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ADDITIONAL DISCUSSION OF H.R. 5175, THE DISCLOSE ACT, DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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ADDITIONAL DISCUSSION OF H.R. 5175, THE DISCLOSE ACT, DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS

TUESDAY, MAY 11, 2010

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 5:00 p.m., in room 1310, Longworth House Office Building, Hon. Robert A. Brady (chairman of the committee) presiding.

Present: Representatives Brady, Lofgren, Capuano, Lungren, and Harper.

Staff Present: Jamie Fleet, Staff Director; Tom Hicks, Senior Elections Counsel; Janelle Hu, Elections Counsel; Jennifer Daehn, Elections Counsel; Matt Pinkus, Professional Staff/Parliamentarian; Kyle Anderson, Press Director; Joe Wallace, Legislative Clerk; Daniel Favarulo, Legislative Assistant, Elections; Greg Abbott, Professional Staff; Shervan Sebastian, Staff Assistant; Peter Schalestock, Minority Counsel; Karin Moore, Minority Legislative Counsel; Salley Collins, and Minority Press Secretary.

The CHAIRMAN. I would like to call the hearing on House Administration to order. And good afternoon to members of the committee, witnesses and guests. And thank you for being here today.

This hearing is our third on the impact of the Citizens United decision and the potential legislative response. As I said last week, the DISCLOSE Act is a bipartisan and fair solution to the Supreme Court overturning decades of campaign finance precedent. The bill does not play political favors. It applies to corporations, labor unions, trade associations and nonprofit advocacy organizations. The DISCLOSE Act provides prompt and honest disclosure of political spending seeking to influence our elections.

As we have heard from our witnesses last week, additional disclosure laws are needed. The DISCLOSE Act allows voters to follow the money. The bill would require all covered organizations to report to the FEC within 24 hours of their campaign-related activity and their transfers of money to other groups that are then available for campaign-related activity. Disclosing these transfers of moneys will ensure that special interest money cannot hide behind sham organizations and shell corporations.

The DISCLOSE Act also prevents foreign-controlled corporations and government contractors from influencing our elections. This is

not complicated. We do not let foreign citizens vote in our elections; we should not let them have any financial interest in them either.

Critics of the DISCLOSE Act claim that it will chill First Amendment rights, but the Supreme Court in the Citizens United decision by an 8 to 1 majority rejected their argument that disclosure requirements chill the exercise of free speech. The court noted that disclosure requirements did not prevent anyone from speaking and recognized that disclosure laws enable the voter to make informed decisions and give proper weight to different speakers and different messages.

The bottom line of this legislation is simple: Voters deserve to know who is financing elections. I hope that we can get to that simple goal. And I thank our panel for being here today and look forward to your testimony.

Now I would like to recognize the ranking member, Mr. Lungren, for any opening statement.

Mr. LUNGREN. Thank you very much, Mr. Chairman, for having this, the second hearing on proposed legislation following the Citizens United decision.

As I understand it, it is the mind of the chairman of the Democratic majority to mark up this bill on Thursday afternoon. I might just say, the dispatch with which we are dealing with this is in obvious distinction to how the Court has treated this and how the FEC treated this.

The organization Citizens United had to wait for several years before they got a decision, during which time they were unable to exercise what the Court said was their constitutional right protected under the First Amendment dealing with free speech and the essence of free speech being political speech.

With all due respect, Mr. Chairman, it sounds like the gentleman doth protest too much in explaining how this bill is a bipartisan bill. I suppose 2 out of 176 or 178 Republicans makes it bipartisan.

It would have been more bipartisan had the majority leadership—not speaking of you, Mr. Chairman, but others—had at least considered it appropriate to share the bill with us before it appeared in its final form announced to the press.

It is difficult to understand bipartisanship when the press gets a quicker look at it than those of us on the bipartisan side of the aisle. But I understand these things.

Saying something is disclosure doesn't make it disclosure. We have to be very careful how we deal with this law because it does deal with the First Amendment right of protected free speech, political speech.

Mr. Chairman, I thought we had a productive hearing last week, and I am looking forward to hearing from the witnesses here today. Thank you all for being here.

Mr. Chairman, the hearing last week was revealing. It revealed that at least one of the majority's witnesses did not believe that the Federal Election Commission could implement regulations before the bill becomes effective; thus leaving those who wish to speak out about politics without clear guidance on what they can say or how they can do it and suggesting that it would nullify their ability to so act for this election cycle. Perhaps that is the purpose of the bill.

It revealed how another majority witness who said he had participated in the writing of the bill could not, at least in my judgement, clearly answer my question about the provisions on coordination and how they may differ from current regulations because of the use of the word "or," which, as a former English major, always suggested to me it meant alternatively as opposed to requiring both elements. And we have the question of content and conduct being both included as the measure of coordination superseded by language, which at least suggests to me it can be solely content. That is troublesome, at least as far as I am concerned, because it may stray too far in terms of defining what coordination is or is not.

It also revealed that some Members on your side of the aisle thought the bill could stand some improvement. And for that, I offer my thanks. And hopefully we can improve that which is before us.

Mr. Chairman, I look forward to hearing from our witnesses today. And I hope that if this committee does report the bill to the House, it will be one that has been carefully considered and subject to amendment. We may ultimately not agree on the policy that should be in place, but I think we do agree that the bills we pass should be clear and coherent in achieving their ends and free of unintended consequences.

And since a bill contains potential criminal penalties, we have an obligation to ensure that it is not vague. We have an obligation, particularly when the criminal penalties are attached to an attempt by us to constitutionally restrict what otherwise would be considered free political speech, that we be very careful about how we do that.

The Court most recently in a case involving the question of honest services statute, at least in the oral argument, expressed concern about passing statutes which are so vague as to give not unlimited but undue discretionary authority to prosecutors to pick out those they wish to take action against. And I think, therefore, we should be cautioned as to ensure that when we write this bill, it does so in a way that not only will pass the constitutional muster, as articulated in the Citizens United case, but also not chill free speech.

Thank you very much, Mr. Chairman.

I look forward to today's testimony. And I thank you for having this hearing.

The CHAIRMAN. Thank you.

Anyone else?

Gentlelady Lofgren.

Ms. LOFGREN. Mr. Chairman, I do want to hear the witnesses. I won't go on in any kind of considerable length. I think this is the third hearing we have had, the second hearing on the bill and the third hearing on the subject. And I think that there has been substantial—and I would like to submit for the record by unanimous consent a list of the communications between the majority and minority on this item. I am sure that Mr. Lungren speaks in good faith, but I think it is just inaccurate.

Mr. LUNGREN. Will the gentlelady yield?

Ms. LOFGREN. Yes, I would.

Mr. LUNGREN. Does that include the two letters I sent to the authors of the bill asking for cooperation for which we received no response for several months?

Ms. LOFGREN. Yes, it does. And it also includes a whole variety of noted letters. And I think that if we read it, we will see that this has been far from a secret proceeding.

The CHAIRMAN. Without objection.

[The information follows:]

[COMMITTEE INSERT]

Ms. LOFGREN. And with that, Mr. Chairman, I would look forward to hearing from the witnesses and having time for questions.

The CHAIRMAN. Mr. Harper?

Mr. HARPER. No, thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I would now like to introduce our witnesses.

STATEMENTS OF THE HONORABLE TREVOR POTTER, PRESIDENT AND GENERAL COUNSEL, CAMPAIGN LEGAL CENTER; JOHN C. COATES, PROFESSOR OF LAW AND ECONOMICS, HARVARD LAW SCHOOL; ELIZABETH LYNCH, ATTORNEY, CHINA LAW & POLICY; THE HONORABLE MICHAEL TONER, PARTNER, BRYAN CAVE, LLP; AND WILLIAM MCGINLEY, ATTORNEY, PATTON BOGGS, LLP

The CHAIRMAN. The Honorable Trevor Potter. Mr. Potter currently serves as president and general counsel for Campaign Legal Center. Mr. Potter previously served as general counsel to John McCain in the 2008 presidential campaign and is a former commissioner and chairman of the Federal Election Commission.

John F. Coates is a professor of law and economics as well as the research director for the Program of the Legal Profession at Harvard Law School. Before coming to Harvard, he taught on the adjunct faculties of New York University of Law and Boston University School of Law.

Elizabeth Lynch is an attorney who focuses on legal development and reform in China and is founder of the China Law & Policy. Prior to working with China Law & Policy, Ms. Lynch was a research fellow at New York University Law School, U.S. Asian Law Institute, as well as a practicing attorney in New York, working on commercial litigation, including antitrust and securities actions.

The Honorable Michael Toner. Mr. Toner is partner at Bryan Cave, LLP, where he heads up their election law and government ethics practice. Prior to joining the firm, Mr. Toner was former commissioner and chairman of the Federal Election Commission.

William McGinley is of counsel in the Washington, D.C., office of Patton Boggs, where he advises a wide range of clients on political and campaign finance law issues. Before joining Patton Boggs, Mr. McGinley served as general counsel and deputy counsel to the National Republican Senate Campaign Committee.

I thank the witnesses. And there is a button in front of you, and if you would just push that and speak into the microphone. We do have a 5–minute rule, and we do allow on this issue, on this bill being as important as it is, to go over it. We don't want to go over it too far because you get a chance to reiterate anything you say

in your statement that you can't get in, you can put in for the record. You will be able to incorporate it, I am sure you all can, when you answer that or any question that we give you, you can incorporate any part of your statement into that answer.

We do have votes coming up around 6:30. I will do this as best as possible to get everything in. And hopefully we can get it in by then. If not, we all have to come back here about 7:30, 8:00 o'clock. And if you care to do that, I will join you doing that. But I would rather see if we can get this done.

Mr. Potter, you are on.

STATEMENT OF THE HONORABLE TREVOR POTTER

Mr. POTTER. Thank you, Mr. Chairman and Mr. Lungren.

I appreciate the honor of appearing before you today to discuss the DISCLOSE Act.

I would like to say at the outset that I am appearing today on my own behalf and not on behalf of any other entity or client of my law firm.

In Justice Kennedy's majority——

The CHAIRMAN. In legalese, that means you are not getting paid?

Mr. POTTER. It does.

The CHAIRMAN. Thank you. I didn't mean to interrupt you. Thank you.

Mr. POTTER. In Justice Kennedy's majority opinion in Citizens United, he was very clear about the importance of disclosure. He stated, "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."

Justice Kennedy further stated, "the First 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."

Finally, Justice Kennedy stated, "the public has an interest in knowing who is speaking about a candidate just before an election."

Thus Justice Kennedy in his Citizens United opinion bound together the two elements of the decision: Independent corporate speech in elections is a First Amendment right, and the funding sources of such speech must be fully disclosed in order to make this constitutional right function in our political system.

This section of Justice Kennedy's opinion was the only one joined by the four Citizens United dissenters, meaning that the fundamental importance of disclosure was recognized by eight of the nine Justices.

This background is important to your consideration of the DISCLOSE Act not only because it makes it clear that the disclosure provisions of the bill are constitutional, but because they complete the process begun by the Supreme Court in the Citizens United decision by requiring the sort of disclosure that Justice Kennedy and the other Justices found so essential to our Democratic system.

I am fully aware that there are many who term this debate a partisan one between Republicans and Democrats. And as a Republican, I regret that is so. I know the DISCLOSE Act has only two

distinguished Republican Members of the House as cosponsors, and I hope there will be more Republican support because this should not be a partisan issue.

Many Republicans have long argued for the exact conclusion that Justice Kennedy arrived at: Less restriction on political speech in return for full disclosure.

This is not to say that the DISCLOSE Act is a perfect act of legislative draftsmanship. Few pieces of legislation are, especially before they have seen the light of public comment and the committee process. Thus I hope the members of the committee from both sides will work together to improve the bill.

In particular, I have concerns that the provisions on foreign national involvement in the U.S. political process can and should be clarified and improved.

Let me begin by saying that I think there is a bipartisan unanimity that we do not want foreign governments, foreign government officials or foreign government controlled entities from Venezuela, China, or elsewhere, spending money in U.S. elections, either directly or through the U.S. companies they control. This is a serious threat the bill must address.

However, the bill goes further in a manner that I think makes it vulnerable to potential constitutional challenge for being both over-inclusive and under-inclusive. For instance, it declares some U.S. companies to be foreign nationals if they have a single non-U.S. Individual or company owning 20 percent of its shares, even if that individual has no control over the corporation's affairs.

More broadly, the current draft raises the question of why some U.S. companies like, say, Anheuser-Busch or Chrysler are treated differently in terms of their ability to have U.S. PACs or participate in local political activity than other U.S. companies with whom they directly compete, like, say, Sam Adams and Ford.

I believe the better answer is to clearly prohibit the involvement in U.S. elections of any companies with foreign government ownership, either directly or through foreign government controlled corporations. This definition can be written to prevent the dangers we all seek to guard against without sweeping in purely commercial entities.

The analogy would be to the Foreign Agents Registration Act, which makes exactly this sort of distinction.

The DISCLOSE Act's provisions requiring personal certification by the CEO under threat of perjury could police this ban on foreign government involvement. I am sure there are other areas of the proposed legislation which would also benefit from bipartisan discussion and amendments and hope that will occur.

However, the bill fulfills an important need by requiring disclosure of who is spending money in U.S. elections. As I have noted, an 8–1 majority of the U.S. Supreme Court has stated that such disclosure is not only constitutional but is the expected and indeed necessary counterbalance to the new corporate and union right to expend unlimited funds in U.S. elections.

I urge Congress to require such complete disclosure in time for the 2010 elections. Thank you.

[The statement of Mr. Potter follows:]

TESTIMONY OF TREVOR POTTER

BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION

ON H.R. 5175, THE DISCLOSE ACT,

May 11, 2010

Thank you for the honor of appearing before you today to discuss the DISCLOSE ACT.

I am a Republican former Commissioner and Chairman of the Federal Election Commission, and am currently a Member of the law firm of Caplin & Drysdale, and President of the Campaign Legal Center, which has worked to encourage faithful implementation of the Bipartisan Campaign Reform Act. However, I am appearing today only on behalf of myself, and not on behalf of any other entity or client.

In Justice Kennedy's majority opinion in Citizens United v Federal Election Commission, 558 U.S. ---- (2010) he made two things very clear: First, it is generally constitutional to require disclosure of the sources of funding for spending in federal elections, whether or not that spending "expressly advocates" the election or defeat of a federal candidate. Second, he and seven other Justices were clear that they thought such disclosure was entirely appropriate and useful in a democracy.

Justice Kennedy stated that disclosure of the sources of funding of political advertising "provide[s] the electorate with information" and "insure[s] that the voters are fully informed

about the person or group who is speaking," Citizens United at 52-53, citing McConnell v FEC, 540 U.S. 93, 196 (2005) and Buckley v Valeo, 424 U.S. 1, 76 (1976) (per curiam). He also cited the holding in Bellotti that "Identification of the source of the advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." Id. At 53 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792, n. 32 (1978).

As to the argument that disclosure requirements should be limited to "express advocacy," Justice Kennedy's Opinion flatly declared: "We reject this contention." Id. He noted that the Supreme Court had, in a variety of contexts, upheld disclosure requirements that covered constitutionally protected acts, such as lobbying. Id. "For these reasons", Justice Kennedy stated, "we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." Id. at 54.

As to the value of disclosure of political speech, Justice Kennedy was equally clear. He wrote:

> "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 corporations 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." Id. at 55

Justice Kennedy concluded:

> "The First 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." Id.

Thus, Justice Kennedy binds together the two elements of his Opinion—independent corporate speech in elections is a First Amendment right, and the funding sources of such speech must be fully disclosed in order to make this constitutional right function in our political system. This section of Justice Kennedy's Opinion was the only one joined by the four Citizens United dissenters, meaning that the fundamental importance of disclosure was recognized by eight of the nine Justices. Full disclosure is one of the few concepts in this contentious area of law to receive such a broad endorsement from the Supreme Court.

This background is important to your consideration of the DISCLOSE Act, not only because it makes it clear that the disclosure provisions of the bill are constitutional, but because they complete the process begun by the Supreme Court in the Citizens United decision by requiring

the sort of disclosure that Justice Kennedy and the other Justices found so essential to our democratic system. I would go so far as to say that unrestricted corporate speech in elections without disclosure of the sources of such speech is contrary to the Court's theory in Citizens United, which paired corporate First Amendment speech rights with the virtues of disclosure of the sources of such speech—disclosure to shareholders and to the general public.

Thus, I commend the provisions of the DISCLOSE Act that require disclosure of the funding sources of political speech. I should note that the Citizens United case referred only to corporate speech and disclosure, because only a corporation was challenging the restrictions in the law. However, the DISCLOSE Act correctly, I think, recognizes that First Amendment rights will be found by courts to apply to unions as well, and therefore includes unions in the Act's provisions as well.

I am fully aware that there are many who attempt to cast this debate as a partisan one between Republicans and Democrats, and I regret that is so. I know the DISCLOSE Act has two distinguished Republican Members of the House as co-sponsors, and I hope there will be more Republican support. This should not be a partisan issue. Many Republicans have long argued for the exact conclusion that Justice Kennedy arrived at: less restriction on political speech in return for "full disclosure." Corporate speech restrictions were struck down by the Supreme Court—it is now up to Congress to supply full disclosure. The Supreme Court had only a narrow 5-4 majority to strike down the restrictions on independent political expenditure by corporations, but it had an 8-1 majority, spanning the philosophical wings of the Court, in

favor of disclosure over the Internet and by other means to the public and shareholders of the details of corporate funding of such political expenditures. I hope Congress can muster the same broad philosophical support for such disclosure, since both political parties have long favored at least that much regulation.

That is not to say that the DISCLOSE Act is a perfect act of legislative draftsmanship—few pieces of legislation are, especially before they have seen the light of public comment and the Committee process. Thus, I hope the Members of the Committee from both sides will work together to improve the Bill. In particular, I have concerns that the provisions on foreign national involvement in the US political process could - and should - be clarified, and improved.

Let me begin by saying that I think there is bipartisan unanimity that we do not want foreign governments, or foreign government officials, or foreign government controlled entities—whether from anti-American governments of countries like Hugo Chavez's Venezuela or Iran, or of global competitors like China and Japan—spending money in US elections, either directly or through US companies they control. This is a serious threat the Bill must address.

However, the Bill goes further, in a manner that I think makes it vulnerable to a constitutional challenge of being both over-inclusive and under-inclusive. For instance, it declares some US companies to be "foreign nationals" if they have a single non-US individual or company owning 20% of its shares, while other companies with three non-US investors together owning

51% of the shares may not be so labeled (if no one of them individually reaches the 20% threshold). This is so even if the single 20% shareholder has no seats on the US company's Board, and the three foreign shareholders nominate a majority of the Board so long as they are not all foreign nationals. These disparities in treatment between US companies seem vulnerable to constitutional challenge.

More broadly, the current draft raises the question of why some US companies—like Anheiser Busch or Chrysler—are treated differently in this Bill than other US companies with whom they directly compete, like Sam Adams and Ford. None of those US companies to my knowledge are agents of foreign governments or controlled by foreign governments or their agents, yet the Bill would forbid the US employees at the first two from using US-generated funds to sponsor a federal PAC, or to participate in state and local elections in states that have traditionally allowed corporate expenditures. This is so even though both of these activities were permissible for such corporations prior to Citizens United.

