regard to its political spending, but this is an inadequate safeguard against the danger posed by a domestic corporation owned or controlled by a foreign corporation or government from using its funds to advance the interests of the foreign parent. Prior to *Citizens United*, such spending of corporate treasury funds by the domestic subsidiary had been prohibited by the general ban on corporate spending, but that spending will now be allowed. In light of this change, the Congress should strengthen section 441e to ensure that domestic corporations owned or controlled by foreign interests are not used as vehicles to influence federal elections.

- Coordination. Current campaign finance rules relating to coordinated expenditures should be strengthened. The Court in *Citizens United* was clear that it believed the key hedge against corporate election spending resulting in *quid pro quo* corruption is the safeguard that such spending cannot be coordinated with the candidate who is benefited.

But FEC rules on what constitutes "coordination" as a matter of law are notoriously weak. So much so, that when it enacted BCRA in 2002, Congress repealed the then-existing FEC rules on coordination, and directed the agency to write new, stronger rules. The agency promulgated new regulations on coordination in 2003, but those rules were thrown out as inadequate by the D.C. Circuit in 2005. The FEC again re-wrote its rules – but made them worse instead of better. These new rules were again invalidated by the D.C. Circuit in a 2008 decision. The FEC is engaged yet again in a third rulemaking on this topic – but given the current state of dysfunctionality the agency is mired in, there is, unfortunately, little reason to believe it will issue adequate rules this time either. Thus, it has now been eight years since Congress directed the agency to come up with stronger coordination rules, and we are still without rules that comply with the law.

In light of *Citizens United,* strong rules defining coordination as a matter of law are more important than ever, in order to ensure that there is no *de facto* coordination between a candidate and an outside corporate spender. Such *de facto* coordination would present precisely the opportunity for corrupt *quid pro quo* deals to be made between the candidate and the spender that the Court assumed would not arise when corporations engage in "independent" spending.

It is time for Congress to step in and do what the FEC has been unable or unwilling to do – write a strict and realistic standard for what constitutes coordination, in order to ensure that the independent expenditures that corporations are now free to make are truly independent.

- Lowest unit rate. Congress should expand the lowest unit rate rules to provide candidates and parties with enhanced access to low cost and non-preemptible broadcast time. This would provide significant additional resources to candidates and parties that they can use to respond to outside spending by corporations and others.

But by the same token, Congress should strongly resist any attempt to reinstate the corrupt soft money system as an alternative means of providing additional resources to parties, either by repealing the soft money provisions of BCRA, or by raising the hard money contribution limits. To use *Citizens United* as an excuse to revive the soft money system is nothing less than an argument that one means of corruption justifies another means of corruption. Adding to a problem is no way to solve a problem.

- Pay-to-play. Congress should give careful consideration to strengthening existing "pay-to-play" rules. There is a longstanding ban on federal contractors making contributions in federal campaigns. The FEC, by regulation, has extended this prohibition to cover independent expenditures as well. The FEC rule should be codified. Federal contractors – such as defense contractors – have a direct contractual relationship with the federal government and a heightened financial interest in government contracting decisions. The government has a compelling interest in ensuring that federal contractors, including corporations, do not use the power of their treasuries to buy favoritism in the federal contracting process.

- Corporate governance. Related to disclosure, Congress should consider adopting corporate governance provisions that would grant shareholders a voice in the political spending done by their corporations. Again, this is an approach endorsed by the Court in *Citizens United.* The Court said, "Shareholder objections raised through the procedures of corporate democracy *see Bellotti*, supra, at 794, and n. 34, can be more effective today because modern technology makes disclosures rapid and informative." (Op. at 55).

Such shareholder provisions should include, for instance, a requirement that shareholders affirmatively approve on an annual basis a corporation's policy on making expenditures or electioneering communications to influence federal elections. When such expenditures are

made, the corporation should be required to provide notice of the specific spending to shareholders, as well as to the Securities and Exchange Commission, and to file an annual disclosure report on its political spending with the SEC. Finally, a corporation's CEO should be required to certify that the corporation's political spending does not constitute corporate waste, has been approved by the shareholders, has been fully disclosed and is in compliance with law.

- Other reforms. Finally, in the longer term, it remains essential for Congress to enact fundamental campaign finance reforms, including fixing the presidential public financing system, establishing a new system of public financing for congressional races and replacing the failed Federal Election Commission with a new, effective campaign finance enforcement body.

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In *Citizens United*, a bare majority of five Justices dismantled a 100-year-old cornerstone of the Nation's effort to safeguard the integrity of federal elections against corruption and the appearance of corruption. Congress should do everything in its power to enact appropriate measures that will minimize the serious damage caused by the Court's ruling, and it should do so quickly.

Mr. NADLER. I thank you.

We will begin the questioning by recognizing myself.

Professor Tribe, let me ask you a number of questions. Let's talk about disclosure, first of all. Let's say that Exxon—we will use them as our bogeyman today for no particular reason except that they are well known and large—let's say that Exxon wants to contribute a lot of money to a given candidate and wants to do it through the Citizens for a Clean Environment, which they invented.

Now, we could, obviously, require that an ad run by such a group, if it were completely funded by Exxon, say this ad is funded by Exxon, could we not?

Mr. TRIBE. Yes, certainly——

Mr. NADLER. Now, let's assume——

Mr. TRIBE [continuing]. You could say that.

Mr. NADLER [continuing]. Thank you. But let's assume that Exxon got together with 20 other corporations to provide the financing for Citizens for a Clean Environment. Could we require that they list all their contributors or their five largest contributors in this 30-second ad?

Mr. TRIBE. I think it is purely a prudential and not a constitutional matter. That is, in the markup of such a bill, you would have thresholds, and you would certainly indicate that any corporation above a certain size that had contributed more than a stated percentage of——

Mr. NADLER. Okay, thank you.

Mr. TRIBE [continuing]. The cost has to be disclosed.

Mr. NADLER. Now, you mentioned pay or play, and you mentioned the Hatch Act. Do you think it would be constitutional with this Supreme Court majority for us to say that any corporation that does business with the Federal Government cannot use its corporate treasury to fund campaign ads?

Mr. TRIBE. I believe that would be permissible under the rationale of this opinion because the Court is talking about the rights of corporations, and one could protect those rights by shielding them from being pressured to pay to play.

Mr. NADLER. And the same thing with protecting shareholders—could we require that before the corporate treasury is used to do campaign ads that they must get the written permission of 5 percent of the shareholders?

Mr. TRIBE. I think you could certainly require that as to for-profit business corporations where there is reason to think that people invest either directly or through intermediaries not for ideological reasons. I don't think you could do that with respect to corporations which are essentially ideological groups and happen——

Mr. NADLER. But the for-profit——

Mr. TRIBE [continuing]. To be in corporate form.

Mr. NADLER [continuing]. Do you think we could require that they get the permission on—to engage in a campaign by a specified percentage of the shareholders?

Mr. TRIBE. I believe you could.

Mr. NADLER. Thank you. Let me turn to foreign control, foreign subsidiaries. Now, a number of the princes of Saudi Arabia have recently said publicly that their number one danger to their king-

dom is that America might become energy independent, and that would be a terrible danger to them because we wouldn't buy their oil, and they are right, I think. And I hope we do that.

Now, they have a motive, therefore, to influence our politics to see that we don't become energy independent, and they have a lot of money. Could we require that no corporation with more than, say, 5 percent ownership of non-American citizens can use its corporate treasury?

Mr. TRIBE. I believe, though the majority opinion carefully doesn't address that—it simply says that there are certain limits on foreign entities—I believe that there would be five votes at least to uphold such a requirement. I can elaborate if you want to know what my thought process is, but——

Mr. NADLER. Well, let——

Mr. TRIBE [continuing]. That is my conclusion.

Mr. NADLER [continuing]. We will talk later to elaborate, but not in this 5 minutes.

So controlled by foreign nationals, owned or controlled—we know they don't have to own 50 percent of shares in a company to have effective control, nor does it have to be a domestic subsidiary. It could be an American company with X percent of foreign control, and it is effective control.

Mr. TRIBE. Right. There are lots of ways that foreigners could control and influence the American electoral process, and any——

Mr. NADLER. Let me——

Mr. TRIBE [continuing]. Reasonable way of excluding that——

Mr. NADLER [continuing]. Let me ask one other question, and then I will get to a different witness. The Court seemed to say—and I read the opinions last night. The Court seemed to say very—that a corporation essentially is identical to a natural person.

Now, we don't treat corporations identically to natural persons. If natural persons commit felonies, we put them in jail. When we put them in jail they are deprived of their civil rights—the right to vote. The courts have held that people in prison have—lose a lot of their First Amendment rights.

Could we constitutionally do the same thing to a corporation if we found it guilty of an election law violation and sentence it to do no business for 5 years, or sentence it to speak not at all for 3 years?

Mr. TRIBE. Perhaps. I think it would depend on the design of the law. But obviously, the equation of corporations with individuals is only partly metaphoric. That is, as you pointed out in your opening statement, you can break up a corporation if it gets too big to fail. You can't break up a person if that——

Mr. NADLER. Well, I am beginning to—I am beginning to wonder if the Court is going to tell us we can't break up a corporation unless we convict it of a capital crime.

Mr. TRIBE. Well, I suppose that is right. The death penalty is a separate controversy, of course.

Mr. NADLER. Yes.

Mr. Parnell, let me ask you the following. This is an actual case that occurred in New York a number of years ago. How would you deal with it? How do you think we can constitutionally deal with it?

The town or city—there is a town of Poughkeepsie and a city of Poughkeepsie; I forget which it was. It is a small city in New York.

People typically spend $4,000 or $5,000—or at least this was true 20 years ago when what I am about to say occurred. People would typically spend $4,000 or $5,000 at the outside to be elected to the, I think, nine-or ten-member city council at the time.

A very large company wanted to build a mall in the—somewhere in Poughkeepsie, and the then-Democratically controlled city council for some reason didn't want them to do that, so they refused to let—to give them permission to build the mall.

The local Republicans were in favor of the mall, basically, and so in the next election the local Republicans did what they normally did, spent $4,000 or $5,000 apiece to run for office, but this company came in and spent $20 million on an independent campaign expenditure, completely bowled over the local Republicans, who had no control of what was going on, made all sorts of allegations against the other people, made all sorts of claims on behalf of the Republicans, who had nothing to say about the matter and repudiated it afterwards, said, "I didn't mean that. I didn't say that."

Be that as it may, the Republicans got elected. As they had said they would do, they approved the mall. The company then started building. Eventually the mall was built. All of this came out in public. The local electorate got infuriated. They couldn't punish the company, so they punished the local Republicans, who were really not at fault at all.

But the mall got built, and the local democratic procedure, the—of everybody was completely overturned by some company coming in and spending—I forget how many millions of dollars in a campaign that normally wouldn't have totaled, for all people involved, $20,000, $30,000, and just completely overwhelmed the local system.

How do we protect against the use of corporate assets to completely stifle a democratic procedure in a case like that, given this decision?

Mr. PARNELL. Well, I think I would disagree with one of the fundamental premises of your statement there, which is that the democratic procedure was somehow thwarted or overturned, because the voters of those towns—they were the ones that——

Mr. NADLER. One town.

Mr. PARNELL. I am sorry?

Mr. NADLER. One town.

Mr. PARNELL. Oh, I am sorry, one town. They were the ones who had to listen to this million dollars, $500,000, 20—whatever amount of money was spent—they were the ones that had to listen to the arguments made in those campaign ads or mailers, or whatever it was, and ultimately decide, "Do I believe this? Do I agree with this? Does this make sense to me? Or do I not?"

Mr. NADLER. So in other words, someone has a corporate interest to build a mall.

Mr. PARNELL. Right.

Mr. NADLER. They come in and spend $20 million, or $5 million, or whatever it was, never mentioning the mall, saying that the local councilmen on the other side were terrible for some extraneous reason having nothing to do with the mall. They get the peo-

ple they like elected, although they liked them only on one thing, the mall. The mall gets built.

As soon as the electorate finds out what happened, they get infuriated, do what they can, throw out the hapless beneficiaries of this corporate spending. But the town never got a fair hearing on the mall.

Mr. PARNELL. I, again, don't know that I would agree with your description. I mean, there are always factors that come into elections for city council or any other. You have endorsements by organizations. You have media coverage.

Mr. NADLER. Okay. So you think that what happened there is okay and we shouldn't be concerned about something like that being replicated.

Mr. PARNELL. I think that what you—if you want to be concerned about anything, I would be concerned about an electorate that maybe was not paying attention or discerning enough to be able to say, "These allegations——

Mr. NADLER. Okay.

Mr. PARNELL [continuing]. Are not worth considering in my voting process." I mean, ultimately, voters are sovereign. They are responsible for——

Mr. NADLER. But they are sovereign—and you believe that this kind of overwhelming thing doesn't defeat the sovereignty of the voters. Okay, that is a philosophical distinction—difference. Thank you very much.

I will now recognize the distinguished Ranking Member of the Subcommittee, the gentleman from Wisconsin.

Mr. SENSENBRENNER. Well, thank you very much.

Listening to the Democratic witnesses today, I get the impression that they think the sky is falling. And I don't think the sky is falling, but I think that the *Citizens United* case is a natural progression to what has happened over the last 35 or 40 years on the whole issue of campaign finance.

You know, let me say that every time Congress and the Court has tightened the screws relative to campaign finance, something has happened where there is more money that has been gone off the books and away from the direct control of candidates and the direct responsibility of candidates.

And let me give you a historical progression. In 1972 there was a man that gave several million dollars to Nixon's campaign. Nixon disgraced the presidency. The Watergate Congress passed a campaign finance bill that limited contributions. And what did we get? We got PACs, political action committees.

In 1976 the Supreme Court decided the Buckley case. And the Buckley case essentially said that Congress and the States could regulate candidates but could not regulate individuals and equated the spending of money to influence campaigns as something that was protected by the First Amendment. Shortly afterwards, we ended up getting soft money as a result of that.

The McCain-Feingold bill attempted to get rid of soft money, which was money not given for candidate advocacy but given to parties for party-building activities like voter registration, absentee ballots, get out the vote drives and stuff like that. So McCain-Fein-

gold made that illegal, and we had more and more money go off the books for the so-called independent expenditures.

And now the chickens have come home to roost as a result of all of these decisions that have been made either legislatively or judicially with the *Citizens United* case.

Now, you know, maybe, you know, I am a little bit, you know, over reactive as the Democratic witnesses are on this. But I have always believed that we don't need a First Amendment to protect politically correct speech. The reason the First Amendment was passed by the first Congress was to protect politically incorrect speech.

And the three Democratic witnesses, I think, have accurately zeroed in on speech that is politically incorrect which the Court has said is protected by the First Amendment. And they kind of sent the message that no matter how hard we try with the statute to correct the *Citizens United* speech—or *Citizens United* decision, we are—that also is going to meet a similar fate as a result of this Supreme Court majority.

Now, that being said, you know, let me ask the three Democratic witnesses, should we try to amend the statute to try to deal with this, as each of you have said in a little bit different way, which will result in litigation and perhaps the same result? Or should we deal with this issue by a constitutional amendment, as Senator Kerry and Committee Chairman Conyers have recognized and have introduced?

And I would just like to ask a yes or no answer, beginning with you, Professor Tribe.

Mr. TRIBE. If the only word I can use is yes or no, it would be no. But if I may ask, as a matter of personal privilege, to address the question of whether we are "Democratic witnesses," I very much agree with Congressman Watt that this is not and should not be a partisan issue.

I know it was the majority that called us here, but I have, for example——

Mr. SENSENBRENNER. Well, I am running out of time. Mr. Parnell was invited by me.

Yes or no, Ms. Youn?

Ms. YOUN. I would have to say no. I would say let's push back against the First Amendment which, until last month, did not permit this distortion of our democracy.

Mr. SENSENBRENNER. Okay.

Mr. Simon?

Mr. SIMON. I don't support a constitutional amendment as the remedy for this decision.

Mr. SENSENBRENNER. Well, I am glad you said—all three of you have said that, because if we have a constitutional amendment that would mean that Congress would be amending the Bill of Rights for the first time in history, and that opens up a very disturbing Pandora's Box, and I would not support a constitutional amendment.

Going to the next step, if we want to have political responsibility consistent with the First Amendment, what about getting rid of all of these restrictions and instead have a Federal law that channels all of the money through candidate committees, where the can-

didate is responsible for the source of the financing, the amounts of the financing and how that money is expended, but also have a law that requires that all of this information be placed on the Internet before the money hits the candidate's bank account?

Wouldn't that be the way to very clearly constitutionally deal with this issue in a way that does not raise any First Amendment questions either as a result of the *Citizens United* decision or as a result of any of the previous decisions the Court has made?

Let's start with you, Mr. Parnell, since you were off the hook on the last question.