I believe the better answer is to clearly prohibit the involvement in US elections of any companies with foreign government, foreign government official, or foreign governmental entity ownership. This definition can be written to prevent the dangers we all seek to guard against, without sweeping in purely commercial entities. The analogy would be to the Foreign Agents Registration Act, which makes exactly this sort of distinction. To ensure it is successful, the Bill's current requirements for certification by the CEO (under threat of perjury) could apply to all US corporations with significant foreign commercial ownership:

certifying both that there is no foreign governmental ownership, and that the existing requirements of US law are being met (no foreign national involvement in the political expenditure decision-making process, and only funds earned in the US being spent).

I am sure there are other areas of the proposed legislation which would also benefit from bi-partisan discussion and amendments, and hope that will occur. However, the Bill fulfills an important need by requiring disclosure of who is spending money in US elections. As I have noted, an 8-1 majority of the US Supreme Court has stated that such disclosure is not only constitutional, but is the expected and indeed necessary counter-balance to the new corporate right to expend unlimited funds in US elections. I urge Congress to require such complete disclosure in time for the 2010 elections. I cannot do better in closing than to again quote Justice Kennedy's 8-1 majority Opinion on this point:

> "The First 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." Citizens United at 55.

Thank you for the opportunity to testify today.

Trevor Potter

May 11, 2010

The CHAIRMAN. I thank the gentleman.

Mr. Coates.

STATEMENT OF JOHN C. COATES

Mr. COATES. Thank you, Mr. Chairman, Ranking Member Lungren and members of the committee.

I am also delighted to be able to be here today to comment on this bill. By way of background, I am a corporate law scholar and a former corporate lawyer. I was a partner at Wachtell Lipton before going to Harvard. I am not a constitutional law scholar, and I am not going to address constitutional issues either about Citizens United or the bill.

But I can say with some certainty that the Citizens United case did shock in some sense the owners of U.S. corporations. It was a radical change in their expectations of how their money would be used going forward. Corporations have been out of the election world in a direct sense for so long that very few companies that are active today needed to have special provisions in place. They were created after the Taft-Hartley Act. They were created after the Tillman Act, certainly. The owners of those companies never imagined that this change in law would be coming down.

And as a result, the decision creates, from a purely corporate governance perspective, a massive new risk for the shareholders of those companies, and specifically that will be that managers of those companies will be using other people's money, shareholders' money, to pursue their own personal and political agendas using corporate bank accounts in the election process. And they are going to be able to do this in secret without any disclosure to shareholders or any ability on the part of shareholders to learn about, to analyze, to respond to the potential diversion by corporate managers.

The DISCLOSE Act in its entirety is a measured and responsible response, I think, to this risk. By requiring disclosure, the bill would follow a long tradition of the Federal Government mandating disclosure by public companies, which supplements private enforcement by shareholders of their rights under State law. It would enable shareholders to track and monitor election expenditures and, if they want to, to get involved in pressuring managers to do what they want rather than what managers want. And it would discourage a certain kind of activity, which is to say essentially stealing shareholders money for the pursuit of a manager's own personal interest.

I think this, frankly, is what some sponsors and backers of this bill may have been referring to in recent media reports that were quoted last week as suggesting that it would chill some activities. It is not that it would chill speech; it would chill theft and use of the stolen property for speech that the backers of the corporation themselves would not themselves back.

By requiring personal endorsements from CEOs, the bill would also follow a tradition. Here a tradition laid down by Chris Cox, former Member of this esteemed organization, and George Bush, whose reaction to Enron, appropriately, was to start requiring CEOs to personally certify financial statements.

That part of the bill is going to make sure that top managers can't simply pretend to not know what is going on down in the ranks of their organizations. They won't be able to do what Captain Renault did in Casablanca and pretend to be shocked at the gambling that was going on in the casino in that movie. Instead, they are going to have what Justice Scalia calls the civic courage to step up and participate in a democracy, which I think is something that he personally is in favor of.

And finally, by covering conduits, the bill would make the disclosure requirements effective. They will deal with a sort of double problem with the use of other organizations by large companies to funnel money into the election cycle. The double problem is that, first, shareholders have managers take their money and not ask them or tell them about how they are using it. Then they turn it over carte blanche to other organizations, which ensures another layer of secrecy and clouds over their behavior. And again, there is good evidence to suggest that managers of companies themselves are surprised at how their money is used in the election world.

And then, finally, the bill will plug the loophole for foreign ownership created by the Supreme Court in Citizens United. Anybody familiar with the Boston area will know that there is a giant Citgo sign near Fenway. Very few people know that Citgo is, in fact, backed by Venezuela and effectively controlled by Hugo Chavez. And after Citizens United, Citgo can directly funnel Hugo's personal, political ambitions into our electoral world.

I don't think that is a good thing. I think that obviously runs afoul of longstanding bipartisan decisions to not have foreigners in our electoral process.

Just to wrap up. Thank you for the opportunity to comment on the bill. And I hope that you will pass it as soon as reasonably practical.

[The statement of Mr. Coates follows:]

Testimony of Professor John C. Coates IV

John F. Cogan, Jr. Professor of Law and Economics

Harvard Law School

Before the

Committee on House Administration,

House of Representatives

on

The DISCLOSE Act (H.R. 5175)

May 10, 2010

Introduction

Chairman Brady, Ranking Member Lungren, and members of the Committee, I thank you for the opportunity to testify.

The DISCLOSE Act (H.R. 5175) is an important, corrective response to the shock of *Citizens United.* I am a corporate law scholar, and former corporate lawyer (having been a partner at Wachtell Lipton), and I do not view myself as expert in constitutional law. I will not engage the question of whether *Citizens United* was or was not consistent with Supreme Court precedent generally, or whether the DISCLOSE Act is constitutional. I can say with confidence, however, that *Citizens United* radically unsettled long-standing expectations of corporate owners about corporate governance and federal election activity, and that the DISCLOSE Act will assist corporate owners, at a reasonable cost, in trying to address the new governance risks that *Citizens United* creates. I will comment on three aspects of the DISCLOSE Act that will improve corporate governance – the disclosure requirements, the endorsement requirements, and the inclusion of conduits in the new disclosure regime – as well as the foreign control provisions, each of which I favor.

Federal elections have long been understood as off-limits for US corporations. This understanding predated the formation of most currently active US corporations. This understanding thus predated the basic bargains over governance struck between shareholders and creditors, on the one hand, and directors and managers, on the other. As a result, the owners of most currently active companies had in the past no reason to address federal election activity in making investment or governance decisions. To be sure, investors have not thought that corporations would be banned from all political activity – corporations have long participated as advocates for legitimate corporate ends, including through policy advocacy, lobbying, research funding, and opinion leadership, and through separately funded political action committees. The legitimate business interests represented by corporations have been amply represented in robust exercises of First Amendment rights – and all of that will continue unaffected if the DISCLOSE Act is passed.

For closely held companies, which are the most common form of company, individual shareholders have been and continue to be able to extract profits and use them to participate directly in election activity in their individual capacity. They really did not need *Citizens United* to help them, contrary to what the Supreme Court seem to think. Consider Michael Bloomberg, for example: his "corporate wealth" was available to him both before and after Citizens United for any political purpose otherwise permitted to the rest of us, and would remain available whether the DISCLOSE Act is passed or not. Ted Olson's arguments to the contrary notwithstanding, the DISCLOSE Act would have no meaningful impact on the ability of the individual US citizen-owners of US companies to speak freely in elections. But public companies, not private companies, hold most of the dollars of invested capital in the US, account for the great bulk of economic activity, have the weakest governance (in terms of protecting owners' interests), and represent the most

important channel through which *Citizens United* affects owner governance of corporate political activity.

What owners of public companies had long understood – before *Citizens United* – is that they did not need to worry about managers using corporate funds to pursue managers' personal political ends, such as through the election of individual officials, without regard to whether those pursuits would in fact benefit owners.[1] Owners did not need to negotiate disclosure requirements, or monitor expenditures, or install control systems, because the underlying activity was thought to be illegal. Put simply, *Citizens United* created a massive new risk for investors in US companies, one that is not currently addressed in any meaningful way by existing corporate governance mechanisms, or by state law, or by SEC regulations, or stock exchange rules. That risk is that corporate managers will misuse corporate funds – "other people's money" in Louis Brandeis's classic phrase[2] – to pursue their own, personal, political objectives, which would not be supported by all, or even a majority, of shareholders, and that they will be able to do this secretly, without any disclosure or possibility of a private corporate governance response to correct this misuse. In stark terms, the risk is that corporate managers will steal shareholder money, and pervert the very First Amendment rights – the rights of corporate *owners* – that the slim majority in *Citizens United* purported to protect.

The DISCLOSE Act is an important corrective to the new governance risk created by *Citizens United*. By requiring real-time, ongoing disclosure of election expenditures, the bill would allow shareholders to monitor the use of their capital in the election context, and take whatever actions they want to discipline managers for misusing their funds. Investors will be able to learn the level of new political activity permitted by *Citizens United* in the companies in which they invest. They can look for patterns consistent with managerial pursuit of private interests. If patterns are found, they can engage in self-help, by selling their shares, by suing managers for "waste" of corporate assets,[3] or by proposing bylaw amendments to directly control political activity, or if managers act particularly egregiously, to pressure boards to discipline managers.[4]

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[1] This risk is consistent with most research on corporate PACs, which finds little evidence that it produces benefits for corporate sponsors of the PACs, and instead appears to be a form of managerial "consumption" – i.e., undertaken primarily to benefit the private interests of corporate managers. Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., Why is There so Little Money in U.S. Politics?, 17 J. Econ. Persp. 105-130 (2003) (surveying numerous prior studies); cf. Michael J. Cooper, Huseyin Gulen & Alexei V. Ovtchinnikov, Corporate Political Contributions and Stock Returns, 65 J. Fin. 687 (2010) (finding positive correlation between corporate PAC contributions and subsequent abnormal stock returns and earnings, with the strongest effects for contributions to House Democrats, but not being able to conclude the effect is causal).

[2] Other People's Money – And How the Bankers Use It (1914).

[3] Victor Brudney, Corporations and Stockholders' Rights under the First Amendment, 91 Yale L.J. 235 (1981).

[4] The practicality of shareholder self-help should not be overstated. Collective action problems, including free-riding, as well as legal impediments, will make it hard for shareholders to implement restrictions of the kind suggested in the text. Nevertheless, without the disclosures required by the DISCLOSE Act, such self-help will be even more difficult, if not impossible.

The DISCLOSE Act's disclosure requirements also fit perfectly the role that the federal government has played for over 100 years in the governance of public companies. Through the SEC, the federal government has imposed detailed disclosure requirements on companies that wish to sell their stock to the public, and ongoing disclosure and reporting obligations as long as that stock is widely held or traded on a stock exchange. In addition, federal law has long forbidden fraud, including misleading statements as well as deceptive omissions when companies speak. Since corporations are required to speak to their investors regularly, federal law has long essentially imposed a broad ban on speech that is materially misleading, even by omission. These requirements have never been seriously challenged as unconstitutional, even though they clearly impose "burdens" on a corporation's ability to speak freely – corporations in essence have long been required to speak more carefully than individuals. It is primarily through these requirements that the federal government has supplemented private contract, state corporate law and stock exchange rules in the governance of public companies. The DISCLOSE Act's disclosure requirements, in short, are entirely consistent with a long tradition of federal regulation of corporate governance, and will be beneficial for precisely the same reasons that disclosure has generally been thought beneficial for investors.

It may be asked why the corporate governance risks associated with involvement of corporations in election activity is different in kind from the risks associated with other kinds of political activity in which corporations could and did engage prior to *Citizens United*, such as lobbying, or of other activities in which corporations engage that are not necessarily directly related to their business strategies.[5] Election expenditures are particularly risky for shareholders for three reasons. First, other political activities of corporations have long been permitted, as noted above. As a result, *Citizens United* represents no "shock" to corporate governance arrangements as applied to those kinds of activities, and existing disclosure laws and other governance arrangements are more likely to provide sufficient information about those activities to owners. Second, election activity by definition involves attempting to influence the election of an official, who will vote on numerous laws, most of which will have little or no effect on the legitimate business interests of any given corporation, so that a dollar spent by a corporation in an election fight will typically have a greatly diluted impact relative to the same dollar spent in direct lobbying on issues of interest to the corporation's owners. Third, because an elected official will have to vote on a range of issues, the probability that any public company's shareholders will have uniform set of preferences over how the official will vote are nearly zero. Any corporation the managers of which make election expenditures

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[5] Charitable donations are another similar activity, long controversial among governance scholars. See Victor Brudney & Allen Ferrell, Corporate Charitable Giving, 69 U. Chi. L. Rev. 1191 (2002). The difference between charitable work and election work is that charities are already subject to separate reporting regimes, and have generally involved "trivial" corporate expenditures, id. at 1198. If corporate election expenditures remain similarly low in the future, then further governance reform to address them would not then be warranted. But the only way for owners to know if the expenditures in fact remain low is for the kind of disclosure regime required by the DISCLOSE Act to be adopted.

will inevitably be neglecting or harming the preferences of a large fraction (even a majority) of the company's shareholders on most of the issues on which the official will vote. A corporation that confines its expenditures to lobbying, by contrast, will be able to target issues that affect the corporation directly, and thus that affect shareholders (as such) uniformly.[6] Even if some shareholders may disagree even about core business strategies (and thus specific political issues of direct concern to the corporation), the odds that a majority of shareholders will disagree with managers' views will be much lower.[7]

For those reasons, it is my firm belief that most owners of public companies do not want their corporations to compete in elections. Owners certainly do not want companies to end up in an arms' race of zero-sum competition, with each company drawing on general treasury funds in an effort to outspend rivals in election campaigns, with little net effect on political outcomes, all the expense of shareholders. A more straightforward example of socially harmful rent-seeking could not be found. The DISCLOSE Act will reduce the risk of such harms, and thereby benefit the majority of voters who are also shareholders.[8]

A second component of the DISCLOSE Act that is useful from a corporate governance perspective is the requirement that CEOs personally endorse the use of corporate funds in elections. A long line of research in management shows that personal attention from senior management has an important disciplining effect on the potential misuse of corporate funds. In the political arena, this may be a particular benefit, as studies document that senior management of large companies have been caught unawares by the political involvements of their companies, instituted by lower level employees without adequate supervision – and this was in the context of traditional corporate political activity, such as the funding of trade associations.[9] Occasionally, this activity has been brought to the attention of senior management – often through the unfortunate means of public criticism and unwanted media attention on controversial political positions taken by trade groups nominally on behalf of shareholders on issues that had nothing to do with

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[6] Research suggests that companies that engage in large amounts of lobbying "appear to be more bipartisan and less ideological than other groups" active in politics, "giving more equally to both parties and more broadly across the ideological spectrum." Stephen Ansolabehere, James M. Snyder Jr. & Micky Tripathi, Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act, 5 Bus. & Pol. 131 (2002). Research also suggests that lobbying is more effective than corporate PAC donations. See note 1 supra; Brian K. Richter & Krislert Samphantharak, Lobbying and Taxes, 53 Am. J. Pol. Sci. 893 (2009) (finding that lobbying expenditures result in lower taxes for the average firm that lobbies).

[7] There may also be broader social effects of corporate lobbying (particularly of the purely redistributive kind consistent with Richter et al. noted in note 5), and I do not here mean to defend all types of corporate lobbying, only to make the point that corporate lobbying is less likely to harm shareholders' interests than election expenditures, and thus is much more defensible from a corporate governance perspective than electioneering. Lobbying, in any event, is subject to a disclosure regime of its own. E.g., 2 U.S.C. § 1601 et seq.

[8] Research provides evidence that greater transparency reduces rent-seeking. E.g., Helena Svaleryd & Jonas Vlachos, Political Rents in a Non-Corrupt Democracy, 93 J. Pub. Econ. 355 (2009).

[9] Center for Political Accountability, Hidden Rivers (2006), available at: www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932

genuine corporate interests. Once discovered, these activities have often been reversed, consistent with my view that owners – and boards of directors acting on full information – will typically not want their companies to engage in general political activities ranging far a-field of legitimate business interests. In the new post-*Citizens United* era, the risks of misuse by lower level employees will be intensified if the DISCLOSE Act is not enacted and CEOs are not required to take control of their companies' election-related expenditures.

A third component of the DISCLOSE Act that promises to counteract the corporate governance risks created by *Citizens United* is the requirement that corporations report the election activities of conduits and other expenditure-laundering organizations to which the corporations make donations. The use of shell entities or general purpose trade associations to eliminate the paper trail associated with corporate political activity was already a problem prior to *Citizens United*, and *Citizens United* dramatically raises the stakes for this kind of subterfuge. By requiring disclosure of transfers of funds to other organizations with the purpose of influencing elections, the DISCLOSE Act will shine a light for the first time on the shadowy relationships between companies overtly run for the benefit of shareholders and the networks of election activist organizations the primary purpose of which is to engage in political activity.

Without these requirements, the other disclosure requirements in the bill would be worse than useless – they would help camouflage the ability of corporate managers to waste shareholder money by allowing corporations to officially report low (direct) election expenditures while secretly ramping up their (indirect) election activities. Here, the role of nominally general purpose donations to advocacy groups is even more troubling, since for-profit corporations have sought to avoid being linked to direct election activity by turning over large sums with no formal strings attached to these groups. As a result, these groups have been free to diverge even farther from shareholder goals than corporate managers have been able to do directly. In effect, the role of general purpose donations to such advocacy groups has been to double down on the agency problems troubling America's corporate governance system: first, managers diverge from shareholders' interests, and then the chieftains of the advocacy groups diverge even further, all without any information being provided to shareholders, on whose behalf all of this activity is supposedly undertaken.

Finally, the part of the DISCLOSE Act that bans foreign-controlled US corporations from participating in US elections is also a good change. To facilitate US economic development, US law has long attempted to permit US companies to be created quickly and cheaply, without any requirement that they have capital, employees, or even an economic purpose. Thus, many companies – both US and foreign – have thousands of "shell" subsidiaries in the US whose sole purpose is to hold assets or own other companies.[10] Prior to *Citizens United*, none of these shell companies could engage in election activity. After *Citizens United*, all of them can – even if controlled by foreign persons otherwise banned from such activity.

[10] In 2009, Morgan Stanley alone reported 1,306 subsidiaries (50% organized in the US, 50% foreign), 1,122 wholly owned (www.sec.gov/Archives/edgar/data/895421/000119312509013429/dex21.htm).

A prominent example is CITGO, which was created as a wholly owned US subsidiary of Occidental Petroleum in 1983, and later had its stock sold to the national oil company of Venezuela. Prior to *Citizens United*, CITGO could not engage in US election activity . After *Citizens United* it can, even though it is controlled by Hugo Chavez. I, for one, would make clear that US election candidates do not have to compete for US voters' attention during election season with the US subsidiaries of The CITIC Group (the state-owned investment company of the People's Republic of China), OAO Gazprom (the world's largest natural gas company, controlled by the Russian government), or, for that matter, Societe Generale (the French bank that was able to extract more than $10 billion from US taxpayers via the AIG bailout).

Some claim that current US law, which forbids foreign persons from directly or indirectly engaging in US election activity, would apply to CITGO, since its activities would represent indirect activity of Venezuela. That argument does make a kind of common sense – why, indeed, should foreign persons be able to do indirectly what they cannot do directly? But I am unaware of any authority for this proposition, and existing law restricting the political activity of foreign persons risks being evaded by the very kinds of legal "creativity" and judicial "activism" – terms that I do not intend as compliments – that infuses *Citizens United*, which treats US corporations, such as CITGO, as distinct "persons" for First Amendment purposes, despite the fact that the First Amendment nowhere contains the word person, despite the fact that the US Constitution nowhere mentions corporations, and despite the fact that the only corporation that was a party to the case was a closely held corporation formed expressly to participate in political advocacy, unlike the vast majority of corporations affected by the decision. Perhaps those who assert that current law governing foreign persons is sufficient are correct, but I for one do not trust the common sense of the current Supreme Court, at least in cases involving corporate political activity. In any event, it cannot hurt for Congress to clarify the law in this respect, to make it clear that foreign persons are not permitted to use US corporations to engage in activities that are and should be limited to US citizens. In doing so, Congress will simply be doing what it has already done in numerous other areas of law, including purchases of stock of US companies involved in telecommunications,[11] airlines,[12] defense contracting,[13] maritime shipping,[14] fishing,[15] banking,[16] mutual

[11] 47 U.S.C § 310(b) (foreign persons may not own >25% of a US air cargo company).

[12] 49 U.S.C. § 40102(a)(15) (foreign persons may not own >20% of the stock of a US telecom company).

[13] See Christopher F. Corr, A Survey of United States Controls on Foreign Investment and Operations, 9 Am. U.J. Int'l L. & Pol'y 417 (1994) (describing restrictions on foreign ownership of companies that do business with the Department of Defense); Melvin Rishe, Foreign Ownership, Control, or Influence: The Implications for United States Companies Performing Defense Contracts, 20 Pub. Cont. L.J. 143 (1991) (same).

[14] 46 U.S.C. § 55102 (vessels in inland maritime transport must be owned by US citizens).

[15] 46 U.S.C. § 12102(c) (foreign persons may not own >25% of companies owning US fishing vessels).

funds,[17] nuclear energy,[18] or any activity foreign control of which is deemed a threat to national security.[19]

In effect, Citizens United created a giant loophole in the pre-existing law governing foreign election activity. Justice Alito's reaction to the President's State of the Union speech suggests that at least some members of the Supreme Court did not even realize what they had done. The DISCLOSE Act will close that loophole, and restore the sensible status quo position – that just as foreign individuals cannot vote in US elections, foreign-controlled US companies should not be able to influence US elections through election activity.

In sum, *Citizens United* was a radical shift in US corporate governance. The DISCLOSE Act is an important, tailored response, following in the tradition of federal disclosure laws that date back to the Securities Act of 1933. It will enable shareholders to monitor and respond to corporate election expenditures; it will reinforced existing control systems by requiring senior managers to be personally involved in such expenditures; and it will prevent managers from evading these requirements by relying on conduits and general purpose donations to do indirectly what they know shareholders would not want them to do directly. In addition, by closing the loophole in current laws limiting US election activity to US citizens, the bill straightforwardly corrects a mistaken legal consequence of the *Citizens United* decision.

Thank you for your time. I would be happy to answer questions on my testimony, or other aspects of corporate governance or other issues raised by the DISCLOSE Act. I hope you will proceed to pass the DISCLOSE Act as rapidly as possible.

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[16] http://www.federalreserve.gov/pf/pdf/pf_5.pdf (foreign persons cannot acquire >5% of US bank or bank holding company if the Federal Reserve does not find that they are subject to "comprehensive supervision" by their home country bank regulators, a finding not made for a number of foreign countries); 12 U.S.C. § 72 (all directors of US national banks must be US citizens).

[17] See John C. Coates IV, Reforming the Taxation and Regulation of Mutual Funds: A Comparative Legal and Economic Analysis, 1 J. Legal Analysis 2 (2009), available at ojs.hup.harvard.edu/index.php/jla/article/view/59/72 (describing differences in US regulation and taxation of US and foreign mutual funds).

[18] See Atomic Energy Act of Aug. 30, 1954, 68 Stat. 921 (codified as amended in scattered sections of 42 U.S.C.) (foreign-controlled companies may not own US nuclear power plants or operations prospecting for uranium and other source material).

[19] 50 U.S.C. App. 2170 (President may take such action as the President considers appropriate in response to any merger, acquisition or takeover by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the US).

John C. Coates IV
John F. Cogan Jr. Professor of Law and Economics
Harvard Law School

John C. Coates IV joined the faculty in 1997 after private practice at the New York law firm of Wachtell, Lipton, Rosen & Katz, where he was a partner specializing in mergers and acquisitions, corporate and securities law, and the regulation of financial institutions, including mutual funds.

He teaches courses on Mergers & Acquisitions, Financial Institutions Regulation, Contracts, Corporations, and the History of Capitalist Institutions.

He was promoted to Professor in 2001, and was named the John F. Cogan Jr. Professor of Law and Economics in 2006.

He is a frequent panelist and speaker on M&A and financial institution regulation, and a consultant to the SEC, law firms, mutual funds, hedge funds, and other participants in the M&A and capital markets.

He is a member of the American Law Institute. He is the author of numerous articles on corporate, securities, and financial institution law, and for seven years co-authored the leading annual survey of developments in financial institution M&A.

His current research at Harvard includes empirical studies of the purchasing of legal services by S&P 500 companies, the regulation and taxation of mutual funds, the causes and consequences of the completion or failure of M&A transactions, and the causes and consequences effects of CEO and CLO turnover.

Publications include *Reforming the Taxation and Regulation of Mutual Funds: A Comparative Legal and Economic Analysis*, 1 J. Legal Anal. 591 (2009); *Lowering the Cost of Bank Recapitalization*, 26 Yale J. Reg. 373 (2009); *Competition and Shareholder Fees in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. Corp. L. 151 (2007); *The Goals and Promise of the Sarbanes-Oxley Act*, 21 J. Econ. Persp., 91 (2007); *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 Stan. L. Rev. 887 (2002); and *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 Cal. L. Rev. 1301 (2001).

The CHAIRMAN. I thank the gentleman.

Ms. Lynch.

STATEMENT OF ELIZABETH LYNCH

Ms. LYNCH. Good afternoon, Chairman Brady, Ranking Member Lungren and distinguished members of the committee. My name is Elizabeth Lynch, and I am an attorney and editor at China Law & Policy. I want to thank you all for letting me testify today.

I am grateful for this committee's work on the DISCLOSE Act, legislation necessary to deal with the practical problems arising from the Supreme Court's recent decision in Citizens United v. FEC.

Of particular concern is the potential influence of foreign money and, given the structure of some multinational corporations, direct pressure from foreign governments in U.S. elections.

First, how does Citizens United change our understanding of the corporate form? In Citizens United, the Court latches on to the legal shorthand of person and citizen that the common law periodically uses to describe corporations and takes these words literally. In doing so, it elevates corporations to equal status with individual citizens in the sphere of political speech.

According to the Court, there should be no difference between the two. When analyzing a corporation's right to political speech, courts are no longer permitted to take into consideration elements that make corporations inherently different from an individual citizen. These include limited liability, perpetual life, and preferential tax treatment. In other words, courts can no longer pull aside the corporate curtain and look at what is really going on behind the scenes that causes a corporation to be different from a real person.

So how does this new logic help foreign corporations and governments in potentially influencing our elections? In today's world, most foreign companies with a global presence often establish a U.S. subsidiary. These U.S. subsidiaries are incorporated under State law and, for purposes of the law, are considered citizens in the State in which they are incorporated.

Unfortunately, now, with Citizens United, we are no longer permitted to look behind that corporate curtain of a U.S. corporation to see its possible relationship to a foreign corporation.

But make no mistake, these U.S. subsidiaries are heavily influenced, if not outright controlled, by their foreign parent corporations. The parent usually owns a majority, if not all, of the shares of the subsidiary, and capital is often infused into the subsidiary from the parent.

But the picture after Citizens United becomes increasingly more perilous when some of these foreign corporations have direct ties to their governments. For example, in socialist and post-socialist countries, such as China, Russia, and Vietnam, many corporations are still government run. The same holds true for oil-rich nations, like Venezuela and Saudi Arabia, where the oil industry is largely nationalized.

Each of these countries has U.S. subsidiaries for many of their government-run corporations. Citgo, for example, is owned by the National Oil Company of Venezuela. With the Citizens United loop-

hole, the Venezuelan government has the potential to flood money into our electoral process through its relationship with Citgo.

But unlike corporations, foreign governments are motivated by more than just corporate profits. Global influence, power, and advantage are also a major part of their calculation. Even if involvement in U.S. elections might harm profits of the state-controlled foreign corporation, if that involvement is ultimately beneficial to the foreign government for other reasons, it will seek to take advantage of the loophole. And in today's world, where China has $2.4 trillion in foreign currency reserves and the United Arab Emirates' Sovereign Wealth Fund houses $450 billion in assets, these foreign governments now have the money to do so.

And that is why Section 102 of the DISCLOSE Act is necessary. In a post-Citizens United world, the current version of the Federal Election Campaign Act is glaringly ill-equipped.

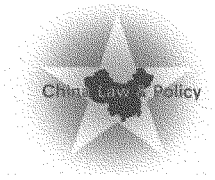
First, the act's current prohibition only applies to political action committees and says nothing about direct expenditures by U.S. subsidiaries of foreign corporations, expenditures Citizens United now permits corporations to make through election night.

Second, the act's current prohibition that the foreign parent cannot give money to the formation of the U.S. subsidiary's PAC is ineffective in today's complex corporate world. Corporations are no longer that transparent. Under today's corporate law, there is simply no way to prevent infusion of cash from one company to another. All the subsidiary has to do is issue stock that is purchased by the foreign parent and use those funds to ultimately do the foreign parent corporation's bidding in our elections.

But Section 102 of the DISCLOSE Act would effectively eliminate these current loopholes. By expanding the definition of foreign national to include U.S. Subsidiaries where 20 percent of the voting shares are owned by a foreign entity or where a majority of the board are foreign nationals or where the U.S. operations are, in fact, directed by a foreign entity, the DISCLOSE Act can protect our elections from undue foreign influence and restore the ability of the U.S. people to hold accountable their government.

Thank you. And I look forward to your questions.

[The statement of Ms. Lynch follows:]



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Testimony of Elizabeth M. Lynch
Attorney, *China Law & Policy*

Hearing on H.R. 5175 - The DISCLOSE Act - Democracy is Strengthened by Casting Light on Spending in Elections

Before the Committee on House Administration
Washington, D.C.
Tuesday, May 11, 2010

Good afternoon Chairman Brady, ranking Member Lungren and distinguished members of the Committee. Thank you for inviting me to testify. My name is Elizabeth Lynch and I am an attorney and an editor at *China Law & Policy*.

I am grateful for this Committee's work on the DISCLOSE Act: legislation necessary to deal with the practical problems arising from the Supreme Court's recent decision in *Citizens United v. FEC*. Of particular concern in our post-*Citizens United* world is the potential influence of foreign money and—given the structure of some multinational corporations—direct pressure from foreign governments in our elections.

To guarantee a functioning democracy and a government accountable to its people, our country has a long-standing history of limiting participation in the electoral process to U.S. citizens.[1] While foreigners, including foreign corporations and foreign governments, are able to participate in other parts of our political process (such as lobbying and public comment periods), elections have remained sacrosanct; foreigners, be them citizens, businesses or governments, have never been permitted to participate in our elections. Voting, campaign donations, and campaign expenditures remain the exclusive rights of U.S. citizens.

In 1938, because of the fear of increasing foreign influence in U.S. politics, Congress codified this long-standing practice and passed the Foreign Agents Registration Act (FARA). In the 1974 Federal Election Campaign Act (FECA), Congress included a section prohibiting foreign governments, foreign political parties, foreign corporations

[1] The sole exception is green card holders. Green card holders may make a contribution to a U.S. campaign. Federal Election Commission, "Foreign Nationals Brochure," July 2003, p. 2 at http://www.fec.gov/pages/brochures/foreign.shtml.

and individuals with foreign citizenship from contributing, donating or spending funds, either directly or indirectly, in any U.S. election.

After *Citizens United*, however, it is questionable whether these longstanding prohibitions are still the law of the land.

The Court, in *Citizens United*, Rendered Corporations the Equal of Persons

This change stems from *Citizen United*'s unprecedented elevation of corporations to equal status with individual citizens in the sphere of political speech. For convenience's sake, the common law has periodically described corporations as "legal persons" and "citizens" of the state in which they are incorporated. But in *Citizens United*, this legal short-hand is taken literally. According to *Citizens United*, when analyzing a corporation's right to political speech, courts are no longer permitted to take into consideration elements that make corporations inherently different from individual citizens, such as limited liability, perpetual life and preferential tax treatment. Nor are courts allowed to treat corporations differently from actual human persons (as they have been doing since the country's founding).

Instead, after *Citizens United*, the law can no longer look behind the curtain of the corporate form: *Citizens United* commands that the law pertaining to political speech treat corporations exactly as individual citizens. What goes on behind the curtain, such as limited liability and the like, is no longer pertinent. Simply put, distinctions between corporations and human beings are no longer permissible and limitations on corporations' political speech are considered unconstitutional.

U.S. Subsidiaries of Foreign Corporations Offer a Loophole for Foreign Influence in U.S. Elections

In treating corporations the same as individuals, *Citizens United* leaves the door open for foreign influence in our politics. Today's corporations are global in scope and complicated in structure. For foreign corporations doing business in the United States, it is common to establish a U.S. subsidiary corporation. These U.S. subsidiaries of a foreign parent corporation are incorporated under state law, most often that of Delaware, and for purposes of the law, are considered "citizens" of the state in which they are incorporated. While in the past the citizenship status of a corporation was merely a legal fiction, *Citizens United* makes it into a reality.

Under *Citizens United*, we are no longer permitted to look behind the corporate veil of a U.S. corporation to see its possible relationship to a foreign corporation. But make no mistake: these U.S. subsidiaries are heavily influenced—if not outright controlled—by their foreign parent corporations. In a parent-subsidiary relationship, especially for foreign corporations, there is a high degree of overlap between the parent and its U.S. subsidiary; the parent usually owns a majority, if not all, of the shares of the subsidiary; capital is often infused to the subsidiary from the parent; and directors from the parent's board usually sit on the subsidiary's board of directors. But with *Citizens United*, what's going on behind the corporate curtain, such as limited liability or foreign ownership, is irrelevant as long as the American corporation's political speech rights are equal to an ordinary citizen's.

Foreign Governments Could Also Use the U.S. Subsidiary Loophole to Influence U.S. Elections

Perhaps even more pernicious is the ability of foreign governments to take advantage of the U.S. subsidiary loophole created by *Citizens United*.

Not all countries operate with the same business philosophy of the United States or Western Europe, where most corporations function independently of government. In socialist and post-socialist countries – like Russia, Vietnam and China – ties between business and government are particularly strong. Indeed, many of these countries' most successful corporations are controlled outright by the government. For example, in the case of China, three of its most profitable global corporations – Haier, China Telecom and China State Construction Engineering Corporation (CSCE) – all of which have U.S. subsidiaries incorporated in Delaware, are officially government-run. While the Chinese government does not meddle in the corporation's daily affairs, it will exert its influence if it suits the government's self-interest. For example, in 1994, Haier, a manufacturer of home appliances and one of China's most successful brands, was pressured by the Chinese government into acquiring a pharmaceutical company, a venture that ended badly.

Corporations in other countries, particularly oil-rich ones like Saudi Arabia and Venezuela, are often government-run and also own U.S. subsidiaries. CITGO is directly owned by Petroleos de Venezuela, Venezuela's state-owned oil company. Houston's Aramco Services Company is a wholly-owned subsidiary of Saudi Arabian Oil Company, the national oil company of Saudi Arabia.

In addition to ownership of U.S. subsidiaries by government-run foreign corporations, foreign governments can also influence U.S. elections through sovereign wealth funds: state-owned and managed investment funds. In the past five years, the world has seen an explosion of sovereign wealth funds, as commodity-rich and foreign reserve heavy nations, such as the United Arab Emirates and China, seek to invest their holdings abroad. In 2007, China's sovereign wealth fund, China Investment Corporation (CIC), bought a 9.9% stake in Morgan Stanley. The United Arab Emirates sovereign wealth fund, Abu Dhabi Investment Authority (ADIA), purchased a 4.9% stake in Citigroup in 2007. Interestingly, a member of the Saudi royal family, Prince Alwaleed Bin Talal Al Saud, owns a 4.3% stake in Citigroup through his company, Kingdom Holding.

It is the logic underlying *Citizens United*'s literal definition of the corporation as citizen that enables these foreign governments—through both subsidiaries of government-controlled corporations and through direct investment in state-run sovereign wealth funds—to potentially influence our elections. After *Citizens United*, courts are no longer allowed to look behind the curtain of the corporate form to the realities of the situation or to distinguish between corporate citizens and individuals; the majority opinion allows no leeway to examine the foreign origins of the shareholders. For the purposes of political speech, one person's U.S. citizenship, be it from a passport or from the documents of incorporation, is just as good as another's; to draw distinctions would be discriminatory.

The Threat of Foreign Government Involvement in U.S. Elections is Real

As the world becomes more interconnected and brands in other countries become more global, the number of U.S. subsidiaries with a foreign parent corporation will only increase. Noted international lawyer Dan Harris, of Harris & Moure in Seattle, believes that the current number is substantial. In just looking at China he remarked, "My small firm represents a number of U.S. companies that are wholly-owned by Chinese companies or by Chinese citizens and that convinces me there must be thousands of such companies in the U.S." And that is just in terms of China. Russia, Vietnam, Saudi Arabia, the United Arab Emirates, and Venezuela likely follow suit. In fact, from 1996 to 2005, foreign ownership of U.S. companies more than doubled.[2]

While certainly not all of these foreign companies are directly owned by foreign governments, the ones that are will have the greatest incentives to use the *Citizens United*

[2] "Foreign Ownership of U.S. Companies Jumps," Reuters, August 27, 2008 at http://www.reuters.com/article/idUSN2744743020080827.

loophole to influence U.S. elections and flood money into our electoral process. Foreign governments are motivated by more than just corporate profits; global influence, power and advantage are also a major part of their calculation. Even if involvement in U.S. elections might harm profits of the state-controlled foreign corporation, if the investment is ultimately beneficial to the foreign government for other purposes, it will seek to take advantage of the loophole. In extending a corporation's political speech rights, *Citizens United* hinges on the belief that groups of people organize themselves into corporations solely to make a profit. But in the case of government-run foreign corporations with U.S. subsidiaries, this is not necessarily the case.