Mr. PARNELL. Thank you, Congressman. Obviously, yes, I believe that—well, actually, I need to kind of separate. You have two different statements in there.

The idea of simply allowing people to contribute to candidates that they support, they believe in, without limits, without restrictions—that is certainly what we believe the First Amendment protects, and so we would be all in favor of the general proposal as outlined by you.

One thing, though—and I may have misunderstood what you were saying—you said channeling all of the money through candidates, and that would, if I am understanding you correctly, exclude still independent groups—the National Rifle Association, Exxon Mobile, the United Auto Workers.

Mr. SENSENBRENNER. Well, the point that I want to make is that if any of us up here on the dais accepts a million dollars from Exxon Mobil and discloses that prior to the money hitting our bank account, I think we all would have a very tough time persuading voters to vote for us when the election comes.

Mr. PARNELL. Yes. Yes. I just wanted to make the point that I was a little unsure of what you were saying in terms of independent spending and whether independent spending would still be allowed under the statute that you proposed. And obviously, we are very keen——

Mr. SENSENBRENNER. I don't think we can prohibit it.

Mr. PARNELL. Exactly. I just——

Mr. SENSENBRENNER. Yeah.

Mr. PARNELL [continuing]. Wanted to make sure that——

Mr. SENSENBRENNER. And that was not *Citizens United*. That was Buckley.

Mr. PARNELL. That was *Buckley,* exactly.

Mr. SENSENBRENNER. Okay.

Mr. PARNELL. One of the things that has kind of gotten lost here in talking about precedents being overturned is that *Austin v. Michigan* was, in fact, a rejection of a part of Buckley that ruled that independent expenditures are not corrupting. They cannot be corrupting.

And so to the extent that the argument is being made that the Supreme Court went way out on a limb here in rejecting precedent, all they did was actually bring back the original 1976 precedent, which I think everybody in the world of campaign finance understands is the guiding precedent in the world of campaign finance.

Mr. SENSENBRENNER. Thank you.

I yield back the balance of my time.

Mr. NADLER. I thank you, and—I thank the gentleman.

And I will now recognize the gentleman from North Carolina for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

If it is any consolation to Mr. Sensenbrenner, I want to assure him that I don't support a constitutional amendment to address this issue either, not that that matters, I am sure.

I actually have two questions that I—maybe will convert this from somewhat of an esoteric discussion that sometimes constituents can't understand to a real-life situation. And I am going to tie the two questions together because I think they are related.

First of all, my first question is do corporations have the same rights under our Constitution as individuals, and second, to, related to that, find out what—whether there are any limitations left after this Supreme Court decision on what a corporation can do either as an independent uncoordinated expenditure or what—whatever, by postulating this example, which I think my constituents will understand very well.

I come from Charlotte. That is the largest center of my—in my congressional district, happens to be the—at least up until the banking and economic meltdown, the second largest financial center next to Wall Street. I had more financial interests in my congressional district than any other Member of Congress other than Carolyn Maloney.

I am on the Financial Services Committee, and we have had a number of very, very difficult issues both before the financial meltdown and since the financial meltdown in which the banking and financial services industry—I won't call particular names, but everybody in my congressional district will understand who I am talking about—were not all that happy with where I come down on a lot of these issues—predatory lending.

I was out there very much aggressively in the front of consumer financial protection agency. I am a strong advocate of finding some solution to this whole too-big-to-fail issue where there are entities in my congressional district that everybody acknowledges under the old criteria have been too big to fail.

Now, the question I want to pose is would there be any limits if one or more of those financial entities in my congressional district—would there be any limits left in—after the Supreme Court's decision on what they could do if they really decided they want to just get rid of this person in Congress?

That seems to me to convert this from a constitutional theoretical discussion into a real-life potential, although I am not anticipating that any of them are going to do that.

I just want to know what the limitations are left and whether there is any way that we can constitutionally reconstruct those limitations as Congress that the Supreme Court as currently constituted might uphold.

I will stop and listen to Professor Tribe and right on down the line, to the extent we have time. Yes.

Mr. TRIBE. Congressman Watt, I think it is a very realistic example, obviously. It is what is real. And the fact is that after this decision, the limits that are left on what they can do are rather paltry.

They can't directly contribute. They can't tell you, "Congressman Watt, we will give you $100,000, a million dollars, if you back off

in terms of a predatory lending or too big to fail or a consumer protection agency." But there are no limits on what they can independently spend getting you defeated or your opponent elected.

But that doesn't mean that Congress can't do something between now and November to reinstate limits. That is, these are not ideological groups. They have ideologies, but they are not like the National Rifle Association or the Massachusetts Council——

Mr. NADLER. Would the gentleman yield for a moment?

Mr. WATT. I am happy to yield.

Mr. NADLER. Thank you. Just on that point, would it be legal under this decision for some corporation to say to a congressman, "I have $10 million to spend for you or against you depending how you vote on this bill," or would that be bribery?

Mr. TRIBE. Unfortunately, it is legal. But what we could do is say that since these are not——

Mr. NADLER. I thank the gentleman.

Mr. TRIBE [continuing]. Ideological groups, they are business groups, what they are trying to do is deploy their shareholders' money, money that isn't theirs, money they haven't given—been given specific permission to spend this way, on political causes.

And therefore, solutions that focus on corporate democracy, corporate governance, as well as solutions that focus on disclosure, could at least reinstate not in full the limits that existed before *Citizens United*, the *Citizens United*, but they could restrict the degree to which the corporations that you are talking about could flood the market.

Ms. YOUN. I wanted to respond first to your first question about whether corporations are, indeed, identical to people. Corporate spending of the kind at issue in *Citizens United* is regulated as a commonplace matter by this Congress all the time.

Corporations really do differ in that regard from individuals. A corporation cannot spend its money in violation of the business judgment rule. I don't have to subscribe to such a rule in my personal spending.

I am allowed to waste as much of my money as I want to on anything I want to. A corporation is not entitled to waste corporate assets. Corporate spending is regulated all the time, and it has never been considered a problem for the First Amendment.

But secondly, I wanted to respond to your very pressing question, because these are exactly what we believe the stakes to be in this decision. Prior to this decision, if a corporation wanted to come after you or after any swing vote on a matter—you know, on a matter of great policy urgency, you know, they had two primary options.

They could lobby, or they could ask their—you know, they could ask people to contribute to their PAC, subject to contribution limits. They could also engage in some limited electioneering-type activity.

But what this allows them to do is to use every dollar in their treasuries to come after you or any other swing voter directly, to use every dollar to try to get—you know, to try to take you out.

And they don't have to do so based on your support of, for example, the—you know, a consumer financial protection agency. They

can do so based on whatever smear they feel like is the best expenditure of a $100 million advertising campaign.

Mr. PARNELL. Congressman, I think $100 million against you might be a bit of overkill. I don't think you need to worry about that sort of expenditures.

No, there are no limits on how much a corporation or a union or an advocacy group can spend attempting to either bolster your campaign or oppose it. I would like to talk about two limits that do exist, however. And these are limits on you.

And this is a limit on how much you are able to coordinate with your party, who presumably would like to see you continue in office. Right now, there is a very limited amount of money that you are able to coordinate with them.

I would think that it might be beneficial, if you are the target of a large expenditure aimed at unseating you—I would think it might be beneficial for you to be able to have unlimited coordinated expenditure with your political party which, after all, exists in part to help you get elected.

And then of course, there is also the contribution limits that remain on you and were not fully indexed for inflation from the 1974 limits that really limit your ability to raise funds in order to get—communicate with the voters on why you should, in fact, retain your office.

Mr. WATT. I am not real anxious to raise those limits, I would have to tell you. I think that would be—who was it that made that point? I am sorry, I wasn't supposed to interrupt.

Go ahead, Mr. Simon. My time is way over—expired, but——

Mr. SIMON. I will be brief. We have heard the Chairman's scenario about what happens at—or has happened at a local level with corporate spending, and your hypothetical of what can happen at the Federal level.

And I think, unfortunately, this—both are correct. Both are a vision of the world we are now in, and I think that is why it is so disturbing.

In addition to what Professor Tribe suggested in terms of disclosure remedies, which I think are very important, and corporate governance remedies, which may be some way to get a handle on this, I think there are no—there is no way to impose a direct limit on independent spending by a corporation.

In your particular hypothetical, however, if the——

Mr. WATT. Why not, if a corporation is not the equivalent of an individual?

Mr. SIMON. Well——

Mr. WATT. I just don't understand that.

Mr. SIMON [continuing]. Because five justices of the Supreme Court have said that Congress lacks that power at this point. I mean, that is the harm caused by the majority opinion.

Let me just add, though, in your particular hypothetical, if the financial institutions you are talking about are recipients, say, of TARP money or Federal bailout money, there may be a way on a sort of pay-to-play theory to pose limits on independent spending, because I think Federal contractors, recipients of large Federal funding, do offer an opportunity for congressional action.

Mr. NADLER. I thank the gentleman.

Before recognizing the gentleman from Iowa, I would just point out factually to Mr. Parnell that the law was changed a number of years ago. The campaign contribution limits were raised since 1974, and they have been indexed to inflation. In fact, there is a cost-of-living increase now in the law.

The gentleman from Iowa is recognized.

Mr. KING. Thank you, Mr. Chairman.

I am not aware that that is the case for PAC contributions, but individuals? Would that be a clarification? Yes.

And I would turn my first attention to Professor Tribe.

And I appreciate all the witnesses being here today, and it is a civic service you are all providing.

And you referenced in your opening statement, Professor, about Justice Stevens' dissent, which I have to confess I have not read. But I would ask if you could, in a succinct way, address anything he might have written in his dissent that actually focuses on the constitutional question rather than anything that might be broader.

I have heard a lot about the implications of the decision, not very much about the dissent on whether the majority's opinion was grounded in the Constitution. So what was his argument?

Mr. TRIBE. Well, Representative King, it—I couldn't do justice to all of his 90 pages, and it would take up more than your 5 minutes. But his argument was entirely about the Constitution.

That is, he did rhetorically say that he feared the consequences for democracy, but he went back to the founding, talked about the concept—how shocked the founders would be if they thought—if someone suggested that corporations in general had the same rights as individuals.

Indeed, the equation of money with speech is a rather modern innovation. Used to be that money talks was kind of a metaphor and an insult, but it now has become the Constitution of the United States.

And that really begins with decisions like Buckley. It was not part of the founding. So he says if you are a genuine originalist, he explains in very great historical detail—which Justice Scalia tries in his concurring opinion to answer but in my view not very successfully, though, believe it or not, I very often agree with Justice Scalia on First Amendment matters.

He tries to show, Justice Stevens does, that at the founding no one would have thought that corporations in general have the same rights as people, especially in the electoral area. That is, there was a voter-focused concept at the founding.

Voting was basic, although it wasn't extended, as we all know, tragically, to the entire electorate. And the idea that entities that couldn't vote, like foreign corporations, could influence American elections would have been anathema.

And then he proceeds with the jurisdictional and jurisprudential development of the law and really takes apart in a way that would be an instructive sort of lesson for law students every argument in the majority.

The majority's response is at a very abstract level. The majority says, "We have long had a principle that someone's identity is irrel-

evant to the value of his speech." And then he refers to a case, *First National Bank of Boston v. Bellotti.*

Now, that is a case with which I agree. But the difference there is that the State of Massachusetts tried to engage in controlling politically incorrect speech. That is, they basically——

Mr. KING. If I could interrupt for a moment, please, Professor, and if I could go back to the point about——

Mr. TRIBE. Sure.

Mr. KING [continuing].—Justice Stevens, did he write about or consider the requirements in our past history of ownership of property as a condition to the right to vote? Was that considered in the decision?

Mr. TRIBE. I don't think that there is a reference to it, except that there is a footnote that talks about how the right to vote has been broadened by the poll tax amendment.

Mr. KING. Okay. Well, thank you. I think that lays a little bit of the background, and I just wanted some of that into the record.

And then, I just recall, Ms. Youn, when you talked about the—actually, I think you said, "I defy anyone to take the statement that corporations have been unable to express their point of view."

And in keeping with my opening remarks—and I expressed that they are constrained from expressing their point of view, and as I operate inside this political bubble that we are in, I see them continually constrained from expressing their point of view.

And I think they are intimidated from expressing their point of view for fear they will be punished. In fact, in a—and this just comes across my mind—an Energy and Commerce markup of that bill that I mentioned, the cap and trade bill, one of the most stellar witnesses who testified most vigorously against cap and trade before he walked out of the room was handed a letter that his corporation would be investigated.

And so that was a complete open and blatant example of intimidation of a corporation. The rest of the—many of the other corporations—I can't speak for all of them—were constrained in their testimony because they feared they would be investigated. This corporation was handed the letter as the star witness walked out of the chamber.

So I think they have been constrained. I think they have been unable to express their point of view out of fear that—as you referenced, interest for their shareholders and their assets.

And so I make the argument back to you and give you an opportunity to rebut my argument.

Mr. TRIBE. Are you directing that——

Mr. KING. To Ms. Youn, please.

Mr. TRIBE. Okay.

Mr. KING. Thank you, Professor.

Ms. YOUN. I don't know the circumstances of the exact investigation that you reference. I would say that investigation that is solely done to harass a corporation or an individual for its viewpoint is intensely problematic.

But what I would say is that it is important to distinguish in these instances between intimidation for whatever reason and government censorship.

For example, I might be intimidated from, you know, expressing my views on—I don't know—politics in a variety of fora. I might fear that someone would come up with a rejoinder. But that is not the same thing as censorship.

Mr. KING. Well, thank you. And then I would turn to Mr. Parnell.

And I will make this statement. I am a person who comes at this thing from a constitutional perspective, and our hearing here is about how do we shape legislation that will not be overturned by the Court by their view of constitutional perspective.

But I am not hearing argument about what the Constitution actually allows, and it does go back, in my view, just simply to the definition of what is a person, what is an entity, how is your voice heard. There are a lot of different ways to analyze that.

And I would make, again, the point that I want to see free enterprise of speech the same way I want to see free enterprise economically. And this Nation is founded on free enterprise capitalism.

And some of those freedoms are rooted back in the First Amendment and that ability for that free speech. And as you heard my remarks on—in the beginning, Mr. Parnell, about how corporations are intimidated from actually the full-throated voice in the political arena.

And I had some reservations, too, because I often sit in a meeting and—or I will hear legislation here, and they will say, "I just want to level the playing field." But generally, that means that it wants to be tilted a little bit in favor of the advocate for changing the angle of the playing field.

And I understand that this path that has been directed and opened up is fraught with peril. But freedom is always fraught with peril, and I would ask if you could speak to that issue from your perspective.

Mr. PARNELL. Sure. I mean, obviously, I largely agree with the sentiments that you expressed. You know, talking about intimidation of corporations—and certainly, unions get intimidated. Activists get intimidated.

I note that Congressman Cohen is here. He is the sponsor, I believe, of an anti-SLAPP law that my organization recently signed on that is designed to prevent people from filing lawsuits against people with the aim of silencing their voices and prohibiting them from participating in politics.

The political process is messy and chaotic, and I am not telling you anything that you don't know, that you have to deal with people who criticize you and who don't particularly think you are doing a good job in office, and it takes money to criticize you. It also takes money to praise you. It takes money for you to explain to the voters why they should vote for you.

My group starts with the premise that Congress shall make no law, and that kind of settles a lot of these questions for us, and I think that that maybe ties in with your perspective on this. You know, I don't really know that I have a lot to add to that.

Mr. KING. Well——

Mr. NADLER. The gentleman——

Mr. KING [continuing]. Thank you, and I—as watching my time conclude, I will restrain my concluding statement and yield back to the Chairman.

Mr. NADLER. I thank the gentleman.

The gentleman from Virginia is recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I think this whole thing started when we tried to regulate issue ads. We had always regulated express advocacy, where you are telling somebody who to vote for and who to vote against, but had given a pretty much free pass on issue ads, where you can talk about an issue and then tell the public to call them and tell them to stop voting that way, or tell them to vote this way or that way.

The issue ads became "sham" issue ads because although it said it was really advocacy, and that line was in a fairly bizarre place, but the only thing worse than where the line was was anywhere else you tried to put it. And so we were kind of stuck in that place.

I guess we tried to do that with McCain-Feingold, and what the Supreme Court apparently did is just wipe out the whole matrix. It said, "Issue ad, express ad, well, you can do anything you want anyway."

Is there any way that we can get back to pre-McCain-Feingold where we could at least put some limit on express advocacy and give free speech to issue advocacy?

Mr. TRIBE. Congressman Scott, I think the answer is no. You can improve disclosure, corporate governance, try to restrict pay to play, which really could take care of a lot of problems, because a lot of these companies are on the receiving end of government contracts, government bailouts.

But even if someone says, quite up front, vote for or against Congressman Scott, vote for his opponent, that is clearly something that, if it is independent, they could spend all the money in their general treasury on after this decision.