Unlike before, many of these foreign governments now have the money to spend on U.S. elections. It's only been within the past five years that there has been an explosion in sovereign wealth funds and other countries' holdings of vast amounts of foreign currency reserves. China's foreign currency reserves have recently hit $2.4 trillion[3] and the United Arab Emirates' sovereign wealth fund, ADIA, has an estimated $450 billion in assets.[4] In analyzing investment possibilities, a foreign government might determine that a better return than holding cash would be to use its money to run advertising campaigns against a member of Congress who has voted against that country's interest.

Section 102 of the DISCLOSE Act is Necessary to Protect U.S. Elections from Foreign Influence

While some may argue that the current version of the FECA can close *Citizens United*'s U.S. subsidiary loophole, this is simply not true. In a post-*Citizens United* world, the current version of the FECA is glaringly ill-equipped to prevent foreign influence in our elections. Today, under the FECA, U.S. subsidiaries of a foreign corporation are only prevented from forming a political action committee (PAC) if either "the foreign parent corporation finances the PAC's establishment, administration, or solicitation costs," or "individual foreign nationals: participate in the operation of the PAC; serve as officers of the PAC; participated in the selection of persons who operate the PAC; or make decisions regarding PAC contributions or expenditure."[5]

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[3] Andrew Batson, "China's Foreign Currency Reserves Swell," The Wall Street Journal, January 18, 2010 at http://online.wsj.com/article/SB10001424052748703657604575004501953577566.html.

[4] Andrew England, "Abu Dhabi Names New ADIA Boss," Financial Times, April 14, 2010 at http://www.ft.com/cms/s/0/62a0c134-47bb-11df-a4a6-00144feab49a.html (subscription required).

[5] Federal Election Commission, "Foreign Nationals Brochure," July 2003, p. 2 at http://www.fec.gov/pages/brochures/foreign.shtml.

First, the FECA's current prohibition only applies to PACs and says nothing about direct expenditures by U.S. subsidiaries of foreign corporations, expenditures *Citizens United* now permits corporations to make through election night. China Construction America, the U.S. subsidiary of China's state-owned China State Construction Engineering Corporation, can easily buy advertising space during *American Idol* and run various advertisements urging U.S. citizens to vote for or against any candidate it perceives as sympathetic or hostile to China's interests, without running afoul of the current FECA. In fact, given the $2.4 trillion held by China in foreign reserves, China Construction America can likely buy *all* of the advertising space during *American Idol*, *Glee* and *Lost*.

Second, the FECA's current prohibition, written in 1974, prior to the explosion of multinational corporations and the formation of complicated corporate structures, is completely unhinged from today's realities. The current FECA assumes that corporate transparency exists: that money can easily be followed form a parent company to a subsidiary. But in fact, that is not the case. Under today's corporate law, there is simply no way to prevent an infusion of capital from one company to another. Aramco Services Company can issue more stock to be purchased by its parent, the Saudi government-controlled Saudi Arabian Oil Company. Aramco Services Company can then take that cash raised from its stock issuance and use it to flood television time with advertisements against any candidate that hints at supporting policies detrimental to Saudi Arabia. This would not violate the current FECA.

In order to limit the very real risk of foreign influence in U.S. elections after *Citizens United*, the FECA must be strengthened to deal with today's multinational corporations and the complex capital structure of parent-subsidiary relationships. Section 102 of the DISCLOSE Act does this. By expanding the definition of foreign nationals to include U.S. subsidiaries where a foreign corporation, government or person owns 20% or more of the voting shares or U.S. subsidiaries where the majority of the board of directors consists of foreign nationals, Section 102 will prevent foreign governments, through their government-run corporations, from impacting our elections. In addition to this general control test analysis, Section 102 also defines foreign nationals as any corporation where foreign nationals have the ability to direct, dictate or control the decision making process as it pertains to interests in the U.S.

Furthermore, Section 102(b) properly places the onus on the chief executive officer, under penalty of perjury, to comply with the legislation. Under Section 102(b), if a corporation chooses to expend funds for electioneering communication, the chief

executive officer is required to file a certification with the Federal Election Commission (FEC) that it is not a U.S. subsidiary that is controlled by a foreign corporation, government or person. It is important that the officers in the U.S. subsidiary are held responsible because they are often the only ones with access to information about share ownership, board membership and decision-making power. Many foreign parent corporations have American subsidiaries that are private, i.e., are not subject to the same reporting requirements as publicly-traded ones. In some states, such private corporations have no reporting requirements at all. With a private corporation, it is difficult to determine share ownership, identity of officers or even names of the directors. This difficult detective work should not become the FEC's responsibility when the officers of the U.S. subsidiary already know this information.

For these reasons I support Section 102 of the DISCLOSE Act as necessary legislation in order to prevent foreign influence in our elections and to guarantee that U.S. elected officials are accountable to the U.S. people.

Elizabeth M. Lynch

Elizabeth M. Lynch, founder of *China Law & Policy*, is an attorney who focuses on legal development and reform in China. Ms. Lynch recently concluded her work as research fellow at NYU Law School's U.S.-Asia Law Institute where she worked with Professor Jerome Cohen on criminal justice reform in China. Her work on Chinese legal reform and policy appears regularly in the *Huffington Post* and has been featured in the *China Rights Forum*. Prior to joining the U.S.-Asia Law Institute, Ms. Lynch was a practicing attorney in New York, working on commercial litigation including anti-trust and securities actions. She also worked on pro bono cases, including a state post-conviction petition for an individual on Tennessee's death row.

Ms. Lynch received her J.D. from Harvard Law School and her B.A. in Chinese Studies and Political Science from the State University of New York at Albany. In between undergrad and law school, Ms. Lynch was a Fulbright Scholar researching rule of law issues at Peking University in Beijing. She is fluent in Mandarin Chinese.

The CHAIRMAN. Thank you.
Mr. Toner.

STATEMENT OF THE HONORABLE MICHAEL TONER

Mr. TONER. Thank you, Chairman Brady, Ranking Member Lungren, and members of the committee for the opportunity to testify today regarding the DISCLOSE Act.

I am appearing today in my personal capacity and not on behalf of any particular client.

At the outset, I would like to emphasize that I am very troubled by the process by which Congress has considered the DISCLOSE Act to date. The legislation purports to respond to the Citizens United ruling but contains a large number of provisions that have nothing to do with the ruling and are in no way necessitated by the Supreme Court decision.

The legislation was crafted behind closed doors with, as far as I can determine, little or no consultation with the Republican congressional leadership, neither in the House of Representatives or the Senate.

In addition, the DISCLOSE Act seeks to make major changes to the Federal Election Campaign Act only months before a national election, with an effective date of 30 days after enactment, regardless of whether the Federal Election Commission has issued any regulations to effectuate the legislation.

Moreover, the DISCLOSE Act fails to define numerous key statutory terms, which creates some potential for widespread confusion among regulated entities about what their legal obligations are under the law, all of which could take place as soon as this fall in the final weeks before the midterm election.

Needless to say, the presence of any of these phenomena would seriously jeopardize the enactment of sound legislation. The presence of all three of them here makes it nearly impossible, in my view, for Congress to act in a responsible way.

I will not attempt to identify all of my objections to the DISCLOSE Act, which are outlined in greater detail in my written comments, but I would like to highlight two of the biggest problems I see in the proposed legislation.

First, the DISCLOSE Act would severely restrict the political activities of a large number of American corporations, including many longstanding companies run by American citizens, if foreign nationals are associated with the companies in certain ways. The practical effect of these provisions would be to prohibit many American companies from making any contributions or expenditures in connection with U.S. elections, from making any independent expenditures or election year communications, or even from operating a political action committee, which after all is funded by contributions from American citizens, is fully disclosed to the Federal Election Commission, and allows the company's employees to be involved in American politics.

The biggest targets of the legislation are American subsidiaries of foreign parent corporations, including companies that employ tens of thousands of Americans and have operations across this country. Targets of legislation potentially include Anheuser-Busch, Food Lion, Michelin North America, the Miller Brewing Company,

Nestle U.S.A., Panasonic Corporation, and the John Hancock Life Insurance Company, just to name a few of the legislative targets.

I understand that advocating for additional foreign national restrictions in American elections makes for good politics, particularly in an election year. But to potentially sweep up hundreds of established U.S. companies that are run by Americans and restrict them from being involved in American elections, in my view, is very misguided.

It is also unnecessary, given that the Citizens United ruling did not affect FECA's existing regulations on foreign national contributions and expenditures, which, after all, were strengthened just 8 years ago in the Bipartisan Campaign Reform Act of 2002, and given that no one has argued that there has been inappropriate foreign national involvement in American elections in recent years.

Second, a number of key statutory terms are not defined in the DISCLOSE Act, which makes the legislation unduly vague in a wide variety of areas. I will just touch on one key area, and that deals with political party coordinated expenditures. The DISCLOSE Act provides that payments by political parties for communications made on behalf of their candidates would be subject to FECA's party-coordinated expenditure limits but only if, "the communication is controlled by or made at the direction of the candidate." However, the legislation does not define or specify what types of candidate conduct or communications constitute direction or control within the meaning of the statute.

And that is a very important element. I think if Congress is going to amend the party committee coordinated expenditure limits, that there be key definitions as to what these statutory terms entail. My written comments go into a few scenarios that I think could easily arise and whether or not the legislation would restrict the activities or not.

But more broadly, given that political parties cannot corrupt their own candidates, political parties should be permitted to make unlimited coordinated expenditures without any qualifications or conditions whatsoever. It is important to note that, under current law, political party coordinated expenditures must be made out of hard dollar funds which are raised subject to the contribution limits and source prohibitions of FECA. Permitting unlimited coordinated party expenditures would allow the political parties to more efficiently target their hard dollar funds in the most important races across the country and also would be fully consistent with the Bipartisan Campaign Reform Act's emphasis on hard dollar fundraising and making those types of funds more important in Federal elections.

If Congress decides to amend FECA's political party coordinated expenditure provisions, in my view, it should lift the limits on party coordinated expenditures altogether without any statutory conditions.

Thank you so much, Mr. Chairman, for the opportunity to be with you, and I look forward to the questions.

[The statement of Mr. Toner follows:]

TESTIMONY OF MICHAEL E. TONER
BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION
REGARDING THE DISCLOSE ACT
MAY 11, 2010[1]

Thank you Chairman Brady, Ranking Member Lungren, and Members of the Committee for the opportunity to testify before you today regarding the Democracy is Strengthened by Casting Light on Spending in Elections Act ("DISCLOSE Act"). I am a Partner at Bryan Cave LLP in Washington, DC and I head the firm's Election Law and Government Ethics Practice Group. I am a former Chairman of the Federal Election Commission ("FEC") and served as a Commissioner on the FEC from 2002 – 2007. I submit these comments in my personal capacity and not on behalf of any particular client.

At the outset, I would like to emphasize that I am very troubled by the process by which Congress is considering the DISCLOSE Act. The legislation, which purports to respond to the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), was crafted behind closed doors with little or no consultation with the Republican congressional leadership in either the House or the Senate. In addition, the DISCLOSE Act seeks to make major changes to the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") only months before a national election, with an effective date of 30 days after enactment, regardless of whether the FEC has promulgated any regulations to effectuate the legislation. Moreover, the DISCLOSE Act fails to define a multitude of key statutory terms, which creates the potential for widespread confusion among candidates, political parties, corporations, labor unions, trade associations, and other affected organizations about what their obligations are under the law. Needless to say, the presence of any one of these phenomena would seriously jeopardize the enactment of sound legislation; the presence of all three with respect to the DISCLOSE Act makes it nearly impossible for Congress to act in a responsible way.

I will not attempt to catalogue all of my objections to the DISCLOSE Act, which are numerous, but I would like to highlight some of the biggest problems with the proposed legislation.

First, the DISCLOSE Act would severely restrict the political activities of a large number of American corporations – including many successful and longstanding companies run by American citizens and with substantial U.S. earnings – if foreign nationals are associated with the corporations in certain ways. These provisions of the DISCLOSE Act are unwarranted given that FECA and FEC regulations prohibit foreign nationals and foreign corporations from making contributions and expenditures in connection with U.S. elections. In addition, FECA's foreign-national restrictions were strengthened by Congress in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Moreover, there has been no evidence that existing law since BCRA has been ineffectual in preventing foreign national involvement in American elections, and the *Citizens United* ruling did not disturb any of these significant legal restrictions.

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[1] I would like to thank Karen Trainer for her able assistance in preparing this testimony.

FECA currently bars foreign nationals, including foreign corporations, from directly or indirectly making contributions or expenditures in connection with U.S. elections, including independent expenditures and electioneering communications. *See* 2 U.S.C. § 441e. In addition, the FEC has promulgated detailed regulations restricting foreign nationals from *inter alia*:

- directly or indirectly making contributions or donations in connection with federal, state or local elections (11 C.F.R. § 110.20(b));
- directly or indirectly making contributions or donations to political party committees, including national, state, and local political party committees (11 C.F.R. § 110.20(c));
- directly or indirectly making any disbursements for electioneering communications (11 C.F.R. § 110.20(e)); and
- directly or indirectly making any expenditures, including independent expenditures, in connection with federal, state, or local elections (11 C.F.R. § 110.20(f)).

In addition, under current FEC regulations no foreign national may "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 political 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." 11 C.F.R. § 110.20(i).

Notwithstanding these stringent restrictions on foreign national involvement in American elections, and despite no evidence of abuses in this area in recent years, the DISCLOSE Act would extend the existing prohibition on foreign national contributions and expenditures to U.S. corporations associated with foreign nationals under the following circumstances:

- If a foreign national directly or indirectly owns 20% or more of the corporation's voting shares;
- If foreign nationals comprise a majority of the members of the corporation's board of directors;
- If one or more foreign nationals have the power to direct, dictate, or control the decision-making process of the corporation with respect to its interests in the U.S.; or
- If one or more foreign nationals have the power to direct, dictate, or control the decision-making process of the corporation with respect to activities in connection with federal, state or local elections, including the making of contributions, expenditures, independent expenditures, electioneering communications, and the administration of a PAC established or maintained by the corporation.

See DISCLOSE Act § 102. The DISCLOSE Act would also require the CEO or highest-ranking official of the corporation to certify to the FEC under penalty of perjury that the corporation is not prohibited from making contributions, expenditures, independent

expenditures, or electioneering communications prior to doing so, unless the CEO or highest-ranking corporate official has already filed a certification during the year. *See* DISCLOSE Act § 102.

The practical effect of these provisions, if they were to become law, would be to prohibit many American companies from making any contributions or expenditures in connection with U.S. elections, from making any independent expenditures or electioneering communications, and even from operating a corporate political action committee ("PAC") funded by personal contributions from company employees who are American citizens and who wish to support the company's PAC. The biggest targets of the legislation are longstanding American subsidiaries of foreign parent corporations – companies that employ tens of thousands of Americans, have operations across the country, have significant U.S. earnings, and who may wish to make contributions or expenditures in connection with U.S. elections and to operate a company PAC.

The Organization for International Investment, which represents U.S. subsidiaries of foreign parent corporations, has highlighted in powerful detail the wide range of American companies that could be adversely affected by the DISCLOSE Act. Nancy McLernon, who is the President of the Organization for International Investment, has emphasized that:

> The DISCLOSE Act chips away at the political rights of the five million American workers who collect over $400 billion in paychecks from the U.S. subsidiaries of companies based abroad or 'insourcing' companies. Insourcing companies are American companies in every sense of the word, especially in the contribution they make to the U.S. economy and their local communities. As a company incorporated in the U.S., they have the same obligations and rights as any U.S. company.

Organization for International Investment Press Release (issued April 29, 2010) (attached hereto as Exhibit 1).

Approximately 160 U.S. corporations are members of the Organization for International Investment, and they include many companies that are household names in America and that employ tens of thousands of Americans, including Anheuser-Busch, BASF Corporation, Food Lion, Michelin North America, Miller Brewing Company, Nestle USA, Panasonic Corporation of North America, Thomson Reuters, and The John Hancock Life Insurance Corporation, just to name a few. Moreover, U.S. subsidiaries of foreign parent corporations employ millions of Americans and are active in communities across the nation. U.S. subsidiaries of foreign parent corporations reportedly:

- Employ 5.5 million Americans, which represents 4.6% of total U.S. private-sector employment;
- Support an annual payroll of $403.6 billion, with average compensation per worker of approximately $73,000, which is 35% higher than the compensation at all U.S. companies;
- Heavily invest in the American manufacturing sector, with 29% of the jobs at U.S. subsidiaries in manufacturing industries;

- Manufacture American export goods across the globe, accounting for nearly 18.5% of all U.S. exports; and
- Have a larger percentage of their workers (12.4%) covered by union collective bargaining agreements than do other U.S. companies.

See 4/29/10 Organization for International Investment Press Release (Exhibit 1).

A recent article in *The Hill*[2] highlighted additional concerns that American companies have regarding the DISCLOSE Act. For example:

- David Lustig, a Vice President of Unilever, indicated that Unilever is "concerned that the measure could implicitly undercut the principle of 'national treatment' embodied in U.S. investment policy and in bilateral investment treaties, deny equality of treatment to U.S. subsidiaries of foreign companies, send a chilling signal to potential foreign investors and encourage states to restrict the First Amendment rights of companies to defend their interests on initiatives and referenda."

- Sean Kevelighan, a spokesman for Zurich, stated that "Zurich American Insurance Co. is dedicated to ensuring we can continue to fairly and fully participate in the American political system, and we believe that any campaign reform measure must recognize this fundamental right for all Americans."

As Nancy McLernon emphasized in a *Wall Street Journal* article, "[t]alking about restricting foreign influence in elections may sound like good politics, but when you peel back the layers, it could have a wide spectrum of unintended consequences. There is no reason to distinguish a Nestle from a Hershey's."[3]

I understand that advocating for additional foreign national restrictions in American elections makes for good politics, particularly in an election year. However, to potentially sweep up hundreds of longstanding U.S. companies run by Americans and restrict them from being involved in American elections is terrible public policy. It is also disingenuous given that the *Citizens United* ruling did not affect FECA's existing restrictions on foreign national contributions and expenditures, which were strengthened just eight years ago by BCRA, and given that no one has argued that there has been inappropriate foreign-national involvement in American elections in recent years. There is simply no place in credible campaign finance legislation for these kinds of legislative provisions and Congress should summarily reject them.

Second, the DISCLOSE Act would require Section 501(c)(4) social welfare organizations and other types of tax-exempt organizations to disclose their donors if the organizations exercise their constitutional rights, recognized by the Supreme Court in *Citizens United*, to make independent expenditures and electioneering communications. Such compelled disclosure of donors to 501(c) organizations — which by law are not partisan

[2] Kevin Bogardus, "Multinationals Wary of Citizens 'Fix,'" *The Hill* (May 4, 2010).
[3] Brody Mullins and Jess Bravin, "Foreign Spending on Politics Fought," *Wall Street Journal* (January 29, 2010).

political organizations and which are not required to disclose their donors under the Internal Revenue Code – is inappropriate, particularly when the disclosure requirements are onerous and burdensome and are linked to the exercise of fundamental constitutional rights. If these provisions of the DISCLOSE Act become law, they will likely impinge upon the ability of progressive and conservative 501(c) organizations alike to speak out about federal candidates and officeholder and the major public policy issues of the day.

The DISCLOSE Act would require covered organizations — including corporations, labor unions, Section 501(c)(4) social welfare organizations, Section 501(c)(6) trade associations, and Section 527 organizations — to report certain information to the FEC regarding their donors if the organization makes independent expenditures or electioneering communications. Specifically, if independent expenditures exceed $10,000 in a calendar year or if an organization is required to file a report detailing electioneering communications, the organization would be required to disclose donor information. The disclosure threshold would range from $600 to $10,000 depending upon the structure of the organization's bank accounts, whether or not the contribution was designated for the expenditure by the contributor, and whether the communication was an independent expenditure or an electioneering communication. *See* DISCLOSE Act § 211(a) and § 211(b).

A number of progressive 501(c)(4) groups have expressed serious reservations about the compelled donor disclosure provisions in the DISCLOSE Act. For example, David Willett, a spokesman for the Sierra Club, indicated that the Sierra Club is "working to change the legislation" and that the compelled disclosure of donors is "a significant issue."[4] The Alliance for Justice reportedly shares the Sierra Club's concerns about the DISCLOSE Act.[5] As *Politico* recently reported, "[s]ome advocacy groups that typically align with Democrats such as the Sierra Club and the Alliance for Justice have also grumbled about the legislation . . . "[6]

The compelled disclosure of donors to 501(c)(4) organizations, which by law are organized and operate as social welfare organizations and not as partisan political organizations, appears to be designed and has the potential to deter such organizations from engaging in independent speech regarding federal candidates and officeholders, which is constitutionally protected under the *Citizens United* ruling. Although certain disclosure requirements involving political speech are constitutionally permissible, they must be narrowly tailored and not imposed to harass speakers or chill disfavored speech. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). *See also New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (First Amendment safeguards our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."); *Roth v. United States*, 354 U.S. 476, 484 (1957) (First Amendment assures an "unfettered interchange of ideas for the bringing about of political and social change desired by the people."); *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) ("[T]he purpose behind the Bill of Rights, and of the First Amendment in particular . . . [is] to protect

[4] Brody Mullins, "Disclosure of Donors Draws Fire from Left," *Wall Street Journal* (April 27, 2010).
[5] *Id.*
[6] Kenneth P. Vogel, "Dems Launch Citizens United Bill," *Politico* (April 29, 2010).

unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society."). The compelled disclosure of donors to 501(c)(4) social welfare organizations and to other tax-exempt organizations is an institutional concern, not a partisan or ideological one, and I am hopeful that the progressive 501(c) community will continue speaking out against the DISCLOSE Act.

Third, a number of key statutory terms are not defined in the DISCLOSE Act which makes the legislation unduly vague in a wide variety of areas. One of the most important of these areas concerns political party committee coordinated expenditures. The DISCLOSE Act provides that any payment by a political party committee for the direct costs of an advertisement or other communication made on behalf of a candidate affiliated with the party committee would be treated as a contribution to the candidate – and subject to FECA's party committee coordinated expenditure limits – "only if the communication is controlled by, or made at the direction of, the candidate or an authorized committee of the candidate." DISCLOSE Act § 104.

However, the DISCLOSE Act does not define or specify what types of candidate conduct or communications constitute direction or control and therefore would trigger the strict coordinated expenditure limits. Presumably if a candidate and a party committee chairman merely discuss particular advertisements that the party committee could air on behalf of the candidate, and the party committee subsequently airs the advertisements, such communications would not constitute direction or control within the meaning of § 104 of the DISCLOSE Act. But what if a candidate telephones a party chairman and requests or urges that the party committee air a certain advertisement on behalf of the candidate, and the party committee subsequently does so — does that constitute direction or control? What if the candidate calls the party chairman and demands that the party committee air an advertisement and the party committee subsequently complies? Or the candidate warns that he will have the party chairman ousted if he does not comply and the advertisement is subsequently aired? With the key statutory terms in § 104 left undefined, it is unclear what the legal consequences would be under any of these scenarios, and many of them are common occurrences in the daily interaction of candidates, political party committees, and their agents.

More broadly, given that political parties cannot corrupt their own candidates, political party committee should be permitted to make unlimited coordinated expenditures on behalf of their candidates without any qualifications or conditions. It is important to note that under current law, party committee coordinated expenditures must be made out of "hard dollar" funds which are raised subject to the source prohibitions, contribution limits, and reporting requirements of FECA. Permitting unlimited coordinated party expenditures would allow party committees to more efficiently target their hard dollars to the most important federal races in the country and could enable the parties to play a bigger role in federal elections. For all the foregoing reasons, if Congress decides to amend FECA's party committee coordinated expenditure provisions, it should lift the limits on coordinated expenditures altogether.

Fourth, the DISCLOSE Act includes a number of onerous reporting requirements. In most cases, these reporting requirements are duplicative and fail to provide any additional information to the public.

Under the proposed legislation, if an individual or entity makes or contracts to make independent expenditures aggregating in excess of $10,000 during the period up to and including the 20th day before an election, the individual or entity would be required to file a report with the FEC disclosing the expenditures within 24 hours. Additional reports would be required each time an individual or entity makes additional expenditures in excess of $10,000 during this time frame. *See* DISCLOSE Act § 201(b). Current law allows 48 hours for the disclosure of these independent expenditures.

The DISCLOSE Act would also require that all campaign-related disbursements made by covered organizations – including corporations, labor unions, Section 501(c)(4) social welfare organizations, Section 501(c)(6) trade associations, and Section 527 organizations – be disclosed on the organization's website with a clear link on the homepage within 24 hours of the organization reporting such disbursements to the FEC. The covered organization would be required to provide the information in a searchable, sortable and downloadable manner through a direct link from the organization's homepage. The organization would also be required to include the link on the organization's website until one year after the date of the election with respect to which campaign-related disbursements and communications were made. *See* DISCLOSE Act § 301.

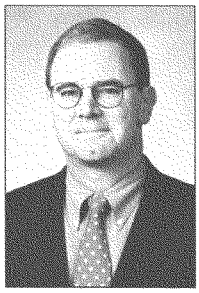
In addition, by January 31 of each calendar year, the covered entity would be required to provide a summary of aggregate disbursements for campaign-related activity during the previous year. The organization would be required to provide the summary in a searchable, sortable, downloadable manner from a direct link on the organization's homepage. The summary must include a breakdown by political party of the total amount disbursed in support of and in opposition to candidates of each party and a breakdown of the amount disbursed in support of or opposition to incumbent candidates, candidates challenging incumbent candidates, and candidates for election to an open seat. The summary must remain on the entity's website until the end of the calendar year in which the summary is posted. *Id.*

Additionally, the DISCLOSE Act would require that all campaign-related disbursements made by covered organizations be disclosed to the shareholders and members of the organization in any financial reports that are provided on a periodic and/or annual basis to the organization's shareholders or members. The information disclosed must include the date of the independent expenditure or electioneering communication, the amount paid, the name and office sought of the candidate and whether the communication was in support of or opposition to the candidate, and certain information regarding funds transferred to other entities for the purpose of engaging in independent expenditures and electioneering communications. *Id.*

These provisions do little more than require entities that make disbursements in connection with election-related communications to re-disclose information that is already publicly available or will be publicly available under provisions contained in current law or

other provisions of the DISCLOSE Act. For example, the report that covered organizations making election-related expenditures would be required to disclose on a public website within 24 hours of filing with the FEC would contain the exact same information that the organization would required to disclose to the FEC. Information sent to shareholders would also repeat information previously reported to the FEC. Similarly, information that covered organizations would be required to disclose in a year-end online summary would generally include information previously reported to the FEC, as well as information on totals that could be ascertained from previously reported data and publicly available information regarding candidates' party affiliation and status as an incumbent or challenger. Such duplicative reporting requirements are not appropriate, particularly given how onerous and burdensome that they are likely to be for many covered organizations.

Thank you very much for the opportunity to provide this testimony regarding the DISCLOSE Act. As the legislative debate concerning the DISCLOSE Act proceeds, I am hopeful that Congress will determine that the legislation is misguided and should be not be enacted into law, particularly in the final months before a national election. If Congress disregards these concerns and nevertheless enacts the DISCLOSE Act, litigation almost certainly will be brought which will allow the Supreme Court to act once again to safeguard the fundamental constitutional rights that were recognized in the *Citizens United* ruling.



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As head of Bryan Cave's Election Law and Government Ethics practice, Michael Toner is a widely respected election law expert and author on campaign finance matters.

He joined the firm in 2007 after serving as chairman of the Federal Election Commission in 2006. Toner served as an FEC Commissioner from 2002-2007.

A seasoned political veteran, Toner served as Chief Counsel of the Republican National Committee (RNC) in 2001-2002, as well as General Counsel of the Bush-Cheney transition team in Washington, D.C. and the Bush-Cheney 2000 presidential campaign in Austin, Texas. Prior to his tenure on the Bush-Cheney campaign, Toner was Deputy Counsel at the RNC from 1997-1999. He also was counsel to the Dole-Kemp presidential campaign in 1996.

Toner has written widely on campaign finance matters. Toner is a contributing author of three critically acclaimed books, including *The Year of Obama*, *The Sixth Year Itch*, and *Divided States of America: The Slash and Burn Politics of the 2004 Presidential Election*. Toner's articles have also been published in The Washington Post, The New York Times, The Boston Globe, The Chicago Tribune, The Washington Times, The Hill, and Roll Call.

Toner has appeared as a guest commentator on Fox News Channel, ABC News, CBS Evening news, Bloomberg News, Fox Business Network, C-SPAN and National Public Radio.

Publications

- "The Impact of Federal Election Laws on the 2008 Presidential Election," a chapter in *The Year of Obama*, edited by Larry Sabato (Pearson Education, Inc. 2009).
- "Emerging Campaign Finance Trends and Their Impact on the 2006 Election," a chapter with Melissa Laurenza in *The Sixth Year Itch*, edited by Larry Sabato (Pearson Education, Inc. 2008).
- "The Impact of the New Campaign Finance Law on the 2004 Presidential Election," a chapter in *Divided States of America*, edited by Larry Sabato (Pearson Education, Inc. 2006).
- "Observing the Restricted Speech Zone," with Robert F. Bauer, *Roll Call*, September 26, 2006.
- "Pass Pence-Wynn So We Can Fix Coordinated Expenditures," *Roll Call*, June 15, 2006.
- "Congress Should Pass Hensarling's Bill on Politics and the Internet," *Roll Call*, March 14, 2006.
- "Commissioner's Perspective: Permissible Corporate Involvement in Federal Elections," a chapter with Melissa Laurenza in *Corporate Political Activities 2005* (Practising Law Institute, 2005).
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- "527 Rules Needed Now," *Roll Call*, January 27, 2004.
- "Congress Should Overhaul Presidential Funding System," *Roll Call*, October 16, 2003.
- "Presidential Financing System Needs Overhaul," *Chicago Tribune*, September 28, 2003.
- "Show us the Money, The Federal Election Commission's Final Regulations," *Washington Times*, August 8, 2003.
- "Soft Money for Party Conventions," *Boston Globe*, August 7, 2003.
- "Reforming Campaign Finance," *The Washington Post*, July 6, 2003.
- Legislative Recommendations Regarding Presidential Public Funding Program, with Scott E. Thomas, February 9, 2005.
- Legislative Recommendations Regarding Presidential Public Funding Program, with Scott E. Thomas, April 16, 2003.

Speaking Engagements

- "Federal Campaign Finance in the Wake of Changing Legislation and Recent Supreme Court Decisions." American Conference Institute, Washington, D.C., April 29, 2010.
- "Demystifying the Practical and Constitutional Effects of *Citizens United v. The Federal Election Commission*: The Future of Campaign Finance Law." Georgetown Law School, Washington, D.C., April 13, 2010.
- "The Citizens United Case and Campaign Finance: A Victory for Free Speech or Threat to Democracy?" The Federalist Society, California Lutheran University, Thousand Oaks, CA, March 22, 2010.
- "A Major Landmark Ruling in the Citizens United v. FEC." Bryan Cave LLP Webinar, Washington, D.C., February 25, 2010
- "The Supreme's Citizens United: The Impact on Federal Elections." The Heritage Foundation, Washington, D.C., February 4, 2010.
- "The Brave New World of Campaign Finance." Thompson Reuters, Washington, D.C., January 27, 2010.
- "Association PAC Compliance Training." Public Affairs Council National PAC Conference, St. Petersburg, FL, February 22, 2010.
- "The Rules of the Road are Changing." Public Affairs Council National Grassroots Conference, Orlando, FL, January 22, 2010.
- "What's at Stake for You in Citizens United v. Federal Election Commission?" Public Affairs Council, Washington, D.C., September 3, 2009.
- "Symposium on the Rise of Election Litigation," William & Mary Law School, Williamsburg, VA, March 20, 2009.
- "Trade Association PAC Legal Overview," Public Affairs National PAC Conference, Orlando, FL, February 22, 2009.
- "Making Elections Work: The Law and the Process After November," Panelist, AEI-Brookings Election Conference, Washington, DC, December 4, 2008.

- "Tenth Annual American Democracy Conference Panelist", UVA Center for Politics, Charlottesville, VA, November 21, 2008.
- "Overview of the Honest Leadership and Open Government Act of 2007: New Challenges and Strategies for Government Relations and PAC Professionals," 2008 Vocus Users' Conference, Washington, DC, June 5, 2008.
- "Pollsters and Pundits," Council of American Survey Research Organizations Client Conference, New York City, NY, June 3, 2008.
- "Overview of the Honest Leadership and Open Government Act of 2007," Portland Cement Association, Chicago, IL, April 29, 2008.
- "The Presidential Public Financing System," Cornell Law School, Ithaca, NY, April 17, 2008.
- "The Presidential Public Financing System and Emerging Trends in Campaign Finance," University of Richmond, Richmond, VA, April 4, 2008.
- "Trade Association and Membership Organization PAC Legal Overview," Public Affairs Council National PAC Conference, St. Petersburg, FL, February 25, 2008.
- The Growing Legalization of American Politics," Maxwell School, Syracuse University, Syracuse, NY, October 26, 2007.
- "Recent Trends at the Federal Election Commission," Chamber of Commerce C-100 Retreat, Uncasville, CT, June 25, 2007.
- "Enforcement Cases at the Federal Election Commission," American Association of Oral and Maxillofacial Surgeons, Washington, DC, April 17, 2007.
- "The FEC and the Federal Election Laws: A Review of the FEC's Major Actions in 2006 and a Look Ahead to 2007 and 2008." National PAC Conference Public Affairs Council, Miami, FL, February 28, 2007.
- "The Effect of the McCain-Feingold Law on Politics," Federalist Society, University of Texas Law School, Austin, TX, February 19, 2007.
- "ReDEMption – Analyzing the 2006 Midterms," Panelist, 9th Annual American Democracy Conference, "The 2006 Midterm Elections and the 2008 Presidential Election," UVA Center for Politics, Washington, DC, November 30, 2006.
- "The Growing Importance of PACs under the McCain-Feingold Law," National Association of Broadcasters PAC Biennial Post-Election Conference, Palm Beach, FL, November 15-17, 2006.
- "FEC Rulemakings on Internet Regulation," Law and Politics Workshop, William & Mary Law School, Williamsburg, VA, October 19-20, 2006.
- "FEC Commissioner's Perspectives," Practicing Law Institute, Washington, DC, September 14-15, 2006.
- "How the FEC is Responding to Ethics Concerns in the Recent Regulations and in Enforcement," Public Affairs Council, Washington, DC, August 9, 2006.
- "Advice from the FEC Chairman: Corporate and PAC Compliance," NABPAC Rap Session, Washington, DC, July 18, 2006.
- "Regulation of Leadership PACs: Media and the 2006 Elections," Campaign Legal Center Roundtable Discussion, Washington, DC, July 17, 2006.
- "Politics and the Web," U.S. Chamber of Commerce C-100 Meeting, The Greenbrier, White Sulphur Springs, WV, June 24-27, 2006.

- BCRA: Major Changes to the Federal Election Laws," Vocus Conference, Washington, DC, May 24, 2006.
- "Keeping Your Association Straight with Campaign Finance/Political Issues in an Election Year," Health Care Trade Associations General Counsel Forum, Washington, DC, March 15, 2006.
- "The Future of PACs," Public Affairs Council PAC Conference, Miami, FL, February 13, 2006.

Congressional Testimony

- Testimony of Federal Election Commission Chairman Michael E. Toner and Vice Chairman Robert D. Lenhard on Indian Tribes and the Federal Election Campaign Act before the Senate Committee on Indian Affairs, February 8, 2006.
- Testimony of Federal Election Commission Vice Chairman Michael E. Toner Regarding Regulation of On-Line Political Speech before the House Administration Committee, September 22, 2005.
- Testimony of Commissioner Michael E. Toner before The Committee on House Administration, May 20, 2004.

Congressional Papers

- Legislative Recommendations Regarding Presidential Public Funding Program, with Scott E. Thomas, February 9, 2005.
- Legislative Recommendations Regarding Presidential Public Funding Program, with Scott E. Thomas, April 16, 2003.

Professional Affiliations

- Adjunct law professor, William and Mary Law School
- Lecturer, University of Virginia
- Trustee, American Council of Young Political Leaders

The CHAIRMAN. Thank you.
Mr. McGinley.

STATEMENT OF WILLIAM MCGINLEY

Mr. MCGINLEY. Chairman Brady, Ranking Member Lungren, members of the committee, thank you for the opportunity to testify today regarding the DISCLOSE ACT. I am testifying today in my personal capacity and not on behalf of any client or any other individual or organization.

The CHAIRMAN. Another freebie.

Mr. MCGINLEY. My testimony reflects my personal views on the DISCLOSE Act as a citizen and a political law practitioner.

I have serious concerns about this legislation because it appears designed to chill political speech and discriminate between different types of speakers. The fact that the Federal Government contractor and expanded foreign national bans apply only to corporations and not to similarly situated labor unions is particularly troubling. The only apparent reason for this disparate treatment is an attempt to elevate the labor union speech and possibly protect incumbents.

My testimony today will focus on two topics: First, the potential consequences resulting from some of the vague terms contained in the DISCLOSE Act; and second, the chilling effects some of the disclosure requirements will have on political speech.

The DISCLOSE Act contains many vague terms that will impose onerous requirements on political speakers. This will result in many of them inadvertently violating the law. First, the foreign national certification requirement under 102(c) appears to apply to every for-profit and nonprofit corporation. This means that not only will large publicly traded corporations be required to file the certification, but also every Federal campaign, PAC, and political party committee that is incorporated as a nonprofit corporation. In fact, it appears that the certification will need to be filed by incorporated State candidate committees and PACs and party committees as well, because the certification requires it for donations.

Second, the broad reach of the new definitions of independent expenditure under Section 201(a) and covered coordinated communication under Section 324(b) now appear to regulate Internet communications, including the liberal and conservative blogosphere. These provisions apply to "communications," an undefined term in the act. Current Federal law limits the application of these rules by using the definition of public communication that specifically excludes Internet communications, unless the Internet communication is an advertisement placed on another person's Web site for a fee.