And since I am not in favor of a constitutional amendment, and the Court has the last word on the meaning of the First Amendment, that is going to stay, and you have to operate within that framework.

You know, the Court—I think Justice Jackson once said—is not infallible because it is final. That is, it has the last word, but that doesn't make it infallible. Nonetheless, that is what we have to work with.

Mr. SCOTT. Is there any way—you could put limits on what someone can contribute to an individual. Is there no limit on what individuals and now corporations can spend independently?

Mr. Parnell?

Mr. PARNELL. Congressman, no, there are no limits that are—based on what an individual or a corporation can spend independently.

Buckley v. Valeo—the Court ruled that individuals could not be restrained in any way in their ability to spend unlimited sums. And now, obviously, in *Citizens United* that has been extended to the incorporated entities.

Mr. SCOTT. Could we do anything under a public financing matrix that could limit anyone, or are we still stuck with the can-

didates limited by public financing and everybody else spending unlimited amounts?

Ms. YOUN. The voluntary restrictions that candidates accept when they enter into a public financing system would allow their spending and potentially their acceptance of beneficial independent expenditures to be regulated.

But the Court's current ruling does not permit independent expenditures outside that arena to be restricted.

Mr. SCOTT. Wait a minute. You mean coordinated independent expenditures. If you have a totally uncoordinated independent expenditure, could a public financing matrix limit that expenditure if it is not coordinated?

Ms. YOUN. It couldn't limit that expenditure, no. But what it could do——

Mr. SCOTT. So you might find yourself in a situation where the candidate is locked into an agreement to spend so much and then, out of the blue, is overwhelmed and limited and defenseless against express advocacy ads taking over the campaign.

Mr. SIMON. Congressman, if I might answer that, heretofore public financing systems have in that situation either lifted the spending limit imposed on the opt-in candidate participating in public financing or given additional public funds to the opt-in candidate in order to address unlimited outside spending.

Unfortunately, there is a trend in a couple of lower court provisions that have invalidated those kinds of remedies for opt-in candidates which is, I think, a controversial reading of a different Supreme Court decision a couple of years ago in *Davis v. FEC*.

So I think that particular issue you are pointing to is a matter of unsettled law at the moment.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

The gentleman from Texas is recognized.

Mr. GOHMERT. Thank you, Mr. Chairman.

And do appreciate the point of view of all the witnesses.

And in hearing the discussion earlier about corporate America and making it sound as if Republicans believed that corporations were too big to fail, I would point out to my friends that on the TARP bailout there were twice as many Democrats that voted to protect these groups that were too big to fail as there were Republicans, and that the reports indicate that the contributions from Wall Street executives to the Democratic Party is consistent with what was contributed to President Obama, and that is 4-1 contributed to Democrats and President Obama over Republican candidates—that of the Wall Street executives.

Some of us wanted to see AIG go to bankruptcy, and those parts that were productive and were making a profit be broken up so we didn't have to worry about too big to fail in the future.

And I am not nearly as concerned as some of our witnesses about corporations being able to make contributions and actually toward commercials, toward advertising, because what we have seen is corporations are probably the most easily intimidated group of persons, as they are defined, in America. It doesn't take much of a boycott to seem to set them on a different course.

So it seems to me that the most important thing that we should never get away from—and I know this has been mentioned, but it is transparency. And I would love to co-sponsor any kind of legislation that required greater transparency.

And I would be open to anything you might suggest in the way of laws to control foreign contributions toward manipulation of our elections.

I don't know whether you would want to put a limit, say, at 5 percent—no greater than 5 percent ownership of a corporation by foreign entities, and what kind of disclosures might be most helpful in getting to transparency, because I don't mind corporate persons buying advertising, but I sure do want to know who owns that corporation and make sure that it is not a significant amount of foreign ownership trying to manipulate our U.S. elections.

So as you have time to think in the days ahead, I would love to hear from you on any thoughts you might have. If you have some today, I am glad to hear that, too.

Mr. TRIBE. Congressman Gohmert, I certainly agree with you that transparency is extremely important. And in my prepared statement, I tried to suggest how the disclosure requirements should be tightened.

But I think the Chairman's example of the company that was really interested in having that mall built, and it was willing to spend millions of dollars to completely swamp the amounts that were otherwise spent—that is a good example of how transparency alone won't solve the problem.

Everyone knew which companies were putting that money in. The fact is that those companies could not constitutionally be required to disclose all of their motives. They came in and had ads that didn't say anything about the mall one way or the other.

And that is why other forms of protection—I mean, a lot of people who invested in those companies that wanted to build the mall didn't put their money there because of that alone. They——

Mr. GOHMERT. And I can understand that example, and I see my time is going to an end. But I would also point to you numerous times when, you know, as we have seen repeatedly, Americans love an underdog. And if it looks like the big guy is whipping up on the little guy, they seem to flock to the little guy.

If one party ends up having the White House and both houses, then people start being bothered by—like that. They like what the founders did, and that is contention. That is a little bit of gridlock so government doesn't run out and make too many laws to take away their liberties.

And I would also mention, when we talk about government intimidation, how about—and I hope my friend as Chairman of the Crime Committee—he and I are working on over-criminalization.

I see this morning a story that the IRS has put out—posted a solicitation for 60 new Remington model 870 Police 12 gauge pump shotguns, and maybe we need a hearing to see what the IRS wants to do with those 60—because that sounds intimidating to me. I don't know, maybe——

Mr. TRIBE. I think it would intimidate not only a corporation, but it would scare me.

Mr. GOHMERT. Well, thank you.

But I appreciate the time, Mr. Chairman.

Mr. NADLER. I thank the gentleman.

I will now recognize the gentleman from Massachusetts.

Mr. DELAHUNT. On this issue, I heard the Ranking Member of the full Committee talk about the issue of foreign corporations or foreign influence.

You know, my understanding of the financial markets is that American domestically-domiciled corporations are open to have their shares traded on the financial markets. Am I correct in that rather——

Mr. TRIBE. Certainly.

Mr. DELAHUNT. You know, one could develop scenarios where simply because an American corporation was incorporated in the State of Delaware, for example—might very well have a significant share of its stock held by foreigners.

One can even speculate that national corporations, whether they be state-owned oil companies or state-owned enterprises, could, in fact, have substantial holdings in American corporations.

Does that present a problem to any of you?

Mr. TRIBE. I think it is a terrible problem, Congressman Delahunt. That is, if you believe, as the founders did, that one of the dangers America faces is the danger that nations and their residents that are not necessarily friendly to us will be able, behind the scenes, to manipulate American elections.

Current law is not structured adequately to protect against that. Even a wholly-owned domestic corporation with Saudi Arabia or some other country pulling the financial strings is liberated by this decision to powerfully affect the outcome of State, local and Federal elections.

And the only way to deal with that—and it is important that it be dealt with quickly—is to tighten dramatically the restrictions on foreign influence on American elections. That is where I think Congress ought to start, because I believe there would be wide consensus on the virtue of doing that. That is not a Democratic or a Republican issue.

We have always said that politics stops at the water's edge. That usually means that when people go abroad we are one Nation indivisible. But here, I think it should work the other way, that we really don't want other nations directly or indirectly to be pulling the strings in American elections. And the law should be tightened to deal with that.

Mr. DELAHUNT. You know, when I hear the statement made by my good friend from Texas that, you know, there—or at least the inference that I drew from his observation was that we don't have to be concerned about it because our laws are on the books.

But that seems—if I can finish, Mr. Parnell——

Mr. PARNELL. I am sorry, I thought you were wrapping up.

Mr. DELAHUNT. Oh, no. No.

Mr. PARNELL. Okay.

Mr. DELAHUNT. I am not wrapping up yet. But I will let you know when I wrap up.

But my point is that there is a concern that I have about foreigners, foreign corporations. In some cases I don't know who owns

what anymore in this global economy. We talk about the global economy, and we don't know who owns what.

You know, we talk about Exxon Mobil. Who are the shareholders of Exxon Mobil? Are there relationships between State oil companies elsewhere and subsidiaries, therefore, Ms. Youn?

Ms. YOUN. Well, I mean, that is exactly one of the issues. I mean, China Telecom America is a U.S. corporation that is incorporated in Delaware. China Construction America is incorporated in Delaware. Two——

Mr. DELAHUNT. Now, China Telcom—is that a state-owned—Chinese Communist state-owned entity?

Ms. YOUN. I don't have that information. But I think that the——

Mr. DELAHUNT. So we don't know.

Ms. YOUN. I don't know. But the foreign-owned corporations' problem is only, I think, a subset of the bigger problem where, if a corporation is to buy an election out from under us, we the voters don't have anyone we can hold accountable, like in the Poughkeepsie example. There is no one we can vote out in that——

Mr. DELAHUNT. Right, but my point is—and I understand the larger issue, but my point is we hear a lot here in Congress and obviously in the media about terrorists and terrorism.

You know, one can conjure up a conspiracy, if you will, that there is a cabal out there that is purchasing X number of shares of an American corporation that will exercise influence not in the best interests of the United States, necessarily.

And I think we all know that, you know, shareholders do have some influence occasionally but, you know, maybe there is a director that is susceptible to certain influence. I know this sounds like a Ludlum novel, but a lot of what I hear today sounds like a Ludlum novel.

I mean, I think we have got to be concerned about the possibility of individuals or corporations or adversaries who are hostile to the United States and to our interests and who might very well be advocates for acts of terrorism against the United States to be influencing our elections.

And I have now wrapped up. And with that, I yield back.

Mr. NADLER. I thank the gentleman.

I now recognize the gentleman from Georgia for 5 minutes.

And we have a series of five votes which will probably take about 45 minutes. Maybe we can wrap up in time.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Parnell, can you tell us who the Center for Competitive Politics is?

Mr. PARNELL. Sure. The Center for Competitive Politics was founded by former FEC commissioner Bradley Smith in 2005. Our mission is to focus on promoting and protecting the First Amendment political rights of speech, assembly and petition——

Mr. JOHNSON. Where do you get your funding from?

Mr. PARNELL. We get our funding from American citizens who share our perspective on the First Amendment.

Mr. JOHNSON. How do you market to them, through what vehicles?

Mr. PARNELL. Sure. We find individuals who we believe share our perspective on campaign finance, and we ask them to contribute. It is probably not that much of a different process from what you go through when you are raising money.

Mr. JOHNSON. Well, let me ask you this. Isn't it true that your firm—you are the president—Center for Competitive Politics—isn't it a fact that you also accept contributions from corporations?

Mr. PARNELL. I would accept contributions from corporations, but I——

Mr. JOHNSON. But do you?

Mr. PARNELL [continuing]. Have not yet received any, at least not——

Mr. JOHNSON. Have you ever received in connection with the Center for Competitive Politics a contribution from corporations?

Mr. PARNELL. In 2008 I received one contribution that amounted to about 1 percent of our total receipts. And in 2007 I received another corporate contribution that also amounted to about 1 percent of our receipts.

Mr. JOHNSON. Well, now, you don't have to make any kind of public disclosure of who you receive money from, is that correct?

Mr. PARNELL. I am sorry, the question was did I oppose——

Mr. JOHNSON. No, no. You don't have to disclose to the public who your corporations or who your contributors are.

Mr. PARNELL. That is correct. All (c)(3) organizations—well, most (c)(3) organizations do not have to disclose their donors. There are some circumstances under which some donations are disclosed.

Mr. JOHNSON. Now, it seems a little suspicious to me that on the eve of this hearing you would then be announced as the Republican witness. How long ago did you agree to testify in front of this panel in a private way with your Republican friends?

Mr. PARNELL. I was asked last week.

Mr. JOHNSON. And any particular reason why you did not want that information to get out until yesterday?

Mr. PARNELL. I was asked by the minority not to preempt the Committee's announcement that I would be testifying. My understanding is that it is kind of considered bad form to announce that you are testifying before the Committee has officially invited you——

Mr. JOHNSON. Okay.

Mr. PARNELL [continuing]. To testify.

Mr. JOHNSON. All right. Well, and the Committee in this sense would be the minority party, the Republicans. They would be the ones that would extend the invitation to you, correct?

Mr. PARNELL. Officially, the letter I received was from Chairman Nadler. But yes, it was through Chairman Sensenbrenner's staff or the Committee minority party staff that I was invited.

Mr. JOHNSON. Well, now, let me ask you this question. You are not here to support the notion that corporations should have a right to actually vote in the United States political arena.

Mr. PARNELL. Certainly not.

Mr. JOHNSON. And so they are a little different than individuals, persons, here in America, live human beings registered to vote, correct?

Mr. PARNELL. Of course they are.

Mr. JOHNSON. And now, I am wondering whether or not this ruling in *Citizens United* has adversely impacted the ability of the average American walking the streets, blood flowing through their veins and through their heart and everything and, you know, breathing the air—that we are trying to get cleaned up, by the way—against the insidious advertising budgets of corporations like Exxon—$45 billion dollar a year profit.

But do you think that our—don't you think—let me ask it like that—that the citizens' right to control what goes on in the political arena—their right to vote—is adversely impacted by this decision in *Citizens United*?

And also, I want to get into your explanation for why you thought—or your speculation as to why you think the United States Supreme Court would stoop to this level of judicial activism and also this legislating from the bench argument, those two arguments being used against Democratic nominees for judgeships, Federal judgeships.

Mr. NADLER. The gentleman's time has expired.

The witness may answer briefly.

Mr. PARNELL. Okay. I will try. The first thing to remember about corporations, whether they are unions, whether they are for-profit corporations, or whether it is the National Rifle Association, is they are associations of individuals gathered together for a particular purpose—perhaps collective bargaining, perhaps to make a profit.

So no, I don't believe that the rights of average citizens are, you know, diminished by this because average citizens are union members. They are stockholders. They are members of NARAL Pro-Choice America. They are members of the Sierra Club.

What this decision does is it allows those associated entities to speak on behalf of, in a more effective manner, you know, what citizens could do by themselves.

Mr. NADLER. Thank you. The gentleman's time has expired.

I now recognize the gentlelady from Wisconsin.

Ms. BALDWIN. Thank you, Mr. Chairman.

I know in thinking about the impact of this case, a lot of us, since we have all stood for election and do every 2 years, think about it in the context of congressional races. But I am very, very intrigued about the impact this could have on judicial races.

I know, Professor Tribe, you referenced that in your opening statement. My home State of Wisconsin has seen in the last couple of election cycles some of the nastiest and most partisan judicial races for our State supreme court in a long time. And also, there is—clearly, we have local judgeship elections in the State of Wisconsin also.

In your testimony, Professor Tribe, you said 39 States have judicial elections. I think it is 21 that have supreme court judge—they are elected by the voters.

I wonder if you could speak in a little more detail about the impact that you believe *Citizens United* may have on judicial races.

Mr. TRIBE. Certainly, Representative Baldwin. I think that *Citizens United*, by extension of its reasoning, prevents States from imposing flat prohibitions on business for-profit corporations' independent expenditures in State and local elections, including judicial elections.

Now, some of those States already failed to have limits, but they were considering imposing them in light of the experiences in Wisconsin, in Minnesota, in Michigan, in some other States.

But this pours cold water on those direct efforts, which is why in my testimony I suggested one possibility for States, and that is at least trying to prevent out-of-state interests from influencing the outcome of those elections, something that you couldn't do because of the commerce clause without Congress giving permission.

It is sort of like the situation in the health insurance industry where I think the permission that States were given to build a wall proved to be a terrible idea, and one of the things that I guess you all are considering now is changing the antitrust exemption.

But one area where it might make sense to take advantage of the ability of States to ensure that foreigners, as it were—and Justice Stevens pointed out that vis-a-vis your State of Wisconsin the citizens of other States may be foreigners—that they are not allowed to influence outcomes.

But one other thing that I think this decision does, by signaling the danger of virtually unlimited independent corporate expenditures—and some of them, until we tighten the coordination rules, may not be all that independent.

But one thing it does is highlight the necessity to seriously consider what Justice O'Connor has made really a crusade, in which I am going to be helping her in every way I can, for States to consider whether they should go to a different way of selecting judges, perhaps merit selection followed by retention elections, because the importance of preserving an independent State judiciary is extremely crucial to the rule of law in this country, as I am sure you know.

And I think this decision may give an impetus to that movement, because even if you do all the things that I have recommended in terms of transparency, corporate governance, the exclusion of outsiders, the exclusion of pay to play—even if you do all of that, this decision still leaves a margin of corporate influence that you might want to try to restrict by not having elections for judges.

Ms. YOUN. What the——

Ms. BALDWIN. Ms. Youn? Yes.

Ms. YOUN [contiinuing]. What the Wisconsin example really brings home as well is the extent to which the deregulatory push by the Roberts Court is taking options off the table for State government.

Wisconsin, in response to this massive corruption scandal, recently passed a judicial public financing system. That judicial public financing system is now being constitutionally attacked by the same groups that brought the *Citizens United* challenge.