Moreover, the media exemption contained in the DISCLOSE Act coordination rules under Section 324(b)(4) does not include Web sites or Internet communications in the same manner as current law. Therefore, this legislation does not exclude bloggers or Internet communications and places them at risk. If this bill passes, the Internet's status as a free speech zone is in danger.

Third, Section 324(a) provides that the republication in whole or part of any candidate or campaign materials constitutes coordination and results in a contribution to that candidate, regardless if

there is any actual coordination between the two groups. This is a radical departure from the current coordination framework, which requires that actual coordination be present.

Section 324(a) as currently drafted does not contain similar safeguards. This means that if an outside group uses a portion of a campaign ad or a brochure to criticize a candidate, it may result in a prohibited contribution to that candidate.

In addition, the DISCLOSE Act's burdensome reporting requirements will have a chilling effect on independent political speech. First, Section 102(c) requires every corporation to certify under penalty of perjury that it is not subject to the expanded foreign national ban prior to engaging in political speech. This requirement will cause delay when a political speaker conducts the due diligence necessary to make such a certification. This severely burdens speech because effective advocacy requires a speaker to be nimble in response to the political messages of others.

Second, the legislation requires a covered organization to file a public report, including posting the report on the organization's Web site if it transfers money to another person that is deemed to be made for campaign activity. These types of transfers are made before an advertisement is publicly released. This prespeech disclosure forces a speaker to confer a competitive advantage on its opponents by revealing its private political strategies. It also dilutes the effectiveness of the advocacy.

Finally, I am concerned that the legislation may become effective 30 days after enactment during the upcoming 2010 elections; 30 days is not enough time for the FEC to clarify the application of the DISCLOSE Act through the proper rulemaking procedures.

Equally troubling is the protracted process for judicial review of this legislation, which appears designed to push any potential judicial relief until after the 2010 elections.

I respectfully request that the committee not adopt the DISCLOSE Act and fashion a reasonable disclosure regime for independent speech that respects the freedoms of association and speech under the First Amendment.

I am happy to answer any questions you may have.

[The statement of Mr. McGinley follows:]

Testimony of William J. McGinley, Patton Boggs LLP
In His Personal Capacity

Before the Committee on House Administration
United States House of Representatives
May 11, 2010

H.R. 5175, Democracy is Strengthened by Casting Light on Spending in Elections Act ("DISCLOSE Act")

Chairman Brady, ranking Member Lungren, Members of the Committee, thank you for the opportunity to appear before you today to testify regarding the Democracy is Strengthened by Casting Light on Spending in Elections Act, otherwise know as the "DISCLOSE Act," H.R. 5175, 111th Cong. (2010).

I am appearing before you today in my personal capacity and not on behalf of any client, or any other individual or entity. Accordingly, my testimony today constitutes my personal views concerning the constitutional and practical implications of the DISCLOSE Act on the political process, and not the views of any other individual or entity.

The freedoms of speech and association under the First Amendment are important to me as a citizen and a political law practitioner. I previously served as Deputy Counsel at the Republican National Committee and General Counsel at the National Republican Senatorial Committee. In private practice, I served as outside counsel to the National Republican Congressional Committee advising it on political law issues and its independent expenditure unit. I currently advise corporations, trade associations, issue advocacy and grassroots lobbying organizations, federal candidates, political actions committees, and political party committees on political law compliance issues. Finally, I represent clients in enforcement matters and audits before the Federal Election Commission and state election agencies. I hope that my testimony today will provide the Committee with a practical perspective on the impact of the DISCLOSE Act on the political process.

I. The First Amendment Protects the Freedoms of Association and Speech – Freedoms that are Undeniably Chilled by the DISCLOSE Act.

The First Amendment's command is clear – Congress shall make no law abridging the freedom of speech. "Speech is an essential mechanism to democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010). The First Amendment has its most urgent application during the time period

immediately before an election because that is when voters and constituents begin to concentrate on candidates and the public policy debates. *Citizens United*, 130 S. Ct. 895 ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence."); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("WRTL") ("Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions."). If enacted into law, the DISCLOSE Act's prohibitions, onerous disclosure requirements, and expanded regulation of independent political speech (*i.e.*, speech that is created, produced and placed independent of any federal candidate or political party) will create a statutory framework that severely impacts core First Amendment activities. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

II. The DISCLOSE Act's Prohibitions on the Political Activities of government Contractors and Domestic Corporations with Limited Foreign Ownership are Unconstitutional under the First Amendment.

The DISCLOSE Act's political speech prohibitions on government contractors and domestic corporations with limited foreign national ownership or leadership constitute unconstitutional legislative determinations that identify certain classes of preferred speakers. Certain businesses are silenced, while similarly situated unions do not suffer the same fate. The only apparent explanation for this disparate treatment is the partisan political calculation that the Democratic Party will benefit from silencing its perceived issue opponents in the business community while exempting the similarly situated voices of its labor union allies.

The constitutionality of the DISCLOSE Act is suspect because under the Supreme Court's First Amendment jurisprudence, the federal government does not have the authority to prohibit some speakers from expressing their views on important issues of the day and

candidates for public office in an effort to elevate the voices of others. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 -85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.") (citations omitted); *see also Citizens United*, 130 S. Ct. at 899 ("By taking the right to speak from some and giving it to others, the government deprives the disadvantaged person or class the right to use speech to strive to establish worth, standing and respect for the speaker's voice."). In the context of independent speech – again speech that is not coordinated with a candidate or political party committee – these prohibitions are constitutionally suspect because they are not narrowly tailored to prevent corruption or the appearance of corruption. *Citizens United*, 130 S. Ct. 909 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."); *id.* at 910 ("Reliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.") (citations omitted).

More specifically, Section 101's prohibition on electioneering communications by any company with a government contract over $50,000 would silence an important segment of the business community. The legislation leaves similarly situated labor unions undisturbed by this prohibition, even if they represent federal government employees or the employees of a federal government contractor subject to this ban. This means that these businesses will be prohibited from defending themselves in the political market place of ideas, even if attacked by labor unions or federal officeholders, or from presenting their own views on important issues of the day that affect their industry and our country. *See Citizens United*, 130 S. Ct. 899 ("As instruments to censor, these categories are interrelated: Speech

restrictions based on the identity of the speaker are all too often simply a means to control content."). This prohibition gives a free pass to labor unions and federal officeholders to attack these companies because the companies will be subject to criminal penalties for publicly defending themselves.

Section 102's expanded corporate foreign national prohibition is similarly flawed. The legislation prohibits domestic corporations from sponsoring independent expenditures and electioneering communications if a foreign national – a foreign government, business or individual – owns 20 percent or more of the company's voting stock. The prohibition also extends to companies where foreign nationals constitute a majority of the board of directors, or foreign nationals have the power to control the company's decision-making process, including the decision-making process concerning political activities. In fact, this prohibition appears to prohibit such corporations from establishing and administering a political action committee. Labor unions with foreign national members or leadership are once again left undisturbed.

Current law, on the other hand, strikes the proper balance by prohibiting foreign nationals from participating in election activities or electioneering communications while preserving the political speech rights of a domestic corporation's American employees and shareholders. Federal law already prohibits foreign nationals from participating in federal, state and local elections. It prohibits foreign nationals from directly or indirectly making contributions or donations in connection with federal, state or local elections. 2 U.S.C. § 441e(a)(1)(A); 11 C.F.R. § 110.20(b). Likewise, foreign nationals are prohibited from making disbursements for electioneering communications, 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R. § 110.20(e), or expenditures or independent expenditures in connection with any federal, state or local election, 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R. § 110.20(f). Foreign nationals are also

prohibited from participating in any decision-making process concerning the political activities of the domestic subsidiary in connection with any federal, state or local election. 11 C.F.R. § 110.20(i).

III. The Legislation's Certification and Reporting Requirements Chill Political Speech.

With respect to the DISCLOSE Act's reporting requirements, the legislation's foreign national certification requirement for corporations is a prior restraint on political speech. It requires each corporation that intends to engage in political activities to certify under penalty of perjury that the corporation is not prohibited from engaging in such activities under the expanded foreign national ban. § 102(e) (amending 2 U.S.C. § 441e). This certification must be filed prior to making "any contribution, donation, expenditure, independent expenditure, or disbursement for an electioneering communication" and requires the filer to certify a legal conclusion regarding its eligibility to speak, not just provide information. *Id.* Therefore, the pre-political activity certification is similar to licensing law where the speaker must seek permission to engage in constitutionally protected First Amendment activities.

As applied to for profit corporations, the certification requirement will also cause a company to delay its contemplated political activities while it performs the due diligence necessary to ensure that it is not subject to the expanded foreign national ban under Section 102. This will be a draconian task since the statute does not provide any guidance concerning how to calculate the 20 percent voting stock threshold for the prohibition, or what constitutes the "power to direct, dictate or control the decision-making process" of the corporation by a foreign national. *See Citizens United*, 130 S.Ct. 895-96 ("These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and

governmental practices of the sort that the First Amendment was drawn to prohibit."). Since this process must be completed and the certification filed "prior" to engaging in political activities, it constitutes an unconstitutional prior restraint on political speech. *See Buckley*, 424 U.S. at 81-82 (discussing *Thomas v. Collins*, 323 U.S. 516 (1945), where the Court "held unconstitutional a prior restraint in the form of a registration requirement for labor organizers."). This is particularly troubling since political speech is not a carefully planned, long-term exercise, but a combative give and take that requires a speaker to be nimble enough to respond at a moment's notice to an opponent's message. *See Citizens United*, 130 S. Ct. 895 ("The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.").

In addition, the types of corporations that must comply with the pre-political activity certification requirement are not defined and the provision appears to apply to both for profit and nonprofit corporations. If the final version of the legislation does apply to nonprofit corporations, political party committees and political action committees that are incorporated as nonprofit corporations, and that intend to make contributions, expenditures or independent expenditures, will be required to file this certification before engaging in such activities. *See* 11 C.F.R. § 114.12(a) (providing that political committees, including political party committees and political actions committee may incorporate as a nonprofit corporation for liability purposes). This means that if a national party committee is incorporated as a nonprofit corporation, it is prohibited from making contributions to its candidates, or coordinated expenditures or independent expenditures in support of its candidates, unless and until the pre-political activity foreign national certification is filed with the Commission. This constitutes a prior restraint on political speech for these organizations as well.

The practical effects of the DISCLOSE Act's other reporting requirements infringe on an independent group's ability to privately formulate its political strategy. Section 211 requires corporations and nonprofits to file reports with the Commission within 24 hours of transferring money to another organization deemed to be for independent expenditures or electioneering communications. This reporting requirement, coupled with the pre-political activities certification requirement for corporations, forces the organization to signal its political strategy to its opponents thereby conferring a competitive advantage upon the opponent that chills and deters political speech. *See Bellotti*, 435 U.S. at 785-86 ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."). This compelled disclosure of an organization's internal plans, strategies and needs dilutes the effectiveness of the speech and will result in many organizations choosing to remain silent. *See Buckley*, 424 at 65 ("As we have seen, groups association is protected because it enhances effective advocacy."). As many of these groups have a valuable viewpoint to communicate, this is not a positive development.

In addition, the required disclosure of donors by organizations sponsoring independent expenditures and electioneering communications are constitutionally infirm. Section 211 requires nonprofit organizations to report donations if they make independent expenditures. However, the threshold amounts for disclosure are carefully calculated to ensure that labor unions are not required to disclose the members whose dues are used for the leadership's political programs. Section 211 imposes similar reporting requirements for organizations sponsoring electioneering communications or transferring funds to another organization that sponsors electioneering communications. These complicated conditions for disclosing donors such as determining whether a transfer is deemed to be made for the

purpose of making independent expenditures or electioneering communications, the establishment of separate accounts, the inevitable negotiations between potential donors and recipient organizations concerning whether donations will be used for political activities and, therefore, disclosed to the public in reports, will chill the associational rights of these groups.

Finally, the new disclaimer requirements will chill the speech of organizations that can afford to purchase only fifteen- or thirty-second radio and television ads. Section 214 requires the ad to name the sponsoring organization up to three times and include "stand by your ad" requirements for the head of the organization and its largest donor. This requirement will impact the effectiveness of the advocacy since the disclaimers alone will take an estimated fourteen seconds, thereby dramatically reducing the time available to actually deliver the speaker's political message. Also, the requirement to list the five largest donors on screen for television ads will distract viewers from the political message and dilute its effectiveness.

IV. The Revised Definition of "Independent Expenditure" is Vague and Overbroad.

Section 201's revised definition of independent expenditure and Section 202's revised definition of electioneering communication threaten to chill political speech by mischaracterizing protected issue advocacy as "election" or "campaign" speech through the use of labels and vague standards. Section 201's revised definition of an independent expenditure now includes "the functional equivalent of express advocacy" – a term that is complicated by a vague and confusing definition. This revised definition is a blatant attempt to mischaracterize constitutionally protected issue advocacy as campaign speech by legislative fiat.

> It would be a constitutional "bait and switch" to conclude that corporate campaign speech may be banned in part because corporate issue advocacy is not, and then assert that corporate issue advocacy may be banned as well, pursuant to the same

> compelling interest, through a broad conception of what constitutes the functional equivalent of campaign speech or by relying on the inability to distinguish campaign speech from issue advocacy.

WRTL, 551 U.S. at 480.

An electioneering communication is merely an issue advocacy ad that conveys information and airs in close proximity to an election – it is not campaign speech. An independent expenditure is campaign speech because it expressly advocates the election or defeat of clearly identified candidate or groups of candidates, including a call to action that advocates an election result. The DISCLOSE Act attempts an unconstitutional "bait and switch" by attempting to mischaracterize protected issue advocacy as campaign speech.

V. Conclusion.

The DISLCOSE Act imposes severe burdens on the fundamental First Amendment rights of organizations that wish to express their views. During these challenging times, Congress should not pass legislation designed to silence large categories of speakers where there is no compelling governmental interest to justify it. No such compelling governmental interest appears to exist here. Our country will benefit from a robust and open discussion of important issues of the day and the actions of elected officials impacting the same issues.

The federal government should adopt policies that encourage more political speech from more speakers, not less political speech from fewer speakers. The practical effect of the DISCLOSE Act will be to deny the American people information about candidates and issues because of the number of speakers that will be silenced by its prohibitions or are forced to remain silent due the legislation's onerous requirements.

Finally, I have grave concerns about the DISCLOSE Act becoming effective thirty days after enactment. Thirty days is simply not enough time for the Commission to promulgate regulations providing the regulated community with the guidance it needs to

comply with the legislation's onerous compliance requirements. Constitutionally protected political speech will be chilled as result.

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William McGinley is Of Counsel in the Washington, D.C. office of Patton Boggs, LLP where he advises a wide range of clients on political law issues. Specifically, Mr. McGinley advises federal and state candidates, political party committees, political action committees, donors, political vendors, and grassroots lobbying and issue advocacy organizations regarding campaign finance, tax, corporate, ethics, and broadcast compliance issues. He also advises corporations and trade associations regarding the formation and administration of political action committees, political activities and communications, and congressional and executive branch ethics matters.

In addition, Mr. McGinley represents clients before the Federal Election Commission ("FEC") and other government agencies in connection with audits and enforcement actions. He also designs and presents compliance programs and seminars for clients on political law matters.

During the 2008 election cycle, Mr. McGinley served as outside counsel to the National Republican Congressional Committee ("NRCC"). In this capacity, he advised the NRCC and Republican congressional candidates regarding campaign finance and other election law issues. He also advised the NRCC regarding the operations and activities of its independent expenditure unit.

Before joining Patton Boggs, Mr. McGinley served as General Counsel to the National Republican Senatorial Committee ("NRSC"). In this capacity, he advised the NRSC and Republican senatorial campaign committees regarding ethics, campaign finance, ballot access, and other election law issues. He also advised the NRSC regarding the operations and activities of its independent expenditure unit.

Mr. McGinley also has served as Deputy Counsel to the Republican National Committee ("RNC"). He advised the RNC, state and local political parties, and candidates regarding campaign finance, presidential candidate ballot access, and other election law issues. In this role, he also served as counsel to the RNC Standing Committee on Rules, which makes recommendations to the national conventions concerning the Rules of the Republican Party and national convention delegate selection and allocation procedures.

The CHAIRMAN. Thank you.

We will open up for questions. And I have a question for Mr. Potter. Is it constitutional to require disclosures of the donors to private groups that engage in political speech? And is it necessary?

Mr. POTTER. Mr. Chairman, I think, as my citations to Justice Kennedy in the 8–1 section of that opinion indicate, it is.

What Justice Kennedy and the Court were saying is that it is important for people to know who is speaking and where the funding is coming from. And that would be true whether we are talking about a corporation or a trade association or a union or a 501(c)(4).

Under current law, there is a range of disclosure that is already required, and that would apply to (c)(4)s as well. So I don't see a constitutional problem with the provisions of the act.

The CHAIRMAN. So what this bill does is say, who is saying something, and who is paying for something? That is really—

Mr. POTTER. That is my understanding.

The CHAIRMAN. Thank you.

Mr. Lungren.

Mr. LUNGREN. Thank you very much.

And this is more of a general question, but it is one that I have difficulty finely defining in my own mind.

I am for disclosure, appropriate disclosure. At the same time, we had an experience in California recently where we had a controversial proposition on the ballot called Proposition 8. It had to do with the definition of marriage. During the course of a court case that took place thereafter—it still is not resolved—there was a demand made, enforced by the court, that contributors to the Proposition be revealed.

Subsequent to that, some of my constituents and some just outside my constituency received retaliatory action because they had contributed as little as $1,000 on behalf of the Proposition, one individual being fired from his job or forced to resign from his job, even though it had nothing to do with the job that he had; another business being the subject of boycott and threat.

And I just say that as a factual matter. I know these facts to be true.

Do we say that that is the price of debate in a vigorous society, a vigorous political society, and therefore, even though disclosure may allow for those things to occur, if one wishes to express himself or herself politically by way of donation, that that person should expect that repercussions, including that kind of retaliation, should take place because we believe it is of a higher value for disclosure so that the public may know who seeks to influence decisions before the public?

Mr. Potter.

Mr. POTTER. I think there are two answers there.

One is that, as you are undoubtedly aware, there is a similar case right now in the Supreme Court, and there were oral arguments on it about a month ago out of the State of Washington with parallel questions.

I recall the accounts of that oral argument, and I am going to paraphrase Justice Scalia saying something along the lines of, people who engage in political public discourse shouldn't be shrinking violets.

But that is a flip answer, because the second part is that the Court said, going all the way back to a Socialist Workers Party case, that if you can show that there is going to be actual harm from disclosure, that you are going to be injured in a direct way, then you can be exempt from disclosure. And in fact, I believe it is still the case that the Socialist Workers Party has an exemption at the FEC from filing its donor disclosure forms because of that.

So on an as-applied basis, I think you can say, if there is proof that there is going to be violence or actual harm to somebody because of a disclosure statute, that they can apply for and be exempt. But that doesn't, in my view, mean that you shouldn't have the disclosure requirements for everybody else.

Mr. LUNGREN. Let me ask this question. I brought this up last week, and at least one of you talked about Venezuela having influence over our elections and so forth by way of this and maybe China.