And you know, the degree to which a State can act to keep even its judiciary clean is being radically constricted.

Mr. PARNELL. If I could, I want to take exception to something that Ms. Youn said where she described the scandal or corruption in Wisconsin. I don't regard people speaking up, saying, "This is a terrible candidate," or, "This is a great candidate," as corruption.

It may be in some minds unwelcome, or unpleasant, or false, even, but I would really hesitate before describing free speech in the context of a political campaign as somehow being corrupting.

And real quickly, if I could——

Ms. BALDWIN. Well, no, actually, I am running out of time to ask my final question, but——

Mr. NADLER. I am sorry, the gentlelady's time has expired.

Ms. BALDWIN. Oh.

Mr. NADLER. We have 18 seconds to go on the vote on the floor.

The gentlelady from Texas has agreed to 1 minute so we could wrap the hearing up and not ask the witnesses to stay for an hour of votes on the floor.

Gentlelady from Texas is recognized for 1 minute.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Professor Tribe, my son went to Harvard, and I am going to try and be bionic in my words and point to you. Judge Alito was, seemingly was very unhappy with the President's comments during the State of the Union.

My question to you is—we have to live with the First Amendment. My question to you is how badly will this skew not only the First Amendment and one's right to stand on a position, but what legislative fix would you say this Congress needs to look at again?

Mr. TRIBE. It seems to me, without taking too much of your time, that there are several things that you should look at—limiting foreign influence; limiting influence of out-of-State corporations in State elections; limiting pay to play by enacting rules that tell companies that are contracting with State, local or Federal Government or receiving Federal money that one condition of that is that they not engage in electioneering, which in turn could expose them to all kinds of pressures; looking at better disclosure rules so that disclosure is required not only of the identity of the group that puts the ad but where their money is coming from; tighter anti-coordination rules; and finally, protections for genuine shareholder democracy by requiring shareholder approval.

Those are things I think you can look at, and I don't think that Justice Alito's statement or mouthing of the words that I am sure he didn't expect to be on camera, that "you are not correct," really should be seen as negative. On the contrary, that gives us an insight.

What that means is that he probably would support restrictions on foreign corporate intrusion into elections, because that is what he was reacting to.

Mr. NADLER. I thank the gentleman.

I thank the lady for——

Ms. JACKSON LEE. Thank you.

Mr. NADLER. We thank the lady for cooperating.

Without objection, all Members have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

We thank the witnesses.

And the hearing is adjourned.

[Whereupon, at 12:08 p.m., the subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

February 1, 2010

The Honorable Jerrold Nadler, Chairman
The Honorable Jim Sensenbrenner, Ranking Member
House Judiciary Subcommittee on Constitution, Civil Rights, and Civil Liberties
B353 Rayburn House Office Building
Washington, DC 20515

Re: Submission to House Judiciary Subcommittee on Constitution, Civil Rights, and Civil Liberties for Record of the Hearing, February 3, 2010, "First Amendment and Campaign Finance Reform After *Citizens United*"

Dear Chairman Nadler and Ranking Member Sensenbrenner:

On Thursday, January 21, in the case of *Citizens United v. FEC,* 2010 U.S. LEXIS 766, involving Section 441b of the Bipartisan Campaign Reform Act of 2002 (BCRA), the U.S. Supreme Court in a 5-4 decision made a radical about-face and reversed long-standing precedent that had previously upheld the constitutionality of the federal law that restricts independent corporate spending in elections.[1]

In the majority opinion written by Justice Kennedy, the Court reversed its decades-old decision in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), which upheld a Michigan state law's restriction on the independent expenditure of funds from a corporation's general treasury for political speech. Essentially, the Court ruled that governmental restrictions on corporate spending in elections are invalid and unconstitutional[2] and declared for the first time that "the Government may not suppress political speech on the basis of the speaker's corporate identity" and "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United* at *93.

The underlying premise of the majority's long-awaited opinion is, simply put, an astounding and outrageous new principle of law: Corporations – which are artificial creations of state law designed solely for economic purposes – are guaranteed the same free speech rights as real people under the First Amendment. Justice Stevens' dissent in the case, which will likely be quoted for decades to come, is the most succinct and scouring refutation of that premise:

> "In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters."

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[1] As amended by *§* 203 of BCRA, *§ 441b* prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. *2 U.S.C. § 441b.*

[2] Although Kennedy's majority opinion suggests an exception for extending its decision to invalidate the direct contribution ban on corporations, the *Citizens United* Court's rationale for holding restrictions on corporate independent expenditures unconstitutional could likely be used to invalidate the ban on direct contributions to candidates by corporations, which is the only remaining restriction, other than disclosure requirements, on election-related corporate spending. *See Citizens United* at *60.

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Id. at *143. Stevens also pointed out that the Framers "had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." *Id.* at *205.

Yet despite the undeniable truth of Justice Stevens' arguments, the majority resolutely set down a new interpretation of the Constitution that perverts the First Amendment and opens the door to millions of dollars of corporate special interest money in our elections. A corporation's CEOs and management are now free to spend funds from its general treasury to support or oppose any candidate that they believe will affect the profitability of the company. The amount of corporate spending allowed in elections as a result of the *Citizens United* decision is now quite literally unchecked, and, given their overwhelming financial resources, the public debate on the fitness or suitability of any particular candidate may now be drowned out by the bottomless pockets of big business.

The threat to this country's democracy cannot be overstated. On behalf of hundreds of thousands of members across this nation, People For the American Way (PFAW) calls on Congress to fix the damage done by an ideological majority of the Court.

First, Congress should enact legislation to minimize the most flagrant effects of the *Citizens United* decision. For example, the majority's conclusion that Government may not regulate political speech regardless of the identity of the speaker, has opened the door to foreign influence in our elections,[3] a matter that previously had been fully foreclosed by federal laws.[4] To that end, PFAW supports the American Elections Act of 2010 introduced by Senator Al Franken (S. 2959), which, among other things, would ban election contributions and spending by corporations that are controlled or highly influenced by foreign nationals, including foreign governments, companies and persons.

In addition, PFAW supports the Fair Elections Now Act, introduced by Senator Durbin (S. 752) and Representative Larson (H.R. 1826), which seeks to address the amount of money raised in federal elections from large donors and special interests. Specifically, the Fair Elections Now Act would enact public financing of federal elections and give candidates the option to run for office on a mixture of small contributions and limited public funds. This process would highly incentivize grassroots fundraising and help candidates run highly competitive campaigns without relying on large contributions from corporate special interests.

PFAW also supports other efforts to limit corporate political spending through legislation requiring shareholder approval of political expenditures, more stringent disclosure requirements and restrictions on the ability of corporations who receive federal contracts, bailout monies, or the benefit of any other public resource to engage in political spending in federal elections. We urge Congress to explore these and other options.

However, these statutory fixes will do little to restore the First Amendment to what was intended by the Framers and ultimately will be inadequate against the unfettered influx of corporate election

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[3] Indeed, Justice Stevens recognized the threat when he wrote: "[The majority's rationale] would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans. . ." *Id.* at *198.

[4] Previously, BCRA prohibited, among other things, direct contributions by foreign nationals and indirect contributions in the form of independent expenditures by corporations in federal elections. Although the ban on direct contributions by foreign nationals remains in effect, because *Citizens United* now allows corporations to engage in unlimited independent expenditures in federal elections, foreign corporations with U.S. subsidiaries would now be able to do so as well. The *Citizens United* majority specifically declined to make an exception in its ruling for corporations controlled by foreign entities to close this loophole. *Id.* at *88.

spending. For example, private equity firms with hundreds of millions of dollars at their disposal are not beholden to a group of shareholders and would still be free under *Citizens United* to spend an unlimited amount of money to change the outcome of our elections, as would many other companies. Only a constitutional amendment can restore the American people's authority to regulate corporate influence in our elections and restore our democracy.

As an organization dedicated to defending the Constitution and, especially, the First Amendment, we understand that a constitutional amendment is not an endeavor that is to be taken lightly or without great care to protect the rights and liberties of individual Americans. But the Supreme Court's decision to disregard the voice of the American people by invalidating restrictions on corporate spending in elections is such that a constitutional amendment is the only appropriate and direct response. In *Citizens United*, the Supreme Court has created a situation in which the free speech rights of individual Americans are degraded by the speech of companies. Although enacting a constitutional amendment is difficult, it is both necessary and achievable.

In the months and years to come, People For the American Way urges you to consider all the tools at your disposal, including a constitutional amendment, to correct the wrongs of the *Citizens United* decision and ensure that ours is truly a government of, by and for the people.

Very truly yours,

Michael B. Keegan
President

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

Feb. 3, 2010

The Hon. Jerrold Nadler,
Chairman, 2334 RHOB
The Hon. James Sensenbrenner, Jr,
Ranking Member, 2449 RHOB
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House of Representatives
Washington, D.C. 20515

RE: Testimony submitted on behalf of Public Citizen on *Citizen United v. FEC*

Dear Chairman and Ranking Member:

Public Citizen is pleased that the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties is holding a hearing in recognition of the danger to our democratic form of governance posed by the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*. We respectfully submit testimony to the Committee on the scope of the problem and on appropriate legislative and constitutional responses to the Court's decision.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen played an important role in the Supreme Court proceedings in *Citizens United*, with Public Citizen attorney Scott Nelson serving as co-counsel for the key congressional sponsors of the Bipartisan Campaign Reform Act (BCRA) as amicus curiae.

Background on *Citizens United*

On January 21, 2010, the Supreme Court unleashed a flood of corporate money into our political system by announcing, contrary to long-standing precedents, that corporations have a constitutional right to spend unlimited amounts of money to promote or defeat candidates.

The court explicitly overruled two existing Supreme Court decisions. In *Austin v. Michigan Chamber of Commerce*, the Court held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. *McConnell v. Federal Election Commission* applied that principle to uphold BCRA's restrictions on "electioneering communications," that is, corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. *Citizens United* overrules *Austin* and *McConnell*. The *Citizens United* decision also effectively negates parts of the Court's 2007 ruling in *Wisconsin Right to Life v. Federal Election Commission*.

By overruling these decisions, the Court has opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

There is nothing judicious about this decision. Reversing well-established laws and judicial precedents barring direct corporate financing of elections is a radical affront to American political culture and poses grave dangers to the integrity of our democracy.

A Massive Influx of New Corporate Money in Elections

It is impossible to predict how much corporate money will flood into our elections in a virtually unregulated system; the country has never faced a similar situation. Nevertheless, it is reasonable to assume that the amount will be very substantial indeed – and possibly overwhelming in races of particular interest to the business or labor communities.

Special interest groups funded primarily by corporate money spent, by conservative estimates, about $50 million on TV ads promoting or attacking federal candidates in the last two months of the 2000 election, up from $11 million just two years earlier. Corporations and unions chipped in another $500 million in "soft money" contributions in each of the 2000 and 2002 election cycles, due to a loophole in federal election law.

These loopholes were largely closed in 2002 with passage of BCRA, which added two powerful provisions to the campaign finance laws: First, broadcast ads that mention a candidate, target the candidate's voting constituency and air within 60 days of a general election could not be paid for by corporate or union funds. Second, soft money contributions to parties and federal candidates are prohibited.

Although the Rehnquist Court upheld BCRA almost in its entirety in 2003, the Roberts Court began to whittle away at the law in its 2007 decision in *Wisconsin Right to Life*. That decision resulted in another $100 million in corporate spending on TV electioneering ads in the last two months of the 2008 election.

Corporations have long shown a willingness to spend and contribute hundreds of millions of dollars each election through loopholes in the law. Now that the Court has invalidated restrictions on corporate political spending, expect a flood of new money into the 2010 congressional campaigns, state candidate campaigns, state judicial elections, and the 2012 presidential election.

Three Powerful Ways to Curb Excessive Corporate Spending in Elections

Several options for reining in the damage caused by the Court in *Citizens United* are under consideration. Many of these legislative responses – such as prohibiting foreign nationals from funneling money into American elections through U.S. subsidiaries of foreign corporations, strengthening the anti-coordination rules to prevent corporations from hiring as campaign

consultants the same people hired by the candidates, and enhancing transparency requirements of corporate entities financing ads – will mitigate the expected corporate onslaught and are worthy of consideration.

Three other means for curbing excessive corporate political spending deserve special consideration by Congress. We discuss these options below.

1. Public Financing of Elections

Public financing of elections is the single most effective legislative remedy for unlimited corporate spending. The public financing plans now under consideration have been designed specifically to overcome the barriers imposed by the courts on campaign finance laws, as well as to embrace the new small donor phenomenon seen in the 2008 election. The Fair Election Now Act creates a congressional public financing system with the following features:

- Qualified candidates are provided with ample public funding—more money than nearly all winning House or Senate candidates have raised from private sources—giving candidates the resources necessary to respond to attacks from corporate spenders.

- Participating candidates are not bound by contribution ceilings, which enables those who are the targets of excessive corporate spending to continue raising funds in small donations and to spend those funds without limit.

- In-state small donors who give $100 or less to a candidate have their contributions matched four-fold with public dollars, making small donors very important players in financing campaigns.

The Fair Elections Now Act (S. 752 and H.R. 1826) was introduced in the Senate by Sens. Dick Durbin (D-Ill.) and Arlen Specter (D-Pa.) and in the House of Representatives by Reps. John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.). The House bill has more than 130 cosponsors and should be passed now to provide congressional candidates with an alternative to corporate-funded elections in 2010.

It is critical that we modernize the presidential public financing system in advance of the 2012 presidential elections. Public financing is also key to addressing the corrosive influence of corporate spending in elections for local, judicial, and state candidates.

2. A Shareholder Protection Act and Other Legislative Remedies

Corporate executives should not be able to use other people's money - corporate funds from investors and shareholders, including funds that people invest into retirement accounts - to further their own political agendas without shareholders' consent or even knowledge.

In 2000, the United Kingdom adopted a shareholder protection act that requires CEOs to receive shareholder approval for political contributions to parties or candidates.

We need shareholder protections for the United States that are tailored to the American context and made considerably stronger than the UK law. One such proposal (H.R. 4537) has been introduced in the House by Rep. Michael Capuano (D-Mass.). Specifically, the Shareholder Protection Act of 2010 would do the following:

- Require majority approval by shareholders for corporate political expenditures over $10,000, including expenditures for campaign ads, electioneering communications, issue advocacy and ballot measure campaigns at the state and federal levels.

- Provide that brokers of other people's money cannot vote on behalf of their investors.

It is important that the language in the bill is clarified to establish clearly that it also requires mutual funds to receive consent from their own shareholders for any vote on a corporate political expenditure, and pension funds to obtain consent from beneficiaries. A critical weakness of the UK system is that it allows institutional investors to vote on behalf of shareholders. As a result, only one resolution for corporate political expenditures has ever been rejected by UK shareholders since inception of the shareholder protection law in 2000. An effective shareholder protection act for the United States, where corporations have shown a far greater willingness to spend to influence politics, must close this loophole.

- Create public records, available on the Internet, that fully inform shareholders and the general public of the specific candidates, parties, or issues subject to corporate political spending.

Public Citizen supports other legislative measures to mitigate the damage from Citizens United, as well, including proposals to prohibit government contractors, corporations receiving specific benefits from the government (e.g., TARP recipients) and lobbyists from making political expenditures.

3. A Constitutional Amendment

Corporations are not people. They do not vote, and they should not have power to influence election outcomes. We should end the debate about the freedom of speech of for-profit corporations by amending the Constitution to make clear that First Amendment rights belong to natural persons and the press and do not apply to for-profit corporations.

Public Citizen does not take amending the Constitution lightly. The proposition requires careful deliberation. But the Roberts Court 5 justice majority has interpreted the First Amendment in a way that does grave harm to our democracy, and the Court shows every sign of extending the damage further. A constitutional amendment is the only way to overcome with finality the profound challenges to our democracy posed by the *Citizens United* decision.

As a starting point for deliberating an appropriate constitutional remedy, Public Citizen is proposing the following language:

We need shareholder protections for the United States that are tailored to the American context and made considerably stronger than the UK law. One such proposal (H.R. 4537) has been introduced in the House by Rep. Michael Capuano (D-Mass.). Specifically, the Shareholder Protection Act of 2010 would do the following:

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Co-Chairs ~ Sen. Bill Bradley • Sen. Bob Kerrey • Sen. Warren Rudman • Sen. Al Simpson

SUBMITTED FOR THE HEARING RECORD

House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
February 3, 2010

Written testimony of former U.S. Senators Bill Bradley (D-NJ), Bob Kerrey (D-NE), Warren Rudman (R-NH), and Alan Simpson (R-WY), Co-Chairs of Americans for Campaign Reform

We commend the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties today for taking up one of the most challenging and urgent issues before the Congress: the impact of private contributions and expenditures in U.S. elections and its corrosive effect on public confidence in our democracy – particularly in light of the disappointing decision in *Citizens United v. FEC*.