We have laws on the book which say that foreign nationals cannot take acts to influence elections. I don't believe that Citizens United changes that, and the person making the decision for a corporation must be an American citizen rather than a foreign national. I don't believe that changes this at all.

But I do understand the concern people have with respect to, at some level, some threshold that you would have foreign influence because a corporation is somehow identified with foreign interest as opposed to other interests.

My question is this: As we try and articulate that proposition in the law, ought we be concerned about whether or not we give license to other countries to utilize that same argument against American companies who may operate in their territory?

For instance, if an American company were operating in Venezuela and the Venezuelan government were to say or the president of Venezuela were to say, we are going to put before our legislature a law which will nationalize American companies in this area of our economy, would we—should we be concerned about the inability of the American company to be able to respond to that by saying, even though it is a political decision, we believe this is unfair to our company and our employees in your country and therefore be subject to the law that they may adopt saying that criticizing prospective government decisions, that is bills before the legislature, or criticizing the candidate, the president is up for election when he makes this statement, is an illegal act and would subject the American company to criminal penalties, including imprisonment?

And this is not a flip question. This is a question that I really am somewhat concerned about. We have a legitimate concern here, but ought we not to be very careful how we write this so we don't give that kind of precedent for other countries to be able to use it against us? Obviously, they have their criminal justice schematic, but their definition of political participation may not seem to them entirely different than what we are attempting to restrict here, which is political free speech, otherwise thought. Would any of you respond to that?

Mr. COATES. Let me take a quick stab at it.

So my first response is I am a little confused, both—you make this point, and it was made earlier by some of the other panelists last week, that the existing law already prohibits foreign persons. So, but at the same time, I hear you, the same people, claiming that if we simply add the provision that is in this bill it will have terrible consequences. So either we have the law already in place and it works or we don't need to change it——

Mr. LUNGREN. If you would answer my question, please, because I only have a period of time. If you don't want to answer the question, I will ask somebody else to answer that question.

Mr. COATES. Honestly, that is a sincere response to your statement earlier that we already prohibit the thing that we are concerned about.

Now, in response to the point about foreigners, if we have public financing, as is true in Europe, of campaigns, this whole concern goes away.

Ms. LYNCH. I would just like to respond.

I really appreciate that you are thinking about the international effects of domestic legislation, because I do think a lot of times Congress doesn't look to that. And as somebody who works abroad and interacts with a lot of people in China and places like China, it is something that comes up, like what are the precautions if you are a foreign person abroad or a foreign business.

But I think in the case of the DISCLOSE Act, I do think it is less of a problem. I do think that Section 102 just returns what we had before Citizens United; it just returns it back to the status quo.

I think when Citizens United was decided, I think somebody on the panel said that a lot of corporations were surprised by its decision. And I think that would equally hold true of foreign governments. I don't think foreign governments ever thought they would have the ability to put money in our elections.

And I also think there are other avenues open to foreign governments and foreign corporations in the United States that they effectively use, such as lobbying and also comment periods before rulemaking.

And what is really interesting to note in the case of China is that it has actually become much more responsive to U.S. interests—not U.S. interests, but it has allowed for U.S. corporations, U.S. Chamber of Commerce to actually give comments to recent laws that it has adopted, such as the anti-monopoly law and the amendments to their labor contract law. And all of that happened before Citizens United.

So I actually think, while it is important to always be thinking about potential implications abroad of our own domestic legislation, I think Section 102 wouldn't have necessarily that retribution.

Mr. LUNGREN. I just recall the argument of the government in the first oral argument before the Supreme Court was that the government has the right to even ban a book if published by a corporation that criticized someone within the 90-day period who happened to be up for election. And that bothers me a great deal because that goes far beyond the idea that you are directly contributing to a candidate. That takes expression to the furthest extent, and one thing we have always been a little concerned about is that.

And frankly, I was surprised that the government took that position, but that was the position of the Federal Government. And I certainly wouldn't want that to be the position of a foreign government, saying, well, that is the position that you folks have taken in the United States.

Thank you very much, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

Before I ask my questions, I wanted to note that I see former Representative Pete McCloskey here in the audience, someone who was a tremendous hero and whom we all admire.

And, Pete, it is just great to have you here in the committee room.

Mr. Coates, I am glad that we have got a corporate lawyer, not just constitutional lawyers here, because there are some questions I have had, and maybe you can help answer them for me.

When I read the decision, I will say I didn't agree with the decision, but it is the law. So now we have to see what is there and see what is possible consistent with the law. I accept that.

But here is what I am interested in probing. The decision says the First Amendment does not allow the power to prevent corporate speech, to paraphrase; there is, furthermore, little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy. When I read that, I thought, I don't know about that. I mean, corporate democracy isn't that vibrant really.

And towards the end of the decision, it talks again about shareholders. And I will read just part of it. It says, shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative, which really I think asks us—it is reaching out and enticing us to establish a vigorous disclosure procedure—and again, with the advent of the Internet, prompt disclosure 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 interests in making profits and citizens can see whether elected officials are in the pocket of so-called moneyed interests. The First Amendment protects political speech. The disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. And I have been wondering what "a proper way" might be. And it goes on to say that transparency enables the electorate and the like.

Now, I have been thinking about when shareholders, when you buy a piece of stock, your basic interest is in your return. It is in getting dividends and having the price increase in value so you can sell it. It is not so the officers and the directors can use your money or what would have been your dividend to play politics with your money.

And right now, I don't see any way to protect—I mean, put the free speech issues just to one side for a minute. How can shareholders be protected? I mean, if the value of the share is dimin-

ished because of the expenditure decisions made by the officers and directors to say "sell the stock" is not the remedy because the stock value has been diminished. And also, if you are in a closely-held corporation, you are especially vulnerable because you can't sell the stock, even if that were a proper remedy, which I think it is not.

It seems to me that the business judgment rule really protects and insulates the officers and directors from accountability. And I have been exploring, is there some way that we could give shareholders some kind of remedy at law when there are expenditures for political reasons, which is protected, but the end result is the shareholder eats it financially; shouldn't they have some kind of remedy? How would you craft that?

Mr. COATES. Thank you for your question.

Yes, I agree that the Supreme Court—I agree with the implication of your question that the Supreme Court was a little over-optimistic about the ability of shareholders under current law to take action.

And the most basic point is that, without the disclosure requirements of the kind that are in this bill, they won't even know what is being done with their money.

Ms. LOFGREN. Well, if I may, the disclosure requirements benefit the electorate, and then they can make a decision.

I remember—and I am sure Dan remembers as well—in California, a number of years ago, there was an initiative to regulate smoking in public places. And as soon as the public found out that it was funded by the tobacco companies, it just crashed in the polls. I mean, it went down.

So the disclosure benefits the electorate, but the disclosure doesn't actually solve the problem for the shareholder, does it?

Mr. COATES. It does not completely solve the problem, but it is a minimum. It is a necessary thing. I think one thing, at least in principle, that shareholders could do if they were dissatisfied with what they learned their money was being used to do is to sponsor bylaw amendments that would then further control the use of political money by the companies in which they invest.

And in fact, a significant number of companies have voluntarily adopted mandatory self-imposed disclosure requirements and reporting requirements. And I think, for that reason, that is another reason that this bill is in line with what in fact shareholders would want.

I think it is also reasonable to explore alternative means to give shareholders more of a role in this area, and I think there are other bills that are out there that are worth exploring and working on to see if we could get that done, too.

Ms. LOFGREN. If I could just do one quick follow up. On that point, I don't think it belongs in this bill. I think that these disclosure provisions are essential, and it needs to move promptly. But on a separate track, I have been thinking, shouldn't the shareholder—I mean, we really tightened up derivative—I mean, shareholder lawsuits. And, actually, I was one of the Democrats that voted to override President Clinton's veto on that, and I am glad I did, and I think it was the right vote to this day.

But there are circumstances where, I mean, other than having the ability to go after the corporation that took your dividend and spent it on their pet project, what remedy do you have?

Mr. COATES. The United Kingdom currently requires prior shareholder authorization for political activity. I am not necessarily saying that we could take it from their system and put it in ours exactly in the way that they do it, but that is at least worth exploring.

I will also point out that, to the extent people are concerned about parity between unions and corporations, union members all have basically a right to opt out, not as a vote, not as a collective, but individually on whether they want their money used for political purposes. And so if you wanted to be strictly parallel, you would give every shareholder of every corporation the right to veto their personal pro rata share of proposed political expenditures, and that would be substantially more than the United Kingdom has done. But I think those are things that are at least worth putting in the mix.

Ms. LOFGREN. If I may, and perhaps I can follow up with you subsequent to this, because I think certainly we have tried to be evenhanded so that the rules will follow for everyone. But the union members don't have their entire life savings at stake; the shareholders do. And to say that your pro rata share can be walled off doesn't really do you any good if the stock takes a dive because your CEO, as a wild-eyed lefty, goes off on some tangent and the right wing organizes a boycott, and the stock takes a dive; how does that help you?

Mr. COATES. I would love to follow up and work with you on alternatives to add to what is in the bill, but I just want to reemphasize, without disclosure, none of the rest of it works.

Ms. LOFGREN. Thank you.

I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentlelady.

Mr. Harper.

Mr. HARPER. Thank you, Mr. Chairman.

Mr. Potter, if I could, earlier you made a statement in your opening remarks that this should not be a partisan issue. Does the fact that this is the committee of jurisdiction on this bill, that none of the Republican members of this committee were consulted, does that not make it partisan?

Mr. POTTER. I don't know who was consulted in the process, Mr. Harper.

I do know that I was continually hearing through the spring that one of the reasons that the bill had not yet been drafted and introduced as people had talked about doing shortly after the decision is that they were looking for Republican partners and not finding many.

Since this is the committee of jurisdiction, what I am hopeful at this stage is that in the markup process, there can be a coming together, because, as Mr. Lungren said, I think both sides have favored disclosure as the essence here, and what I am hopeful is that people can coalesce around the details of it.

Mr. HARPER. Senator McCain made some remarks on this, that he thought that this legislation, the DISCLOSE Act, would favor unions. Do you agree or disagree with that statement?

Mr. POTTER. Well, as I said, I am not here speaking on behalf of any client, including the good Senator.

Mr. HARPER. I understand.

Mr. POTTER. I think, having looked at it, and I read the testimony from last week that said it would favor unions, it seemed to me that the disclosure provisions were evenhanded. They would apply to both corporations and unions.

And I can certainly remember past campaigns where unions paid for advertising that ran under catchy names that didn't say anything about unions, "Americans for a Better Country" or something. So I think the fact that it would have to disclose the names of the unions that are sponsoring it, and that it was specifically sponsored by unions, would be an important disclosure provision and probably news to viewers who are used to just seeing the catchy name on it.

Mr. HARPER. Is it your understanding that if corporations received TARP funds, that they are restricted under this bill?

Mr. POTTER. I believe that is the case, unless they paid them back.

Mr. HARPER. But their unions are not restricted. So I am trying to figure out how that——

Mr. POTTER. I suppose if they received TARP funds, but I don't think any of them did.

There are going to be provisions of the bill—the other discussion has been Federal contractors—where there are going to be more corporations affected than there are unions, because there are going to be more corporations that are Federal contractors than they are unions, but I don't know that that makes the bill discriminatory against corporations.

We have to start with the fact that Citizens United is a case about corporate spending. There was no union in that case. I think lawyers assume that unions have the same First Amendment rights as corporations do, but the whole Supreme Court decision is about corporate spending, corporate disclosure, corporate shareholders because that was the case before them.

Mr. HARPER. Thank you, Mr. Potter.

Mr. Toner, do you agree or disagree with Senator McCain's statement that unions are treated—that this may favor unions a great deal?

Mr. TONER. I don't think it is a bad deal for the unions. That would be my short summation.

And if I may, Congressman, two quick points I would make. A couple of the panelists have emphasized that Citizens United was a shock. I think, in many ways, Citizens United was a resettling of precedent in terms of the First Amendment values the Court has emphasized.

And I say that because Citizens United overruled Michigan v. Austin Chamber of Commerce that in many ways was an outlier because the Supreme Court has emphasized that when you are talking about independent speech, there is no anticorruption rationale for restricting it. And so, starting with individuals in Buck-

ley v. Valeo, that is unlimited; starting with political action committees in NCPAC, that was held could not be restricted. Nonprofit corporations, in Massachusetts Citizens for Life could not be restricted. Political parties could not be restricted. Really the only entities in America left were for-profit corporations. And so, in that respect, I think Citizens United was a reordering of the decision.

And beyond that, of course, as you know, a large number of jurisdictions in this country for decades have allowed corporate contributions and expenditures before Citizens United. And I think it is fair to say that some of the best governed States in the Nation operate in those types of regimes, such as, for example, Virginia. And we have not seen the parade of horribles displayed there that we are hearing a little bit this afternoon.

So, for all of these reasons, I really think in many ways, particularly in the foreign national area, this is a statute searching for problems that don't exist. And I will emphasize one thing: Current law does not prohibit American companies that are owned 80 percent by Americans from being involved in U.S. elections. This bill would. I don't think that is appropriate. Maybe other people think it is, but I think that is really a misguided policy choice.

Mr. HARPER. Mr. McGinley, you were talking earlier and you mentioned about this taking effect within 30 days after passage without any regs being written. To your knowledge, has the FEC implemented or given any regulations on the Citizens United case, which was decided back on January 21 of this year?

Mr. MCGINLEY. No. I believe the only thing that they did was put out a policy statement that said that the regulations affected by the decision would no longer be enforced.

Mr. HARPER. Can you think of any reason, other than to impact the November 2010 election, of why would you have this take place without the regs being in effect?

Mr. MCGINLEY. I think that would be the sole reason, because a number of the things that are happening in this bill. The unions are left untouched by the government contractor and the foreign national ban, despite the fact that a union may be an international union with international members receiving dues from an international source, or a union representing the employees of a Federal Government contractor or a union representing Federal Government employees that may be similarly situated. And so those types of labor unions are left untouched, left free to engage in the speech.

And I also might add, under the disclosure regime, it is my understanding that there have been some studies where the average dues that unions receive from a member is below the thresholds for the reporting. What we are seeing is a carefully crafted disclosure threshold amount that requires the disclosure of donors to make sure that union members are not disclosed, and I think that that is very troubling.

Mr. HARPER. Thank you, Mr. McGinley.

Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you.

Mr. Capuano.

Mr. CAPUANO. Thank you, Mr. Chairman.

As far as participation of the process, I mean, if there are amendments to be offered this week or whenever we are going to do the

markup, I am more than happy to look at every amendment offered by any member of this committee and make a judgment on that, and maybe even co-author.

I have some of the same concerns, I said at the last hearing, on the definition of what a foreign corporation is. And if there are thoughtful amendments that are offered, I might even co-author them.

I am not going to do it with the intent of killing the bill because I think the concept is right, but around the details, I am more than open to some of these things. I think some of these concerns are generally okay.

First of all, Mr. Potter, I want to thank you very much. I am not sure, but I may be the only person up here who had an opponent from the Socialist Workers Party, and I didn't know why they didn't file anything. Now I do. I just figured they didn't raise any money. Maybe they raised a lot, and I didn't know it.

Is there anybody on the panel that thinks that, regardless of the definition of a foreign corporation, that a United States citizen that works for a foreign-owned corporation could not make a contribution? Is there anybody here that thinks that this proposal would prohibit a U.S. citizen who works for CITGO or ADIA or anybody else from making a contribution?

Go ahead, Mr. Toner.

Mr. TONER. It would, yes. It would restrict a U.S. citizen from contributing to the company's PAC; yes, sir.

Mr. CAPUANO. No, no, to an actual political campaign or to a specific ballot question or anything else.

Mr. TONER. You mean, setting aside the ability to contribute to the company's PAC, which is a vital part of being involved in American politics?

Mr. CAPUANO. Actually, you know what, I would ask you, and that is fine, if you think so, I would like you to show me that specific language because that is a fair concern. I don't read it that it does, but if you do, I am happy to look at that.

But do you see anything in here that would prohibit them from contributing to my campaign?

Mr. TONER. Setting aside the inability to contribute to the company's PAC, I agree with you. But I do think the PAC is an important issue.

Mr. CAPUANO. I don't disagree, and I would be happy to consider that. But the average employee of a foreign corporation, regardless of whether it is a wholly-owned subsidiary of the government or not of a foreign company, could contribute; we all agree with that. So, therefore, they have the right to participate in their own elections.

Does anybody here think that—and again, CITGO, I am not sure they are a corporate organization. But I am positive ADIA is a corporation sponsorship. ADIA is the largest owned, largest sovereign wealth fund in the world, wholly owned by the government of the United Arab Emirates. Does anybody here think really they should have a right to participate in my election? Do you really think that? And if you do, it is okay; I just want to know it.

Mr. TONER. I don't mean to be so disagreeable. Two points: I think it is illegal under current law, and I am not familiar with CITGO making contributions or expenditures——

Mr. CAPUANO. I didn't ask whether it was legal. I asked whether you think they should be able to do so.

Mr. TONER. Well, I do think it is relevant to assess whether it is lawful under current law, and I think it is unlawful.

Mr. CAPUANO. No, because we are the ones who write these laws, so that is what I am trying to assess. I am trying to assess—my question, every time I write a law, is what do I want the law to be; not what the law is. I want to know, what kind of a world do I want to live in, not just in this; every time I participate in writing legislation, what is my goal? And I would argue that my goal would be to keep foreign entities out of my elections, but I am just curious if anybody here thinks that a corporation that is a wholly-owned subsidy of a foreign government should participate in the American electoral process. It is a philosophical question, not a legal one.

Mr. TONER. Well, this law, this proposed law goes far beyond that goal, Congressman, and would sweep up U.S. Companies and U.S.——

Mr. CAPUANO. Mr. Toner, I guess if you don't answer the question, that is okay. You are entitled to not answer the question. The other people aren't answering it, and that is okay. But it is a very simple question: How is it that you don't understand that question?

Mr. TONER. If you want to make it illegal for American companies that are owned 80 percent by Americans, that is fine; that is your legislative choice. That is what this would do.

Mr. CAPUANO. Mr. Toner, I can talk slower if you want me to. Do you think that a foreign corporation that is a wholly-owned subsidiary of a foreign government should participate in the elections of American politicians? Very simple question.

Mr. TONER. I appreciate the cadence of your question. The answer is, no, but that is not necessary by this bill.

Mr. CAPUANO. Thank you. I appreciate that, because I don't either.

And once you decide that some corporation should not participate in the American electoral process, then the next question is, where is the line? We are no longer at the question of whether corporations should or shouldn't; the question is, which lines? I think those are fair questions.

Twenty percent may be too low, a couple of members of the board maybe. Those are fair points, and I would be open to anybody making a reasonable suggestion to decide maybe the standards are a little too low; maybe they should be different. That is a fair point.

But the concept of saying foreign governments, foreign corporations should not participate in the American electoral process I think is fair.

As far as American corporations participating in other countries, they can and will do that whether we do anything or not. And that is the risk they run, and most companies, especially in China. I don't think that China—actually, you cannot do business in China unless the person who runs that corporation is a Chinese citizen. It is kind of simple. So they kind of already raised the standard.

You can't do business in China as an American citizen on your own, under a corporate format anyway.