We write to you as Chairs of Americans for Campaign Reform, a bipartisan initiative to strengthen American democracy through citizen-funded Fair Elections. Our purpose is simple: to free elected leaders from the mounting pressures of raising campaign funds by supporting the passage of small donor-driven public campaign finance. The Fair Elections Now Act would accomplish that goal.

We have all seen how rising campaign costs and the influx of big money in politics undermines public confidence in our democracy and places undue burdens on elected officials. As we look back on our many years in Washington, it is hard to imagine how many hours were devoted to attending fundraisers and calling strangers for campaign contributions. Today, as you well know, the problem has gotten much worse. In 2008, the average House and Senate incumbent raised $1.3 million and $7.5 million, respectively—nearly twice the amounts raised just ten years ago. That means that you and your colleagues must collect thousands of dollars a day throughout your term in office--time spent away from doing the real work you came to Washington to do.

We know of only one way to fundamentally address this problem: small donor-driven campaign finance reform. A Fair Elections system of matching small donations would ensure that hard-working candidates who accept only small checks from their constituents and show broad-based public support, have access to sufficient funding to mount a credible campaign. It combines what works in our current finance system—citizen small donations—with matching funds to ensure an open debate. And it rejects what does not work: big money from lobbyists and special interest groups which undermines public confidence and distracts from the business of governing.

Consistent with the First Amendment, the program is voluntary; it cherishes political speech by enabling more voices to enter the debate without added regulation. Funding would come from a revenue-neutral allocation of 10% of future broadcast spectrum auctions for House elections.

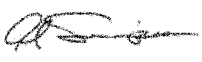
In seven states and numerous cities from Arizona to Maine, citizen funded Fair Elections are ushering in a new kind of politics, where candidates spend more time with the voters they seek to represent in place of large contributors. Three-fourths of candidates across party lines voluntarily participate in the state programs, bringing a new culture of accountability, and the chance to now bring meaningful reform to Washington in the 111th Congress has never been greater.

We urge the Judiciary Committee to refer this urgent legislation and to the full House for consideration and passage this year. The integrity of our democratic institutions depends on such reform.

Sen. Bill Bradley
New Jersey

Sen. Bob Kerrey
Nebraska

Sen. Warren Rudman
New Hampshire


Sen. Al Simpson
Wyoming

ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

Organization for International Investment ("OFII")
Written Statement for the Record of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties Hearing on

The First Amendment and Campaign Finance Reform After Citizens United

February 3, 2010

The Organization for International Investment ("OFII") supports the Committee's goal of restricting foreign influence in United States elections. Nevertheless, we are troubled by the tenor of the debate around foreign influence triggered by the Supreme Court's historic decision in *Citizens United v. FEC* and object to attempts to address such influence by mischaracterizing U.S. subsidiaries of companies headquartered abroad and the important role they play in the American economy. That approach both unfairly maligns the millions of Americans employed by companies which insource jobs in the U.S., and fails to address other business situations which could provide even greater and more direct opportunities for foreign influence. In short, we urge the Committee to focus its efforts on preventing actual foreign influence in American elections, without making unwarranted distinctions between similarly-situated multinational corporations in light of the realities of today's global economy.

I. Nature of Insourcing Companies in the United States

As illustrated in the attached membership list, and by the facts below, the U.S. operations of companies based abroad, or "insourcing" companies, play a major role in our nation's economy, providing critically important jobs (and the associated tax base) in communities across the country.

Some salient facts about insourcing companies:

- U.S. subsidiaries employ 5.5 million Americans — 4.6% of total U.S. private sector employment;
- U.S. subsidiaries account for 6% of total U.S. GDP;
- U.S. subsidiaries support an annual payroll of $403.6 billion — with average compensation per worker of $73,124, which is 34.7 percent higher than compensation at all U.S. companies;
- U.S. subsidiaries heavily invest in the American manufacturing sector; with 29 percent of the jobs at U.S. subsidiaries in manufacturing industries;
- U.S. subsidiaries manufacture in America to export goods around the world — accounting for nearly 18.5 percent of all U.S. exports, or $215.6 billion;
- U.S. subsidiaries have a larger percentage of workers covered by a union collective-bargaining agreement than other U.S. companies — 12.4% of employees at U.S. subsidiaries compared to just 8.2% at other U.S. firms.

In New York, insourcing companies employ 389,300 Americans, more than 5% of state's private-sector workforce. These include 53,500 manufacturing jobs, over 9% of the New York's total manufacturing workforce. U.S. subsidiaries employ 87,200 in Wisconsin and nearly 45% of these jobs

are in manufacturing industries. Manufacturing companies tend to have a strong "multiplier" effect on the economy—stimulating a substantial amount of activity and jobs in other sectors through their demand for inputs from other suppliers. Insourcing companies also employ 209,400 North Carolinians, 248,000 Floridians, 150,800 Virginians, and 173,000 workers in Massachusetts alongside millions of other Americans nationwide.

The significant contributions insourcing companies bring to the U.S. economy are a direct result of the U.S.'s open investment environment, which treats these companies and the Americans they employ on a level playing field with their domestic competitors. At a time when too many American jobs are at risk, Congress should take particular care not to unfairly distort this playing field, thereby disincentivizing insourcing companies and the billions of dollars they invest in our nation, our economy, and our workers.

II. Current law has already addressed any risk of foreign influence through US subsidiaries for decades

Too much of the recent attention to this issue has disregarded the separate legal restriction on expenditures by foreign nationals that was not at issue in *Citizens United*, and which therefore remains fully in effect despite the scope of that decision. That statute, now codified at 2 U.S.C. §441e, in fact has been policed rather aggressively by the Federal Election Commission throughout the Commission's existence. Some of the FEC's largest enforcement matters have involved the foreign national prohibition, even in recent years when many other issues have triggered deep ideological differences among the Commissioners about the implementation of campaign finance law.

Furthermore, since the foreign national prohibition also covers state and local elections, the FEC has had the opportunity to promulgate regulations and flesh out a long line of Advisory Opinions precisely addressing the question of contributions or expenditures from U.S. subsidiaries in those states and localities where such corporate expenditures were not prohibited. The first of the FEC's relevant advisory opinions was issued in 1977, shortly after the Commission was founded, and the most recent such opinion was issued last year. In short, these opinions establish two related principles which have restricted foreign influence in those non-federal elections for decades without serious controversy.

First, these advisory opinions made clear that any corporation must prevent any foreign nationals from taking part in the decision-making process around corporate political expenditures. This is not necessarily disqualifying for a typical U.S. subsidiary, which can empower a subset of its board, made up only of U.S. citizens or permanent residents, to oversee the company's political activities. Second, the company must ensure that only U.S.-derived revenue is used to fund the company's contributions or expenditures. This is not only a paperwork requirement despite the fungibility of corporate treasuries, since any domestic subsidiary which generates no revenue from U.S. operations cannot make contributions or expenditures in the U.S. at all.

Indeed, if domestic subsidiaries actually did present a serious risk of bringing foreign political influence into American elections, it would not be unreasonable to expect that influence to have manifested itself in the decades since the FEC's first opinions on this topic in the late 1970's. In fact, Congress itself implicitly acknowledged the appropriateness of the FEC's approach to political activities of U.S. subsidiaries, since even while broadening the scope of the foreign national prohibition in the Bipartisan Campaign Reform Act in 2002, it made no direct change to the rules on domestic subsidiaries.

Accordingly, we urge the Committee to note the success of the approach adopted by the FEC in 1977 and left in place by Congress in 2002. For decades, this approach has effectively balanced Congress' interest in ensuring that American elections are conducted by and among Americans against the rights of the millions of American workers employed in domestic subsidiaries, and it deserves the Committee's close attention.

III. *Citizens United* makes clear that any expenditure prohibition will be held to strict scrutiny, and accordingly must be narrowly tailored

As an expenditure prohibition, any new law which would broaden the scope of 441e to apply categorically to all U.S. subsidiaries clearly would be subject to strict scrutiny under the Supreme Court's standards as most recently articulated in *Citizens United* and *Wisconsin Right to Life*. As noted above, OFII raises no issue with the nature of Congress' interest in preventing foreign influence in U.S. elections, but we urge the Committee to appreciate the critical importance of narrowly tailoring whatever remedy or remedies it chooses to address that interest.

First, any broad prohibition on expenditures by US subsidiaries would have to be premised on a hypothetical level of foreign control over American political activities that is already illegal and, whether consequential to that prohibition or not, simply shouldn't be presumed to exist between a U.S. subsidiary and its foreign parent. We suggest that any such prohibition on expenditures by U.S. subsidiaries *per se* would be plainly overbroad, particularly in the absence of an appropriate legislative record indicating that such domestic companies actually have served as conduits for foreign influence on American elections.

Second, applying such a prohibition to U.S. subsidiaries alone, without similarly addressing other multinational corporations, would be simultaneously under-inclusive, since it would omit the wide range of other business arrangements which raise at least the same degree of concern over potential foreign influence. In today's global economy, U.S. headquartered companies have business locations and manufacturing operations all over the world, they have foreign nationals in senior executive positions and they often contract with a broad range of foreign governments. Consequently, a U.S.-headquartered parent corporation that is highly subsidized by a profitable overseas subsidiary, for example, or a U.S. joint venture partner that is deeply leveraged into a foreign investment could be beholden to foreign interests as a matter of pragmatism to an even greater degree than a U.S. subsidiary might be as a matter of corporate structure. Especially given the Court's new focus on the equal speech rights of all speakers, any new legislation in this area would be difficult to defend as narrowly tailored if it does not also address these situations.

We also urge the Committee to follow Justice Kennedy's invitation in *Citizens United* to view disclosure as a less restrictive alternative to broad prohibitions. Requiring all corporations to confirm their compliance with existing law, for example (by certifying that no foreign funds were used in any expenditures funded by that corporation and that no foreign nationals were involved) would serve the same goals as a categorical prohibition singling out U.S. subsidiaries without imposing the profound burdens of a prior restraint against political expenditures on people and companies who in fact pose little or no risk of bringing foreign influence into American elections.

IV. Conclusion

OFII neither endorses nor opposes the *Citizens United* decision as such, nor do we take a position regarding the free speech rights of corporations generally. Rather, we offer testimony today to

strongly oppose any effort to discriminate against insourcing companies based on the flawed premise that U.S. subsidiaries are "foreign" rather than "American." Insourcing companies have the same obligations and rights as any other American company. Moreover, their contributions to the U.S. economy and workers should ensure that they are not treated as second class corporations. And, most importantly, millions of insourcing workers are American citizens, voters and taxpayers – whose political rights and patriotism should not be called into question.

We suggest that if the Committee seeks to address the risk of foreign influence on U.S. elections it should do so by imposing broadly-applicable rules for all multinational corporations, or for any corporations which employ foreign nationals or do business outside the United States. This would recognize the realities of corporate ownership and management and would strengthen the argument that any new legislation in this regard was narrowly tailored to address the Congress' compelling interest in protecting the integrity of American elections.

We appreciate the opportunity to share these perspectives with the Committee and would be happy to address any questions or provide additional information to the Committee as it considers these critical issues.

ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

OFII is the only business association in Washington D.C. that exclusively represents U.S. subsidiaries of foreign companies and advocates for their non-discriminatory treatment under state and federal law.

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Hyundai Motor America
ING America Insurance Holdings
InterContinental Hotels Group
John Hancock Life Insurance Co.
Lenovo
Logitech Inc.
L'Oréal USA, Inc.
Louisiana Energy Service (LES)
Louisville Corporate Services, Inc.
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Mitsubishi Electric & Electronics
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Nestlé USA, Inc.
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Novartis Corporation
Novelis Inc.
Novo Nordisk Pharmaceuticals
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Pearson Inc.
Pernod Ricard USA
PetroBras North America
Philips Electronics North America
Randstad North America
Reed Elsevier Inc.
Rexam Inc
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Roche Financial USA, Inc.
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WPP Group USA, Inc.
XL Global Services
Zausner Foods Corporation
Zurich Insurance Group

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Restoring Public Confidence in the Integrity of Elections and Government in the Wake of the Supreme Court's Decision in *Citizens United*

Testimony of Arn H. Pearson
Vice President for Programs, Common Cause

Prepared for the House Judiciary Subcommittee on Constitution, Civil Rights, and Civil Liberties

February 9, 2010

Chairman Schumer, Ranking Member Bennett, and distinguished members of the Committee, thank you for this opportunity to provide written testimony on urgent reform measures needed to restore public confidence in elections and the integrity of our democracy in the wake of last month's landmark *Citizens United* decision.

For almost 40 years, Common Cause has provided a nonpartisan voice for reforms that make government more open, honest and accountable to the American people. In the wake of the Watergate scandal, we led efforts to create the Federal Election Campaign Act in 1974, ushering in the system of campaign finance regulation and presidential public funding that federal candidates have run under for more than thirty years. Common Cause also played a key role in passage of the Bipartisan Campaign Reform Act to close soft money and electioneering loopholes. But skyrocketing campaign spending, constant legal attacks from the Right and creative lawyering by wealthy interests have left that system in dire need of an upgrade.

It comes as no surprise that the American people are experiencing a crisis in confidence in the ability of their elected government to act in the public's best interest. They voted overwhelmingly for reform and change in the past two national elections, but have only seen the grip of powerful interests tighten in Washington, spending well in excess of $1 million per day to block badly needed health care, financial and energy reforms. A recent Wall Street Journal/NBC survey of voters found that 70% of voters think the government isn't working well, and 84% believe "the special interests have too much influence over legislation." Public confidence in Congress now hovers around historic lows. And a bipartisan poll commissioned by Common Cause, Public Campaign and Change Congress last week found that only 18% of voters believe Members of Congress listen more to voters than campaign funders.

Last month's decision from the U.S. Supreme Court in the *Citizens United* case will only make an already bad situation worse. The Court turned its back on 100 years of law and its own precedents to strike down federal prohibitions on independent political spending by corporations

and unions, at the same time pulling the plug on similar laws in 24 states. That much we expected. But the Court also declared outright – beyond overruling *Austin* and *McConnell* – that corporate expenditures *cannot* corrupt elected officials and that appearance of influence *will not* undermine public faith in our democracy. We at Common Cause were stunned by the sweeping nature of these proclamations, made without any factual record on those issues for the Court to review.

The effect of the decision is likely to let loose a flood of corporate and union independent spending in future elections, trigger a fundraising arms race by candidates fearful of that spending, and further reduce public trust in our democracy.

It's only been a few weeks since the *Citizens United* decision, and the big political players are already busy. According to the White House, 160 subsidiaries of foreign corporations – capable of spending hundreds of millions to influence the 2010 elections – have joined forces to block any efforts by Congress to close the foreign-owned corporations loophole created by the decision. Seasoned fundraisers report that party efforts to raise millions from corporations for "independent" expenditures are under way. And just one week before the decision, the U.S. Chamber of Commerce issued a press release threatening to spend an unprecedented amount of money in the 2010 elections to defeat Members of Congress who did not side with their agenda.

This Committee will no doubt hear a wide variety of legislative proposals to mitigate the impact of the *Citizens United* decision, and we encourage you to give them careful consideration. However, given this Court's narrow focus on *quid pro quo* corruption and its ideological approach to campaign finance law, there is very little you can do from a regulatory, limits-based approach to restore balance, let alone take meaningful steps to increase public confidence in Washington.

Common Cause supports a comprehensive package of reforms that both addresses the critical threat posed to our democracy's health by the *Citizens United* decision *and* the preexisting condition of undue influence and conflicts of interest caused by the current system's dependence on big money to pay for elections.

At a minimum, a post-*Citizens United* reform package needs to include:

1. ***The Fair Elections Now Act (S. 752 and H.R. 1826).*** While regulatory reforms are important, the American people will continue to lose faith in Congress unless you create a new system for 21st Century elections that empowers voters to take back control of their government. The Fair Elections Now Act allows candidates who agree to low contribution limits to run highly competitive campaigns focused on Main Street, instead of Wall Street, by providing matching funds for in-state small donations and allowing unlimited small-donor fundraising.

2. ***An upgrade for the presidential public funding system.*** The same voter-empowerment approach needs to be implemented for presidential elections. The current system worked well for candidates of both parties for a generation, but its spending limits are outdated in both amount and timing. Presidential funding reform should provide more matching funds – but for small donors only – earlier in the cycle and larger general election grants, and allow participating candidates to engage in unlimited small-donor fundraising.

3. ***An airtight ban on political spending by foreign-owned domestic corporations.*** The *Citizens United* decision opens a loophole that allows foreign-owned corporations chartered in the United States to spend unlimited amounts of money to influence our elections. That loophole must be closed.

4. ***Real-time electronic disclosure of political expenditures to shareholders, and meaningful shareholder approval requirements.*** Corporations need to be accountable to their shareholders – and the public – for all direct and indirect political spending.

5. ***A prohibition on political expenditures by corporations that receive federal government contracts, earmarks, grants, tax breaks or subsidies.*** Corporations that profit from government contracts and largesse should not be in the business of influencing elections. To allow otherwise will lead to rampant conflicts of interest and further undermine public confidence in government spending and policy priorities.

6. ***Stronger coordination rules, to ensure that "independent" expenditures are truly independent.***

7. ***Stronger disclosure rules.*** Independent expenditures should be disclosed electronically within 24 hours in a manner accessible to candidates, the media and the public. CEOs should be required to "stand by their ads" just like candidates, and corporations that collect money for political expenditures should provide attribution for their top three donors, in order to prevent evasion of disclosure by "Astroturf" entities. FCC advertising logs should be made available on the Internet, and ads should include a web link to a site detailing where the money came from for the ad.

8. ***Pay-to-Play reforms.*** Congress should move quickly to dispel the public's perception of special interest dominance in Washington by enacting low contribution and solicitation limits for lobbyists and lobbyist employers, strengthening conflict-of-interest rules, and banning earmarks for campaign contributors.

The best defense is a good offense. We urge you to seize this moment to lay the groundwork for a new generation of elections that raise up the voices of American voters and free elected

officials from their dependence on wealthy special interests. If what we are witnessing is a return to the "Wild West" of American elections, then allowing candidates to run vigorous campaigns on a blend of small contributions and limited public funds becomes an even more attractive alternative than it is now. In a world where there are no practical limits on political spending by organized wealthy interests, the Fair Elections Now Act offers a floor for competitive campaigns and matching funds to ensure that concentrated wealth cannot drown out the voices of Main Street.

The problem is not so much the amount we spend on political campaigns – columnist George Will likes to remind us that we spend more on potato chips than elections each year – as it is who pays for them, what they get in return, and how that distorts public policy and spending priorities. Keeping our elected officials dependent on the very same wealthy special interests they are supposed to regulate undermines public confidence in their government and its ability to tackle the tough issues that face the nation. And letting the interests who stand to gain from billions in federal spending and bailouts give politicians campaign cash undermines public faith in government's ability to spend money wisely.

The issue of Fair Elections has never been more relevant, and never more urgent. Our new national poll, conducted by the bipartisan pair Greenberg Quinlan Rosner Research and McKinnon Media, found that **64% of voters oppose the *Citizens United* decision** (only 27% support it), and **3 out of 4 already think that special interests control Members of Congress**. Voters want **Fair Elections to be part of a response package by at 2-to-1 margin (62% to 31%)** – a result that holds across party lines – and are more likely to support candidates who support a reform package than those who oppose it.

These forces undermining public faith in their elected representatives do a profound disservice both to the people like you who go into public service and to the core institutions of American democracy. The problems facing America are daunting, yet by most estimates you have to spend more than a quarter of your time fundraising, often from those who have a direct financial stake in what you do. And it's only going to get worse.

At first blush, the current campaign mess may look like a Gordian Knot. The cost of campaigns – and fundraising – is soaring, members face increasing pressure to fundraise for their own campaigns and their caucuses, and powerful interests with a financial stake in what you do are pouring record amounts into political contributions and sophisticated lobbying campaigns But the words of Common Cause's founder, John Gardner, ring as true today as they did in 1965 when he was sworn in as President Johnson's Secretary of Health, Education and Welfare: "What we have before us are some breathtaking opportunities disguised as insoluble problems."

The knot can be cut. Americans are hungry for change. Many members of Congress are hungry for change. The system you inherited – and the *fait accompli* just handed down by the Supreme

Court – does not serve you well, nor does it serve the public well. People want government they can trust, and the power to give it to them lies within your grasp.

The Fair Elections Now Act offers a highly promising, effective and voluntary alternative to the current mess. Inspired by the success of reforms in states like Connecticut, Maine, Arizona, North Carolina and New Mexico, and tailored to avoid the ire of the new conservative majority on the U.S. Supreme Court, Fair Elections empowers candidates to run for Congress using a blend of small donor and public dollars, and to end their dependence on large contributions from special interests. Candidates who show significant support in their home states and agree to accept contributions of $100 or less from individuals only can qualify for an initial campaign grant and earn a 4-to-1 match on in-state small donations.

This is not a partisan issue. In fact, HR 1826 has bi-partisan support with three Republicans joining the 130 House Democrats that have co-sponsored the bill. On Thursday, February 4, 2010 the House Fair Elections Now Act, championed by House Democratic Caucus Chairman John Larson (D-Conn.), reached more than half of the Democratic caucus as co-sponsors of the bill. Supporters include 66 percent of new members, 62 percent of Democratic women, and half of all Congressional Black Caucus members. This high level of support is a sign of the growing momentum for changing the way campaigns are financed in this country.

On the state legislators, there is also bi-partisan support for this type of reform. Hundreds of Democratic and Republican legislators, statewide officials and judges have been elected through similar systems at the state level over the past decade. Candidates who used state citizen-funded election programs now hold 85 percent of the seats in the Maine Legislature, 78 percent of the seats in the Connecticut General Assembly, 54 percent of the seats in the Arizona State Legislature, 80 percent of statewide elected offices in Arizona, and 68 percent of North Carolina's top judicial positions.

Citizen-funded elections work. I have worked closely with lawmakers from both parties over the last 12 years to implement and refine successful public funding programs in Maine and Connecticut, and to help design new systems for many other states and Congress. These are not one-size-fits-all laws; they are pragmatic programs tailored to the political realities of campaigns for different public offices and jurisdictions.

As a result, the laws enjoy strong bipartisan support from elected officials who believe they have significantly improved the political process for candidates and voters alike. Maine's elections commission surveys participating candidates after every election cycle, and those candidates consistently give the program high marks. As in years past, 95 percent said they were satisfied with the Clean Elections program in 2008, and 97 percent said they would likely or definitely use the program again for their next election. The most commonly cited reasons for this satisfaction

were being able to focus on voters and issues, and not feeling obligated to others.[1] In Connecticut, 71 percent of participating candidates were satisfied with the Citizens' Election Program on its debut in 2008, and 66 percent believed the program reduced the perception that they were beholden to special interests.[2]

Voters like Fair Elections too. A recent poll in Maine shows that 74 percent of voters want gubernatorial candidates to use the program, and 55 percent said they would be more likely to support someone who did.[3] Likewise, our national polling in February of last year found 67 percent support for public funding for congressional candidates who agree to abide by lower contribution limits, and that support was remarkably consistent across party lines.[4]

Clearly we need to change the way America pays for elections. The current pay-to-play culture leads to an arms race in campaign spending and fundraising, undermines public confidence in their elected government, deters qualified people from entering public service, and makes it harder for you to do the job you came here for. *Citizens United* only amplifies these difficulties.

Fortunately, the small-donor/public-funding approach embraced by the Fair Elections Now Act is on solid constitutional ground. In fact, the more that the U.S. Supreme Court restricts what Congress can do to reform the system from a traditional regulatory standpoint – dramatically illustrated by their *Citizens United* decision – the more voluntary public funding systems offer the best avenue for meaningful change. In a world with fewer practical limits on political spending by organized wealthy interests, Fair Elections offers a floor for vigorous campaigns for all candidates to ensure that concentrated wealth cannot drown out other voices.

At an 80 percent participation rate, we estimate that the Fair Elections program would cost approximately $500 million per year. That is a very small amount when compared to the cost of the new status quo, in which dependence on special-interest funding for campaigns will dramatically increase and the wealthiest actors in our society will spend unprecedented amounts to bend Congress and the White House to its will.

For the price of a cup of coffee per American per year, you can return common sense to the nation's capitol, put voters in the driver's seat for future elections, and leave a legacy for the next generation of voters and congressional candidates.

I urge you to include the Fair Elections Now Act in whatever *Citizens United* response package you enact.

Thank you for your consideration.

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[1] Maine Commission on Governmental Ethics and Election Practices, *Report on Survey of 2008 Candidates*, forthcoming Aug. 6, 2009.
[2] Connecticut State Elections Enforcement Commission, unpublished survey.
[3] Critical Insights, *Spring 2009 Tracking Survey*, June 2009.
[4] Lake Research Partners and the Tarrance Group, February 2009.

GREENBERG QUINLAN ROSNER RESEARCH

February 8, 2010

Strong Campaign Finance Reform: Good Policy, Good Politics

To: Common Cause, Change Congress, Public Campaign Action Fund
From: Stan Greenberg, Jesse Contario and Andrew Baumann, GQRR
Mark McKinnon, McKinnon Media

Ratings for everyone in Washington are low and voters are deeply pessimistic about the direction the country is heading. Driving those sentiments, according to a new national survey conducted for Common Cause, Change Congress and the Public Campaign Action Fund by Greenberg Quinlan Rosner in conjunction with McKinnon Media, is the belief that special interests are still running the show and that voters' voices are being drowned out by those who help fund politicians' campaigns.

This antipathy leaves voters staunchly opposed to anything that makes it easier for special interests to influence the outcome of elections, and by a two-to-one margin they oppose the recent Supreme Court decision on Citizens United. Voters crave solutions that will put power back in the hands of the people and respond intensely to proposals that would do so.

Voters, particularly independents, strongly embrace the Fair Elections Now Act, a system that allows candidates who eschew contributions over 100 dollars to receive public matching funds for money they raise from individuals in their own state. Voters support the Fair Elections Now Act by a two-to-one margin (62 to 31 percent). Perhaps more important for congressional incumbents, support for the Fair Elections Now Act offers a significant political boost. By a net of 15 points, voters say they are more likely to support the re-election of their Member of Congress (asked by name) if he or she votes in favor of a reform package that includes the Fair Elections Now Act as well as limits on spending by foreign corporations, even after hearing messaging in opposition to the proposal.

Voters Angry About Influence of Special Interest, Especially Independents

Voters are disgusted with 'business as usual' in Washington. There is a deep and pervasive belief, particularly among independents, that special interests are running things and Members of Congress listen more to those that fund their campaigns than the voters that they are supposed to be representing. Three quarters believe that special interests hold too much influence over Washington today while fewer than a quarter believe that ordinary citizens can still influence what happens in politics. Similarly, nearly 80 percent say that Members of Congress are con-

trolled by the groups that help fund their political campaigns while fewer than a fifth believe that Members listen more to the voters.

Moreover, voters do not believe that President Obama has fulfilled his promise to reduce the influence of special interests, with majorities saying both that special interests influence has increased since Obama took office and that the president has not done enough to reduce their influence. On all of these measures, regarding both Obama and Congress, independents are even more cynical and skeptical.

Table 1: Intense Cynicism over Influence of Special Interests Prevails, Especially Among Independents

	First Statement	Second Statement	First – Second Net
	Total		
	Independents		
Limits should be placed on campaign spending	82	14	+67
OR			
Should not place limits on campaign spending	87	11	+76
Members of Congress are controlled by groups that fund campaigns	79	18	+61
OR			
Members of Congress listen to regular voters	86	12	+74
Special interests have too much influence in Washington	74	24	+50
OR			
Ordinary citizens still have ability to influence politics in Washington	81	16	+65
Obama has made effort to reduce influence of special interests	35	56	-21
OR			
Obama has not done enough to reduce influence of special interests	27	62	-35
Influence of special interests decreased since Obama took office	32	51	-19
OR			
Influence of special interests increased since Obama took office	25	50	-25

With voters so concerned about the influence of special interests, it is no surprise that they strongly oppose the recent Supreme Court decision in the Citizens United v. Federal Election Commission case. By a stark 64 to 27 percent margin, voters oppose this decision, with 47 percent strongly opposed. A majority of Democrats, Republicans and independents are opposed, but independents show the strongest antagonism, with 72 percent disagreeing with the ruling.

Broad Support for Reform Proposals, Including Fair Elections Now Act

Angry at Washington and deeply opposed to the recent Supreme Court ruling, voters strongly support proposals to limit corporate influence and develop a program that would allow politicians to run campaigns using small contributions from their constituents.

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A majority of voters strongly favor both requiring corporations to get shareholder approval for political spending (56 percent strongly favor, 80 percent total favor) and a ban on political spending by foreign corporations (51 percent strongly favor, 60 percent total favor). A proposal similar to the Fair Elections Now Act also receives extremely high marks with 62 percent in favor versus just 32 percent opposed for a 30-point margin in favor – higher than the margin for the ban on political spending by foreign corporations.

When voters are read a short description of the Fair Elections Now Act, support holds strong at two-to-one in favor, with majority support from all segments of the political spectrum.

Table 2: Fair Elections Now Act Receives Majority Support Across Party Lines

	Support	Oppose	Net Difference
Support for Fair Elections Now Act			
Total	62	31	+31
Democrats	70	24	+46
Independents	67	30	+37
Republicans	50	40	+10

However, in an environment where voters are experiencing bailout and spending fatigue, a critique that the Fair Elections Now Act would represent nothing more than a 'bailout to help politicians pay for TV ads' does find some marginal traction – supported by 42 percent. Still, a 47 percent plurality reject that criticism and agree with a counter-argument that the Fair Elections Now Act is paid for without funding from taxpayers and is the best way to reduce wasteful pork spending. Moreover, even after hearing these criticisms, at the end of the survey, voters still overwhelmingly want to reward members who vote for the Fair Elections Now Act.

Voters Say They Will Reward Backers of Bold Campaign Reforms

Congressional incumbents who take seriously voters' support for these proposals are likely to be rewarded in November at the ballot box; those who oppose these reforms do so at their own peril.

When presented with potential legislative actions that would help reduce the influence big corporations have on elections, voters strongly support reform. By two-to-one, voters believe that we must ban foreign corporations from spending money to influence our elections and that corporations should be required to get shareholder approval before spending money to influence campaigns, rather than believing that such bans would limit freedom of speech. When the pro-reform argument is made even more forceful by adding a call for a system that allows candidates to run for office without ever taking contributions over 100 dollars, support holds steady at 62 percent, despite the addition of stronger language from opponents that this approach would merely allow politicians to use taxpayer money to fund their campaigns.

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A majority of Democrats, independents and Republicans alike support both plans, but it is worth noting that independents are much more supportive of the more robust proposal that includes the Fair Elections Now Act (63 percent favor the stronger reform, compared to 56 percent who favor the more limited approach). Independents are even more disillusioned with the current state of things in Washington which makes them especially receptive to bold actions to rein in special interests.

Beyond being good policy in the eyes of the voters, supporting these plans also appears to be good politics for Members of Congress. Voters are more likely to support their Member for re-election if they support these campaign finance reform proposals and are less likely to reelect a Member who opposes reform.

Members who support the more robust proposal get an extra boost in support, particularly from independent and Democratic voters.

Table 3: Vote for Overarching Reform Translates Into Re-election Votes

	More Likely To Reelect	Less Likely to Reelect	More – Less Likely
Impact of Vote for Limited Reform Proposal			
Total	25	16	+10
Democrats	21	17	+4
Independents	31	17	+14
Republicans	25	14	+11
Impact of Vote for Proposal Including Fair Elections Now Act			
Total	28	13	+15
Democrats	31	10	+20
Independents	31	13	+18
Republicans	23	17	+7

This memo is based on a survey of 805 likely 2010 voters nationwide conducted February 2-4, 2010 by Greenberg Quinlan Rosner Research in conjunction with McKinnon Media. The margin of error is ±3.5 percentage points at the 95 percent confidence interval.

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POLITICO

SCOTUS ruling fuels voter ire

By: Jeanne Cummings
February 9, 2010 04:43 AM EST

As if voters weren't mad enough at Washington, the Supreme Court apparently has given them one more reason to fume.

According to a bipartisan poll released Monday, voters oppose by a 2-to-1 ratio the court's ruling in Federal Election Commission v. Citizens United that cleared the way for corporations and unions to run political advertising.

The poll suggests that the ruling has reinforced voters' sense of disconnect with Washington and fueled the frustration that boiled to the surface in last year's tea party protests and in elections in New Jersey, Virginia and Massachusetts.

Asked if special interests have too much influence, 74 percent of respondents said yes. Asked if members of Congress are "controlled by" the groups and people who finance their political campaigns, a whopping 79 percent said yes.

Only 24 percent of the voters said ordinary citizens can still influence politicians, and just 18 percent agreed with the notion that lawmakers listen to voters more than to their financial backers.

Voters also issued a harsh assessment of President Barack Obama's promises to change Washington and limit the influence of special interests.

A majority — 51 percent — now believe the clout of corporations and other special interests has increased since he took office, while only 32 percent said their influence has decreased.

"There's no doubt about this. The last thing people want to see is corporations having a bigger role in elections," said Stan Greenberg, the Democratic polling expert who worked on the survey. The respondents' reactions were "knee jerk and with intensity."

The survey was commissioned by Common Cause, Change Congress and Public Campaign Action Fund to measure voter support for a bipartisan reform bill that would revamp the campaign finance system. That bill, the Fair Elections Now Act, would provide a 4-to-1 match of some donations of $100 or less for candidates who don't seek or accept corporate checks. Qualifying candidates would also receive discounted television time and vouchers to cover a portion of their broadcasting budget.

While Democrats could face a backlash for failing to deliver on their promises of change, the survey has warnings for Republicans, too. They are positioning themselves to block passage of new regulations for the financial industry, which, according to a Wall Street Journal report, they hope will result in bigger donations from Wall Street in the midterm elections.

The party's traditional identification with Big Business could be dangerous, given the voters' discontent today and the new attention the court's ruling could bring to it.

"This has been an issue that's been off the radar screen," said Mark McKinnon, the Republican partner in the polling project. Now, "it is getting people's attention, including and especially among Republicans."

The five votes on the court that cleared the way for corporations and unions to run political advertising were all cast by justices appointed by Republicans, including two appointed by President George W. Bush. The decision was hailed by conservatives and many Republican congressional leaders.
But according to the survey, about 51 percent of Republicans said they opposed the court decision, while 37 percent favored it. The ratio was even more lopsided among Republican voters who backed Republican candidates in 2008. Among those respondents, 56 percent oppose the ruling, and just 33 percent support it.

"It's important for Republicans to see this research and hear this message," said McKinnon.

Among all voters, 64 percent surveyed opposed the ruling, and 27 percent approved of it.

The survey found that voters supported the Fair Elections Now Act, 62 percent to 31 percent. Among independents, support rose to 67 percent. The poll also found that voters were more likely to support a candidate who backed such reforms.

Support is also strong for a variety of other proposals introduced since the court ruling was issued last month.

A whopping 80 percent of voters back a requirement that corporations receive approval from shareholders before spending money on political activities. About 60 percent back a proposal to ban foreign-owned corporations from spending money to influence elections.

Critics have warned that the ruling in the Citizens United case will lead to a flood of new television advertisements that could drown out the candidates' own messages and render the voters mute.

For evidence of the disproportionate power of corporations, McKinnon pointed to the "Defeat the Debt" advertisement that ran twice during the Super Bowl on Sunday night. A 30-second national ad during the game ran about $2.5 million, according to CBS, which could have meant the bill for the ad was about equal to the amount spent in some of the most expensive House races in history.

The commercial was sponsored by the Employment Policies Institute, an organization run by Rick Berman, a lobbyist and Republican strategist who has conducted a host of advocacy campaigns backed by big corporate interests. But Berman bought time only in the Washington market, not nationally, so his bill amounted to only a little more than $100,000, said Sarah Longwell, a spokeswoman for the anti-debt group.

Still, the potential for millions in corporate advertising now exists, McKinnon said, and the result could be the fulfillment of the voters' worries expressed in the campaign finance survey.

"If you want to buy yourself a senator from a small state with cheap media markets, you can," he said.

San Francisco Chronicle

January 22, 2010

Justices Strike Down Campaign Finance Laws
Money talks, high court rules

Five robed radicals on the Supreme Court have pushed money-infused politics in the wrong direction by overturning a century's worth of campaign spending laws. Voters should prepare for the worst: cash-drenched elections presided over by free-spending corporations.

The ruling was dreaded for months as defenders of campaign finance laws tried to guess how far the court would go in paring back campaign financing rules. A string of prior laws dating back to the robber-baron era suggested the court would limit its reach.

No such luck. The 5-to-4 case swept away the underlying arguments for many of these laws. The upshot is that corporations and labor unions can spend freely on independent ads targeting or supporting candidates.

The majority's thinking is based on absolutist vision of free speech and belief that corporations and unions have the same constitutional protections as individuals when it comes to basic rights.

This viewpoint is "a rejection of the common sense of the American people," said Justice John Paul Stevens, who read his angry dissent out loud. Corporations "are not themselves members of 'We the People,' by whom and for whom our Constitution was established."

It's hard to overstate the legal sweep of the decision. It rejects two recent court rulings, one that barred corporations and unions from dipping into their treasuries to pay for candidate ads and the second that restricted these so-called independent expenditure efforts. The five-member majority didn't just blaze new ground; it torched the court's own past record.

In practical terms, the decision amounts to a political earthquake. Big-money issues such as health care, cap-and-trade pollution controls and Wall Street regulations will drive attack ads against politicians who refuse to do the bidding of particular special interests.

There's a chance to undo the damage. The coming tidal wave of spending may push Washington to reform the process. One goal should be a system of public financing for federal elections, and one such plan, the Fair Elections Now Act, is before Congress.

The proposal, similar to systems used in several states, would provide public funding for candidates who demonstrate widespread support and agree to spending limits. It would be voluntary, in keeping with court rulings, but should have a cleansing effect.

This country's politics, already tainted by heavy spending, can't allow a court decision that invites even more cash - and a corrosion of the democratic process.

January 21, 2010

The Honorable Harry Reid
522 Hart Senate Office Building
Washington, DC 20515

Re: Citizens United and the Fair Elections Now Act (H.R. 1826 & S. 752)

Dear Majority Leader Reid:

We write to you at an extremely troubling moment in the history of our democracy. The recent Supreme Court decision in *Citizens United v. Federal Election Commission* has opened the door to increased election spending by the deepest pocketed political interests in American politics. The corrosive influence of special interest money already impairs our government's ability to address our nation's most critical problems. We cannot continue down this path.

As business leaders, we believe the current political fundraising system is already broken. The Supreme Court decision further exacerbates this problem. Members of Congress already spend too much time raising money from large contributors. And often, many of us individually are on the receiving end of solicitation phone calls from members of Congress. With additional money flowing into the system due to the Court's decision, the fundraising pressure on members of Congress will only increase.

Congress needs to spend its time working on the leading issues of the day, from reviving our economy to addressing our nation's energy crisis to reforming the healthcare system. And on those issues, Americans must have full confidence that Congress has acted in the best interests of the public, swayed by the merits of policy without regard to the interests of campaign contributors.

We believe Congress must address both the *Citizens United* decision *and* the problems of the current campaign finance system by passing the Fair Elections Now Act (S. 752 and H.R. 1826). This measure would enact a voluntary alternative system for financing federal elections, giving candidates the option to run for office on a mixture of small contributions and limited public funds.

Under the leadership of Assistant Majority Leader Richard Durbin (D-Ill.) and House Democratic Caucus Chairman John Larson (D-Conn.), the bill is moving forward. We have significant momentum in the House, with 128 cosponsors joining Representative Larson. With a strong public financing system in place, candidates will be not be consigned to a system in which constant fundraising creates conflicts of interest and leaves Members little time to do the job they were elected to do.

We hope in the wake of the Supreme Court's decision you will support the Fair Elections Now Act so that Congress can act effectively on the people's business.

Signed,

Berkley Bedell
Founder & Former President
Pure Fishing

Peter A. Benoliel
Chairman Emeritus
Quaker Chemical Corporation

Edgar M. Bronfman, Sr.
Former President and CEO
Seagram's, Ltd.

Allan Brown
Chairman of the Board
Vance Brown Builders

Richard M. Burnes, Jr,
Founder and General Partner
Charles River Ventures

Frank Butler
President (Ret.)
Eastman Gelatine Corp.

Ben Carlisle
President
Allegiant Partners Inc.

Ben Cohen
Founder
Ben & Jerry's

Charles Couric
Founder & Past President
Brita Products Company

Richard Foos
President
Shout! Factory

Walt Freese
CEO
Ben & Jerry's

Murray Galinson
Former Chairman (Ret.)
San Diego National Bank

Gerald Grinstein
Strategic Director
Madrona Venture Group
Former CEO of Delta Airlines

Mike Hannigan
President
Give Something Back

Alan G. Hassenfeld
Chairman of the Executive Committee
Hasbro, Inc.

Christie Hefner
Former Chairwoman & Chief Executive
Playboy Enterprises

Arnold Hiatt
Former Chief Executive Officer
Stride Rite, Inc.
Chairman
Stride Rite Foundation

William N. Hubbard III
President
Center Development Corporation

Frederick S.Hubbell
Chairman (Ret.), Insurance and Asset
Management Americas
ING Group

G. David Hurd
Emeritus Chairman
Principal Financial Group

Michael J. Johnston
Executive Vice President (ret.)
Capital Group Companies

Mike Kappus
President
The Rosebud Agency

Harry P. Kamen
Chairman & CEO (Ret.)
MetLife

Joe Keefe
President & CEO
Pax World Management Corp.

Earle W. Kazis
President
Earle W. Kazis Associates, Inc.

Steve Kirsch
Founder, Chairman and Chief Executive Officer
Propel Accelerator
Chief Executive Officer
Abaca Technology Corporation
Chairman
Kirsch Foundation

Alan E. Kligerman
Chief Executive Officer
AkPharma Inc.

Thomas Layton
CEO
Metaweb Technologies

Mark Lichty
President & CEO (Ret.)
Bustin Industrial Products

Vernon R. Loucks
Former CEO
Baxter International Inc.

Arnold Miller
Co-Founder
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Corporate Affiliations for Identification Purposes Only

CC: Senate Minority Leader Mitch McConnell
Senator Charles Schumer, Chairman, Committee on Rules & Administration
Senator Bob Bennett, Ranking Member, Committee on Rules & Administration
Assistant Majority Leader Richard Durbin

As of February 3, 2010

The Honorable Harry Reid
522 Hart Senate Office Building
Washington, DC 20510

Re: *Citizens United* and the Fair Elections Now Act (H.R. 1826 & S. 752)

Dear Senator Reid:

As religious leaders, we believe in equality and justice for all people and in building the common good. In a democracy, these ideals cannot be realized, however, if the rules governing the electoral process actively or passively favor one segment of the population over another.

We believe existing campaign finance laws already permit the unfair influence of persons and groups with extraordinary wealth over the political process by providing them with special access to elected officials. This special access ultimately results in legislative outcomes that reflect the needs of those with the financial means to make political contributions, and not the needs of the poor or disenfranchised.

The recent Supreme Court decision in *Citizens United v. Federal Election Commission* will surely amplify the voices of the wealthy campaign donors and bring new powerful players to fore at the expense of everyone else.

We believe Congress must address both the *Citizens United* decision and the problems of the current campaign finance system by passing the Fair Elections Now Act (S. 752 and H.R. 1826). This measure would empower average people to participate in politics with small donations, and would return the gaze of our elected officials solely to the needs of their districts and the nation as a whole, rather than the interests of those with significant financial resources for campaigns.

We pledge our support and we pledge to work among members of our churches, synagogues, mosques, gurdwaras (a Sikh place of worship) and temples throughout the nation to encourage support for your efforts to bring about reform. As you know, the Fair Elections Now Act was sponsored by Assistant Majority Leader Richard Durbin (D-Ill.) in the Senate and House Democratic Caucus Chairman John Larson (D-Conn.) and Congressman Walter Jones (R-N.C.) in the House. In the House, the legislation has attracted nearly 130 cosponsors. With a strong Fair Elections system in place, candidates will spend less time courting the narrow slice of Americans who currently fund campaigns and engage a larger, more active citizenry.

We hope in the wake of the Supreme Court's decision you will support the Fair Elections Now Act so that Congress can act effectively on the people's business.

Signed,

The Rev. Dr. Michael Kinnamon, PhD, General Secretary
National Council of the Churches of Christ in the USA
New York, NY

Bishop Gabino Zavala, Bishop President
Pax Christi USA: National Catholic Peace Movement
Los Angeles, CA

Archbishop Vicken Aykazian
Archbishop of the Washington Area
Recent Past President of the National Council of Churches (2008-2009)
The Armenian Apostolic Church
Washington, DC

Dr. Sayyid M. Syeed, National Director
Office for Interfaith & Community Alliances
Islamic Society of North America
Washington, DC

Rabbi Michael Lerner
Editor, Tikkun
Rabbi, Beyt Tikkun Synagogue,
Chair, The Network of Spiritual Progressives
San Francisco, CA

Jim Winkler, General Secretary
United Methodist General Board of Church & Society
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Mr. Manmohan Singh, Secretary General
World Sikh Council
America Region

Dr. Ronald J. Sider, President
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Rabbi Dr. Marc Gopin
James H. Laue Professor,
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Diplomacy and Conflict Resolution Institute for Conflict Analysis and Resolution,
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Former President, National Council of the Churches, USA
Professor, Union Presbyterian Seminary, Richmond, Va.
Richmond, Va.

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The Shalom Center
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The Rev. Dr. James Forbes
Former Senior Pastor,
Riverside Church in New York
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The Rev. Dr. C. Welton Gaddy
President, Interfaith Alliance
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The Rev. Peter Morales, President
Unitarian Universalist Association of Congregations
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Marie Dennis, Director,
Maryknoll Office for Global Concerns
Washington, DC

Mary Ellen McNish, General Secretary
American Friends Service Committee
Washington, DC

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Chicago Theological Seminary
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President and CEO
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Congressman Paul Findley (Republican -- Illinois)
Author and Interfaith Leader
Cofounder of the Council for the National Interest,
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Former Member of Congress (Democrat – Pennsylvania)
Former General Secretary of the National Council of Churches
Former President of the *Claremont School of Theology*
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The Rev. Dr. Betty Jane Bailey
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Rabbi Adam Zeff
Germantown Jewish Centre
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(**) For identification purposes only.

January 26, 2010

The Honorable Harry Reid
522 Hart Senate Office Building
Washington, DC 20515

Re: Citizens United and the Fair Elections Now Act (H.R. 1826 & S. 752)

Dear Majority Leader Reid:

Like you, we are deeply concerned by the U.S. Supreme Court decision in *Citizens United vs. Federal Election Commission.* The Roberts Court has changed the landscape of political campaigns, given the new potential corporations have to raise exorbitant amounts of money for independent expenditures.

At this critical point, we urge you to find a solution to help candidates combat the expected increase in spending on independent expenditures. As supporters of the Fair Elections Now Act (H.R. 1826, S. 752), we encourage you to include this policy as part of any legislation considered in the coming days, weeks, or months in the wake of the *Citizens United* decision.

The Fair Elections Now Act addresses the fundamental problems of the current system – that elected officials and candidates spend too much time fundraising, and too much of the money raised is from large donors or special interests. This bill would enact public financing of federal elections and give candidates the option to run for office on a mixture of small contributions and limited public funds. Fair Elections puts a premium on grassroots fundraising, and enables candidates to run highly competitive campaigns without relying on large contributions.

Under the leadership of House Democratic Caucus Chairman John Larson (D-Conn.), there is significant momentum in the House, with 128 cosponsors, who have joined Rep. Larson in support of enacting the Fair Elections Now Act. In the Senate, Senate Assistant Majority Leader Dick Durbin, is joined by five additional Senators on the bill. With a strong, voluntary public financing system in place, candidates will be not be consigned to a system that is already broken, in which constant fundraising creates conflicts of interest and leaves Members little time to do the job they were elected to do.

Congress is already under fire for taking money from the very industries it regulates, like health care, energy and financial services. Voters are concerned about this problem: A bi-partisan poll from Lake Research/Tarrance Group released last year found that 79 percent of Americans are worried that Congress will be unable to tackle these important issues because of its dependence on large contributions. The Fair Elections Now Act can restore the public's faith in Congress' ability to act in the public interest.

You should seize the opportunity provided by the *Citizens United* decision to advance solutions to address the comprehensive problem of money in politics. Only policies like Fair Elections will reduce voter concerns about the influence of campaign donors, just as Congress did with post-Watergate reforms a generation ago. The path forward lies with small-donor democracy, not increased corporate dominance in Washington.

In closing, we encourage you to use your leadership role to push forward the Fair Elections Now Act as the part of the solution to address the potential problems created in the wake of the *Citizens United* decision. The time is now to strengthen voter participation in our democracy through a small-donor based public funding system. As representatives of organizations that advocate for citizens nationwide, we look forward to working with you on this measure.

Sincerely,

Gillian Caldwell
Campaign Director
1Sky

Linda Meric
Executive Director
9to5

Roger Hickey & Robert Borosage
Co-Directors
Campaign for America's Future

David Halperin
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Kirsten Collings
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Carmen Balber
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Erich Pica
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Michael Huttner
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ProgressNow

Anna Burger
International Secretary-Treasurer
Service Employees International Union

Carl Pope
President
Sierra Club

Heather Smith
Executive Director
Rock the Vote

Jeff Blum
Executive Director
US Action

CC: Senator Charles Schumer, Chairman, Committee on Rules & Administration
Assistant Majority Leader Richard Durbin

October 29, 2009

Corporate Democracy:
Potential fallout from a Supreme Court decision on *Citizens United*

The impending Supreme Court decision in *Citizens United v. Federal Election Commission,* which could be announced as early as Tuesday, Nov. 3, is expected to significantly expand the role of the most powerful special interests in financing American elections. The Court appears poised to turn its back on more than 100 years of law and pave the way for corporations and unions to spend unlimited amounts of money on direct campaigns to elect or defeat federal candidates.

Such a dramatic decision would further reduce trust in government policymaking and take our country in the wrong direction. It is hard to imagine how America can achieve real progress and tackle critical challenges – like health care, climate change and the economy – when our elected representatives are locked in an all-out fundraising arms race that makes them both more dependent on and vulnerable to the powerful special interests opposed to change.

Lifting the ban on corporate political spending could unleash a flood of money into the political system and further diminish the public's voice. Precisely how much money is hard to say, but consider the following:

- **Last year's Congressional and Presidential election was the most expensive in history, with total political and issue advertising exceeding $3 billion nationwide. Corporations and unions could more than double this amount – every election – if they put as much into political ads as they already spend lobbying Congress, $6 billion in the last election cycle.**
- **The health and insurance industries alone spent more than $1.6 billion lobbying Congress during the 2008 election cycle, nearly double the $861 million that all winning congressional candidates (435 House candidates and 35 Senate candidates) spent on their campaigns during the same period.**
- **PhRMA recently launched a $150 million advertising campaign to support Senator Baucus' health care plan (without a public insurance option) – more than the $140 million spent by all 55 winners of hot congressional races in 2008 combined. That's one trade association on one bill.**

- **In the 2008 elections, winning candidates for the House of Representatives spent an average of $1.4 million – roughly equivalent to what the health care industries are spending per day so far this year to lobby Congress on health care reform.**
- **If the Supreme Court lifts the ban on using corporate profits for political spending, corporations would likely spend vastly more than labor unions. During the 2008 election cycle, corporations outspent organized labor 4:1 on political action committee (PAC) contributions, but 61:1 on lobbying.**

Opening up another avenue for unlimited private money to flow into the political system will almost certainly increase the overall amount spent each election. This, in turn, will further fuel the "arms race" that already forces our elected officials to engage in perpetual fundraising.

One of the only solutions to this deterioration of our democratic process is contained in legislation currently under consideration in Congress. The Fair Elections Now Act (H.R. 1826/S. 752) would allow candidates to run competitive campaigns using a combination of small contributions and limited public funds, instead of relying on large contributions from powerful special interests and bundlers.

Legal Background

Citizens United vs. Federal Election Commission originally concerned whether a movie produced by the nonprofit group Citizens United, entitled "Hillary: A Movie," qualified as a campaign ad and was subject to disclosure requirements. Instead, the Supreme Court decided to reopen the larger issue of whether corporations and unions should be allowed to spend unlimited amounts of treasury money on advertisements and other campaign activities that expressly endorse or attack a political candidate.

Corporations and unions have been prohibited from spending money from their general funds on this kind of advocacy at the federal level since 1947, when Congress passed the Taft-Hartley Act. The Supreme Court later upheld the constitutionality of this ban in 1957 in *U.S. v. United Automobile Workers*.

If the Supreme Court rules that the ban on direct corporate and union political advocacy is unconstitutional on First Amendment grounds – that corporations and unions have the same First Amendment rights as individuals – the Court could ultimately use the same reasoning to also overturn the ban on donations from corporate and union general funds directly to candidates, which was outlawed in 1907 by the Tillman Act.

Prohibiting corporations and unions from using treasury money to influence federal elections has been upheld repeatedly by the Supreme Court in *FEC v. National Right to Work Committee* (1982), *Austin v. Michigan State Chamber of Commerce* (1990), and most recently in *McConnell v. FEC* (2003) after the passage of the Bipartisan Campaign Reform Act (BCRA). In *McConnell*, the Court noted that, "Congress' power to prohibit corporations and unions from

using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."

The Court has repeatedly upheld these regulations in order to ensure that the special economic status corporations enjoy under the law is not used to dominate the political arena. In *Austin*, Justice Marshall recognized the state's compelling interest in avoiding a "different type of corruption in the political arena: 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."

Corporations and unions already spend hundreds of millions per cycle through PACs and 527s to influence federal elections. Allowing corporations to directly tap their enormous profits for unlimited political spending will hasten the nation's descent into a new era of "corporate democracy," where entities whose sole purpose is to maximize profits are given free rein to dominate elections and drown out the voices of ordinary Americans.

Political Spending: Corporations vs. Candidates

Corporations already spend huge sums every year to influence the outcome of public policy. While the current system bars direct corporate and union political spending, those entities are still able to wield considerable electoral influence through PACs, 527s, bundling and executive giving. If the Supreme Court strikes down the ban on direct political advocacy by corporations, it would create yet another opening for corporate money to flow into the political system. Under this scenario, companies could effectively run full-blown political campaigns – including television commercials, phone banks, and neighborhood canvassing – that would mirror the official campaigns of the candidates.

When it comes to lobbying – where corporations and unions can tap their treasuries without restriction – corporations and unions spend more in any given election cycle than candidates spend on their own campaigns. During the 2008 election, all candidates for Congress spent a total of $1.4 billion on their campaigns, or roughly 26 percent of the $5.2 billion corporations spent on lobbying during the same two year period. For the last five elections, candidate spending has been on average about 29 percent of total corporate lobbying during the same period.

Total Corporate Lobbying vs. Total Candidate Spending

Cycle	Corporate Lobbying	Campaign Spending	%
2008	$5,170,752,703	$1,366,384,657	26%
2006	$5,002,604,155	$1,411,998,213	28%
2004	$4,164,795,807	$1,135,090,248	27%
2002	$3,410,549,971	$930,186,153	27%
2000	$2,981,481,715	$1,010,902,673	34%
Totals	**$20,730,184,351**	**$6,324,802,014**	**29%**

Source: Center for Responsive Politics (www.opensecrets.org)

In theory, if corporations spent about one-third of what they currently spend on lobbying during a two-year election cycle on direct political advocacy, they could outspend all Congressional candidates combined. In practice, corporations could target a discrete number of competitive races in order to give a majority in Congress to a particular party or ensure outcomes on critical legislation.

For example, in the 2008 elections the average winning candidate for the House of Representatives spent $1.4 million on his or her campaign, and the average winning candidate for the Senate spent $8.5 million. While total campaign spending does not automatically determine the winner in Congressional races, there is a strong correlation between levels of campaign spending (up to a certain amount) and election results.

In the upcoming 2010 elections, there are 13 seats in the U.S. Senate that are currently considered competitive by the Cook Political Report, six seats held by Republicans and seven held by Democrats. In the House, the Cook Report identifies 47 competitive races for 33 Democratic-held seats and 14 Republican-held seats. Using 2008 spending numbers, the winning candidates in those 60 races could be expected to spend a combined total of approximately $175 million.

When just one trade association, like PhRMA, can put $150 million into a targeted advertising campaign for one bill, it doesn't take much to imagine a future election in which corporate spending exceeds candidate spending.

Political Spending: Corporations v. Organized Labor

A Supreme Court holding in *Citizens United* that it is unconstitutional to limit corporate and union political spending would, in all likelihood, lead to a much greater spending gap between corporations and labor. Most of this spending currently takes place through PACs, which have strict limits on how much they can raise and spend. PACs may receive up to $5,000 from any one individual and can give up to $5,000 to a candidate per election (primary, general or special). In the last election cycle, corporations outspent unions 4 to 1 when it came to PAC spending. All

corporate PACs spent approximately $270 million during the 2008 elections, while all organized labor PACs spent $66.4 million during the same period.

The disparity between corporate and union spending is much more dramatic when it comes to lobbying Congress, where there are no limits on treasury funds. During the 2008 election cycle, corporations spent a total of $5.2 billion dollars lobbying Congress, or 61 times as much as labor unions, which spent $84.4 million during the same period.

Lobbying Spending by Economic Sector
2008 Election Cycle

Source: Center for Responsive Politics (www.opensecrets.org)

PAC Spending by Economic Sector
2008 Election Cycle

Source: Center for Responsive Politics (www.opensecrets.org)

Case Study: Independent Expenditures in California

Supporters of unlimited corporate and union political spending argue that many states already allow this type of advocacy, and that it has not caused a flood of private money into the political process. While that may be true in some states, California's experience has not been encouraging.

In California, which does not limit corporate and union political spending, independent expenditures exploded after voters adopted campaign contribution limits in 2000. According to the California Fair Practices Commission, independent spending on state legislative races soared from $376,000 in 2000 to $23.5 million in 2006. For statewide races, independent spending in California increased from $526,000 in 2002, when there were still no contribution limits, to $29.5 million in 2006 – 41 percent of candidate spending for that election, according to data from the National Institute for Money in State Politics.

In many cases, corporations or individuals spent large sums supporting or opposing individual candidates far in excess of contribution limits. In a particularly dramatic example, Intuit spent $1 million to influence the state comptroller race. Intuit, which produces "Turbo Tax," opposed the creation of a free on-line tax preparation program for California residents known as Ready Return. The company spent $1 million in support of Republican Tony Strickland against Democrat John Chiang, who supported the Ready Return program. Although Strickland lost the race, Intuit's expenditure helped fill the gap in fundraising between the two candidates, as Chiang had raised approximately $3 million for his campaign and Strickland had raised only $2 million.

Some wealthy individuals have also used independent expenditures as a way to get around contribution limits. Californians for a Better Government, which billed itself as, "A Coalition of Firefighters, Deputy Sheriffs, Teachers, Home Builders and Developers," spent almost $10 million on independent expenditures supporting California State Treasurer Phil Angelides during the 2006 election. However, more than 80 percent of the committee's contributions came from just two individuals, Angelo Tsakopoulos and Eleni Tsakopoulos-Kounalakis, according to the California Fair Practices Commission.

If the Supreme Court strikes down the ban on direct political advocacy by corporations and unions, the decision will also serve as the basis for legal challenges to the 24 states that currently prohibit or limit corporate spending in state and local elections: Alaska, Alabama, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, North Carolina, North Dakota, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Wisconsin, West Virginia and Wyoming.

Political Spending as Percentage of Corporate Profits

Not surprisingly, many of the biggest companies in the United States are also some of the biggest political players in Washington. Yet, even the vast amounts many of these large corporations spend are still a relatively insignificant amount compared to the resources they could potentially bring to bear. On average, the biggest Fortune 500 companies, which are also among the biggest political donors, spent less than 1 percent of their profits on lobbying and campaign contributions during the last election cycle.

Profits Compared to Lobbying and PAC Spending
2008 Election Cycle (millions)

Company	Profits FY07-FY08	Political Spending		% of Profits
		Lobbying	PAC	
Exxon Mobil	$80,110	$45.9	$0.7	0.06%
General Electric	$43,037	$39.0	$1.6	0.09%
Bank of America Corp.	$36,115	$9.6	$1.4	0.03%
Chevron	$35,826	$22.0	$0.6	0.06%
J.P. Morgan Chase & Co.	$29,809	$10.8	$1.1	0.04%
Pfizer	$27,481	$26.0	$1.5	0.10%
Microsoft	$26,664	$17.9	$1.0	0.07%
Citigroup	$25,155	$17.3	$0.8	0.07%
Altria Group	$21,808	$28.5	$0.9	0.13%
Goldman Sachs Group	$21,136	$6.1	$0.8	0.03%

Source: Center for Responsive Politics (www.opensecrets.org); Fortune Magazine

In fact, if any of the largest companies, such as J.P. Morgan Chase or Exxon Mobile, chose to spend even a tiny fraction of their corporate profits during an election on direct advocacy for or against Congressional candidates, they could easily outpace total candidate spending. All of the Congressional candidates who won in the 2008 election – 435 House candidates and 35 Senate candidates – spent a combined total of $861 million on their campaigns, or less than 1 percent of the total profits Exxon Mobile recorded during its 2007 and 2008 fiscal years.

The Way Forward: Fair Elections Now

All signs indicate the U.S. Supreme Court has a 5-4 majority in support of rolling back restrictions on corporate and union spending in their upcoming decision in *Citizens United*. Such a decision would come as no surprise for the Roberts Court, as the conservative majority has moved steadily toward deregulation of campaigns over the past two years.

While there are a few defensive legislative options for reducing the impact of a negative decision in *Citizens United* – such as requiring shareholder support for corporate political expenditures or improving disclosure laws – none of them will prevent the corrosive influence of big money in politics from getting worse. The recent direction of the Roberts Court leaves very little room to maneuver in the post-Watergate regulatory regime.

The only short-term option available to "change the game" is to create a new system of paying for political campaigns based on a blend of small donors and limited public funding that allows candidates to run highly competitive races without relying on wealthy special interests. This model is the basis for current legislation to modernize public funding for presidential elections,

under the draft **Presidential Funding Act of 2009**, and to create a new public funding system for congressional elections, under the **Fair Elections Now Act**. The path to the future should be "small-donor democracy," not "corporate democracy."

No matter how the Court rules, Congress must avoid the temptation to make matters worse by giving in to temptation and raising contributions limits. This is perhaps the worst of all policy options. Given that corporate executives and PACs already dominate election financing today, raising contribution limits as a response to more corporate spending in elections makes little sense whatsoever. It will only worsen the pay-to-play culture and public policy distortions created by Congress' current dependence on large contributions – and further undermine voters' confidence that Congress can act in the public's best interest – without relieving Members of the crushing burden of year-round fundraising.

It is difficult to predict exactly what will happen if the Supreme Court decides to lift the ban on direct corporate and union political spending. However, it seems certain that the fear of unlimited corporate political spending will fuel a rapidly escalating fundraising arms race between candidates, the parties and outside interests. Elected officials will feel compelled to spend more and more of their time raising money, further distracting Congress from the pressing issues of the day, creating fear of political reprisal for unpopular votes, exacerbating conflicts of interest, and undermining public confidence in their government's ability to act in the public interest.

Fair Elections Now

A Summary of the Fair Elections Now Act

The Fair Elections Now Act (S. 752 and H.R. 1826) was introduced in the Senate by Sens. Dick Durbin (D-Ill.) and Arlen Specter (D-Pa.) and in the House of Representatives by Reps. John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.). The bill would allow federal candidates to choose to run for office without relying on large contributions, big money bundlers, or donations from lobbyists, and would be freed from the constant fundraising in order to focus on what people in their communities want.

Participating candidates seek support from their communities, not Washington, D.C.

- Candidates would raise a large number of small contributions from their communities in order to qualify for Fair Elections funding. Contributions are limited to $100.
- To qualify, a candidate for the U.S. House of Representatives would have to collect 1,500 contributions from people in their state and raise a total of $50,000.
- Since states vary widely in population, a U.S. Senate candidate would have to raise a set amount of small contributions amounting a total of 10% of the primary Fair Elections funding. The number of qualifying contributions is equal to 2,000 plus 500 times the number of congressional districts in their state. For example:

  A candidate running for U.S. Senate in Maine, which has two districts, would raise 3,000 qualifying contributions – the base of 2,000 donations plus an additional 500 for each of the two congressional districts.

  A candidate running for U.S. Senate in Ohio, with 18 districts, would require 11,000 qualifying contributions before receiving Fair Elections funding.

Qualified candidates would receive Fair Elections funding in the primary, and if they win, in their general election at a level to run a competitive campaign.

- Qualified House candidates receive $900,000 in Fair Elections funding split 40% for the primary and 60% for the general.
- The formula to determine the amount of Fair Elections funding for qualified Senate candidates is as follows:
- Qualified candidates receive $1.25 million plus another $250,000 per congressional district in their state. The funding is split 40% for the primary and 60% for the general election.

Qualified candidates would be also eligible to receive additional matching Fair Elections funds if they continued to raise small donations from their home state.

- Donations of $100 or less from in-state contributors would be matched by four dollars from the Fair Elections Fund for every dollar raised.
- The total Fair Elections Funds available is strictly limited to three times the initial allocation for the primary, and again for the general, available only to candidates who raise a significant amount of small donations form their home state.
- If a participating candidate is facing a well-financed or self-financed opponent, or is the target of an independent expenditure, they will be able to respond by utilizing this matching fund provision.

Joint fundraising committees between candidates and parties would be prohibited.

Fair Elections helps offset fundraising for, and the excessive cost of, media.

- Participating candidates receive a 20% reduction from the lowest broadcast rates
- Participating Senate candidates who win their primaries are eligible to receive $100,000 in media vouchers per congressional district in their state. House candidates receive one $100,000 media voucher.
- Participating candidates may also exchange their media vouchers for cash with their national political party committee.

Participating candidates could set up leadership political action committees but would be limited to a $100 contribution limit per individual per year.

The cost of Fair Elections for Senate races would be borne by a small fee on large government contractors and for House races would come from ten percent of revenues generated through the auction of unused broadcast spectrum.

- The largest recipients of federal government contracts would pay a small percentage of the contract into the Fair Elections Fund.
- If the system proves popular like similar laws at the state level, the new system could cost between $700 and $850 million per year.

The Fair Elections Now Coalition

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