Am I wrong about that, Ms. Lynch?

Ms. LYNCH. You can't do business legally in China, yes.

Mr. CAPUANO. Legally. Of course, we only want to talk about what is legal under the law.

So I guess I also want to talk about the shareholder issues that Ms. Lofgren was talking about. Just out of curiosity, on the general concept, if any corporation, the most American corporation of all American corporations—whoever makes the American flags—I hope they are made in this country. I don't know. But the most American corporation, if that corporation has a dollar sitting around that they don't need to run the corporation, they don't need to buy any more machines, they don't want to hire anybody; whose dollar is that? I would argue that it would be the shareholders? Anybody disagree with that? Do you think it belongs to the CEO of the corporation? Okay. I guess that is unanimous for the silence.

I would think that it is the shareholders' money. And that being the case, I would then argue that any of these dollars should be subject—again, I am going back to Ms. Lofgren's suggestion and Mr. Coates' comment or suggestion with the comment, that when it comes time for corporations to spend money that they do not need to run the corporation, it should be the decisions of the shareholders to do so. And if they do—and I make no bones about it, I start from the premise that I don't like this decision, but okay, as Ms. Lofgren said, it is the law. I am really kind of over it. I was over it pretty quickly. On the level of how angry I get about this decision, it is really not that high. There are a whole lot more decisions that the Court has made that I didn't like. We can start with Bush v. Gore, but that is a different issue.

But all that being said, Mr. Coates, and for others, I would ask you to look at the Shareholder Protection Act that has been proposed that would allow shareholders to be the decision makers as far as how much money a corporation is—that is not for today's discussion though.

I guess on the final point that I want to make, on retaliation, because I think retaliation is a fair point to make, and it is a real fact of life; I have seen retaliation in political circumstances all my life. And I don't like them. As a matter of fact, when I was mayor of my community, one of the things I did, I banned lawn signs, which is, by the way, unconstitutional, but we did it anyway. And we lost in court, which I knew we would.

But then I put political pressure on those who put yard signs up. The rule was, if you come into my city and you want to put up yard signs, you buy my political opposition. And for 10 years, we had no yard signs. Neighbors got along. Everything was fine. That was my definition of terms.

So retaliation, I think, is a very real consideration. However, the question to me then comes, retaliation doesn't just come on these issues. Is not retaliation potentially possible in straight-up political elections like, for instance, district attorneys, judges, attorneys general? Even Members of Congress might feel some compunction about maybe not being so friendly to someone who opposed them. So is retaliation in this circumstance, does anybody see it here as

any different, any more nefarious, or any more possible than it is in any other political situation? If you do, do you think that those contributions to judges running for office or DAs or attorneys general, should they be secret as well?

Mr. COATES. Could I say, I think it is less—when I give money to my local Congressman—Barney Frank, for example; I live in Newton—that is instantly disclosed on the Web. It shows up so fast, and people track it, and then they analyze all the professors at Harvard and all professors generally. And they publish reports about it, and we get retaliated against. So you're telling me that I get retaliated against, that is not so bad; but if Exxon gets retaliated against, that is terrible.

Mr. CAPUANO. Who would dare retaliate against a professor in my district?

With that, I—I actually have no time left, so I give back what I don't have.

The CHAIRMAN. Well, I think this is an important bill, so I will let the blinkers go right by.

Mr. LUNGREN. I am just surprised that a Harvard professor would get retaliated against for contributing to Barney Frank in Massachusetts. I guess I don't understand Massachusetts.

As I understand the general proposition, the Supreme Court has basically said that you can restrict types of political participation, and we can put limits on expenditures to candidates, for instance, even though the use of money is free speech because of the corruptive influence or an attempt to try and eliminate or at least ameliorate the potential corruption; I mean, that is sort of a gross statement.

Presumably that is the same basis for which this bill does not allow those who are Federal contractors to participate as others might participate. If that is the case, what is the essential difference between a corporation that has a government contract and a grantee of the Federal Government, which is not so impaired under this bill, or we talk about unions, a public employee union is not similarly restricted? Mr. Toner or Mr. McGinley or anybody else, can you tell me why there is an essential difference in those categories?

And if there is not an essential difference, does that not give rise to a potential constitutional challenge where the Court has already told us, you cannot distinguish between corporations or different types of associations, free speech rights, and in this case, it would seem to me that if you differentiate between unions and corporations, one having a contract and the other having a relationship with the Federal Government representing Federal employees who get their direct pay from the Federal Government, how is that distinguishable? Or do you think that might give rise to a constitutional challenge in the courts?

Mr. MCGINLEY. I will take the first crack at this one.

I think that it does give rise to a constitutional challenge in the courts for the very reasons that the Court laid out in Citizens United. The Court said that the Federal Government does not have the authority to distinguish between different speakers who choose to speak in the political process.

If you have a corporation with a contract with the Federal Government and you have a labor union that represents Federal Government employees, a public service union, there really should be no difference between the treatment of the two under the law. What this does is decide that the employer cannot speak about issues that may be of concern to the employer.

Mr. LUNGREN. Because of the potential corruptive influence.

Mr. MCGINLEY. Because of the potential of corruption, which is the only compelling governmental interest that can satisfy the need to limit the speech, as opposed to the union, which represents the employees of the Federal Government and engages in collective bargaining. Why there should be a difference between those two types of situations I cannot explain.

However, I can say that the Court was very clear about the fact that we need to have more speech from more speakers, and that the Federal Government contract prohibition that is currently in the DISCLOSE Act is going to prevent these companies from speaking out. Not only on express advocacy, which would be the advertisements that advocate the election or defeat of a candidate, but it may also prohibit them from speaking out with Electioneering communications, which now, under the bill, are not only from 60 days back from the general election and 30 days back from the primary; they begin from 120 days back from the general election. So if there is a bet the business piece of legislation that is moving through Congress that could endanger this company's business, they don't have the authority, not to advocate the election or defeat; they can't even discuss the business and ask the general public to contact those Representatives because that may be a prohibited communication under this bill.

Mr. LUNGREN. And what type of media can they use?

Mr. MCGINLEY. They wouldn't be able to use the television or radio under the Electioneering communication ban. But also under this bill, you have expanded the definition of an independent expenditure, which is something that applies year-round. Not only does it include express advocacy, which are those advertisements that advocate the election or defeat, but you have taken the functional equivalent of express advocacy, which is the electioneering communication standard that the Supreme Court set forth in Wisconsin Right to Life. Those are issue ads. That is the court case where the Court laid down that the First Amendment allows speakers to convey information. It may not be that they are not advocating the election or defeat, but the only authority that the Federal Government has to regulate those ads is if the advertisement is susceptible of no reasonable interpretation other than an appeal to vote for or against a candidate, an objective standard.

In fact, in Citizens United, the FEC's attempt to promulgate a regulation that had two parts and 11 factors was specifically singled out by the Supreme Court as analogous to a prior restraint, because it was too confusing and nobody understood it. Now we have a definition of independent expenditure in this bill where it talks about the functional equivalent and offers a definition that really borrows largely from what the Supreme Court has already criticized as analogous to a prior restraint.

Mr. LUNGREN. So we have actually moved further towards the prior restraint——

Mr. MCGINLEY. That is correct.

Mr. LUNGREN [continuing]. Definition that the Court at least pointed to in the Citizens v. United case.

Mr. MCGINLEY. That is correct.

The CHAIRMAN. If your answers aren't quicker, you are going to come back here instead of going to dinner.

Mr. TONER. That is a powerful incentive to me, Mr. Chairman. I am hungry.

Mr. LUNGREN. Mr. Chairman, there are a whole lot of other questions——

The CHAIRMAN. I can well imagine.

Mr. LUNGREN [continuing]. But I understand that we have time limits here.

So, Mr. Chairman, I would like to introduce three items for the record; number one, the testimony from the Center for Competitive Politics.

The CHAIRMAN. Without objection.

[The information follows:]

Testimony of the

Center for Competitive Politics

Before the Committee on House Administration

"Additional Discussion of H.R. 5175, The DISCLOSE ACT, Democracy is Strengthened by Casting Light on Spending in Elections"

Tuesday, May 11, 2010
5 p.m.

Center for Competitive Politics
124 S. West St., Suite 201
Alexandria, VA 22314
http://www.campaignfreedom.org

In the wake of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, there has been a great deal of confusion over the issue of disclosure, confusion that has been stoked by irresponsible and inaccurate rhetoric about "shadow groups" and "front groups" from individuals and organizations who oppose the Court's ruling and seek to undermine it and the First Amendment.

In order to clear up these misunderstandings, the Center for Competitive Politics has prepared a memo, attached to this testimony, which outlines current disclosure requirements according to federal law and the regulations of the Federal Election Commission (FEC). To summarize the key points of the memo:

- Any group, including a 527 group or a 501(c)(4), (c)(5), or (c)(6), must disclose all contributions above a certain amount given for the purpose of funding an independent expenditure (IE) or an electioneering communication (EC). **2 U.S.C. 434(c)** and **2 U.S.C. 434(f)**
- Any group, including a 527 group or a 501(c)4, (c)5, or (c)6, must disclose all contributions above a certain amount solicited for the purpose of funding an IE or EC. **2 U.S.C. 434(c)** and **2 U.S.C. 434(f)**

Given these requirements, there is simply no credible possibility that so-called shadow groups could form in the late stages of a campaign, run IEs or ECs without disclosing their donors, then disappear after Election Day with the public having no idea who the major funders were.

A group that attempted to operate in such a manner would quickly draw the attention of the FEC—after all, the very act of engaging in an IE or EC draws significant attention to the act. Does anyone truly believe that a group, founded months before an election and expending most of their funds producing and broadcasting IEs and ECs in that time period, could convince anyone that it did not solicit contributions intended for use in IEs and ECs, or accept contributions earmarked for that purpose?

Similarly, an older, more established group that solicits or accepts funds for the purpose of engaging in an IE or EC must also disclose the source of those funds. For example, an effort by the Sierra Club or American Medical Association to raise funds to help elect or defeat candidates for office would have to disclose the donors who give to support these IEs and ECs.

The concern that an organization might be able to fund IEs and ECs out of general funds and thereby avoid disclosure is entirely misplaced. Again, contributions that have been solicited or made for the purpose of engaging in independent expenditures must already be disclosed. By definition the general treasury funds of an organization represents funds from all members and donors, and the use of general treasury funds to further an IE or EC represents the collective voice of the organization as determined by the leadership, not just the largest members or donors. Requiring organizations to disclose donors who did not give in order to further IEs and ECs not only violates the privacy protections recognized in *NAACP v. Alabama*, it threatens to publically identify citizens as supporting messages that they may, in fact, not support.

Not only is such disclosure unwarranted, it goes far beyond the alleged intent of this legislation, to prevent so-called "shadow groups" and "front groups" from hiding their contributors. When established groups like NARAL Pro-Choice America, Natural Resources Defense Council, the National Rifle Association, and others speak using general treasury funds, everybody understand exactly who is speaking—the citizens who have come together to create these and other well-established groups that have gained the trust and respect of many Americans. Disclosure of the type envisioned in the "DISCLOSE Act" undermines the speech of these groups by suggesting that it is not, in fact, the general membership of the group that is speaking, but instead the largest donors to the group.

The "DISCLOSE Act's" requirements for new and intrusive disclosure requirements are not needed. Current law adequately provides for full transparency for contributions given by citizens and organizations like businesses, unions, trade, professional, and advocacy groups, for the purpose of funding IEs and ECs. No additional laws are needed to disclose the campaign finance activity that the supporters of this bill claim to be concerned about.

MEMO

To:	Members of Congress and staff, media, First Amendment advocates
From:	Center for Competitive Politics
Date:	May 10, 2010
Re:	Disclosure provisions in the proposed legislative response to *Citizens United*

The Center for Competitive Politics remains concerned regarding the disclosure provisions in S. 3295 and H.R. 5175 ("The DISCLOSE Act"). Such proposals are unnecessary, as the existing statute and FEC **regulations** prevent the type of opaque spending of money with which the bill's sponsors are concerned. Knee-jerk legislation imposing a new disclosure regime for groups that wish to speak—months before an election—presents a serious threat to the constitutional protection of political speech. Sponsors of the bill and their allies in the self-styled reform community have implored Republicans to simply support "disclosure," but not all disclosure is beneficial. Indeed, supporters of DISCLOSE admit that the bill's intent is to silence disfavored interests:

"My view is that many CEOs of major organizations will do this [air political ads] if they don't have to disclose, but once they have to come up front and disclose, I think it will, anyone who wants to hide will not do an ad after this legislation," past Democratic Senatorial Campaign Committee Chair Chuck Schumer said at a press conference unveiling the bill in late April (he's the chief sponsor in the Senate).[1] In an Oct. 29, 2009 memo from "reform" groups Common Cause and Public Campaign, the groups said Congress should pass a bill providing "[i]increased disclosure" if Citizens United won its case: "This approach, which could be pursued under both FEC and SEC rules, exposes corporations and candidates to potential embarrassment when expenditures come under public scrutiny."[2] These comments make clear that Democratic leaders are not seeking meaningful disclosure, which is already mandated under current law, but an onerous regime designed to stifle speech and force groups to run through a more complicated regulatory gauntlet.

Even White House Counsel Bob Bauer recognized the costs and potential burdens of disclosure regulations. In a recent article, he explained the motives of "reformers" (using "disclosure" as a catalyst for ever-more regulation): "So for the committee, donor or vendor whose mandated disclosures are scrutinized by the state and allied nongovernmental 'watchdogs,' the disclosure regime is not only a challenge to privacy but also the gateway to entanglement with the legal process. The state is not facilitating an exchange of information with their fellow citizens primarily for their enlightenment. Aided by private organizations well funded in their commitment to campaign finance reform, it is committed to the production and availability of data for the purposes of developing the law and extending its reach."[3]

Current 2 U.S.C. 434(c) requires that groups report independent expenditures greater than $250.
Current law already provides for disclosure of independent expenditures This includes the name of the group, individual, or other entity that is doing the spending, the date on which it occurred, the amount spent, the candidate who benefits from the independent expenditure, the purpose of the expenditure and a statement certifying the expenditure was made without coordination between the party authorizing the communication and the candidate whom it promotes. This regulation requires that the reporting follow the money—both who

[1] Transcript of Sen. Chuck Schumer (D-N.Y.) press conference at the Supreme Court by the Center for Competitive Politics; April 29, 2010
[2] Memo from Common Cause/Public Campaign, "Re: Policy, media and organizing response to Citizens United," Oct. 29, 2009
[3] Robert F. Bauer, "Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System," 2007 (6 Election L.J. 38)

gives and who receives. For example, in the recent Massachusetts Senate race, TeaPartyExpress.org spent hundreds of thousands on independent expenditures. However, their political action committee, called Our Country Deserves Better PAC, was the source of the funds. A simple search of the FEC website shows that both of these names are listed on the filing papers, along with the names of any person who donated money that furthered the production of the communication. An example is shown below:

SCHEDULE A

ITEMIZED RECEIPTS
All Listed Line Numbers

Committee: OUR COUNTRY DESERVES BETTER PAC - TEAPARTYEXPRESS.ORG

There are a total of 1111 Itemized Receipts

Displaying 1 through 500

Previous Page | Page 1 of 3 (1111) | Next Page

Contributor's Name / Contributor's Address	Employer / Occupation / Memo Description	Date / Memo / Text	Amount ($) / Aggregate ($) / Limits
QUINTEN WARD PO BOX 8000 #243 MESQUITE, Nevada 89024	NONE RETIRED	01/01/2010	500.00 800.00
Mr. DON WILLIAMS 1615 EVE DRIVE CONCORD, California 94521	NONE RETIRED	01/01/2010	25.00 250.00
Dr. DONALD LIMSTER 47-109 EL MIRARA PALM DESERT, California 92260	NONE RETIRED	01/02/2010	100.00 500.00
ROBERT MAYFIELD 11309 PICKFAIR AUSTIN, Texas 78750	ROBERT MAYFIELD DC	01/02/2010	100.00 800.00
WILLIAM GILES 22387 COVEY ROAD ORRISONIA, Pennsylvania 17243	WILLIAM GILES ARTIST	01/03/2010	500.00 500.00
CHARLES E LADEN 30 COBURN DRIVE WEST BLUFFTON, South Carolina 29909	NONE RETIRED	01/03/2010	25.00 205.00
[illegible]	NONE	01/03/2010	50.00

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

Purpose of Expenditure: Email Newsletter Costs
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/06/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

Amount Expended = $11027.73
Calendar YTD Per Election for Office Sought = $348671.17

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

Purpose of Expenditure: Internet Newsletter Costs - Candidate Specific
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/09/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

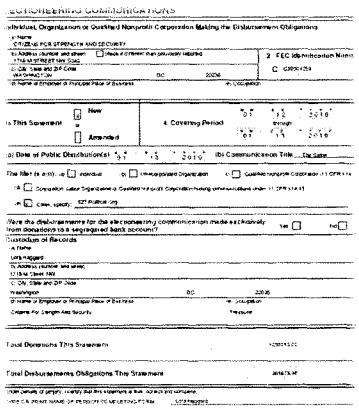
Amount Expended = $10500.00
Calendar YTD Per Election for Office Sought = $348671.17

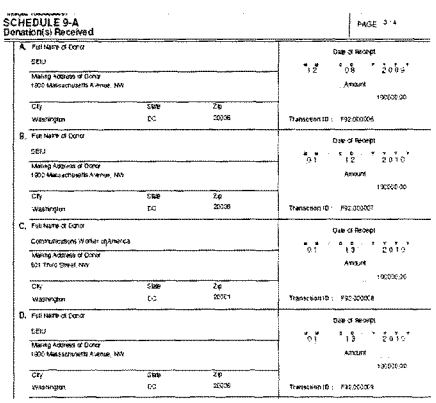
Reporting also follows where the money in independent spending goes. A separate tab on the FEC report shows the disbursements by the group—to whom each payment was made and for what purpose. See example at right:

Current 2 U.S.C. 434(f) requires groups to report "electioneering communications" when they exceed $1,000.

Current law also requires reporting of "electioneering communications. This mandates that the identity of person making the disbursement, any person sharing or exercising direction or control over the activities of such person, the custodian of the books and accounts of the person making the disbursement, the principal place of business of the person making the disbursement (if not an individual), each amount exceeding $200 that is disbursed, the person to whom the expenditure was made and the election to which the communication pertains be disclosed. Contributions made by individuals that exceed $1,000 are disclosed, accompanied by the individual's name and address.

As with independent expenditures, the reporting of electioneering communications also tracks the money. Looking again at the Massachusetts Senate election in January, a quick search of the FEC database shows that the ambiguous-sounding group "Citizens for Strength and Security" spent $265,876.96 for a communication on Jan. 13, 2010. While the name of the group may not reveal much, the list of donors who funded the electioneering communication do—the eight donations listed came from two labor unions, the SEIU and Communications Workers of America. Such concerns that corporations like Exxon could set up "shadow groups" through which to funnel money for political advertisements are unfounded. That spending would be tracked just as the disbursements by "Citizens for Strength and Security" were.





Similarly, non-profit groups, such as 501(c)(4)s, are also subject to the same kind of disclosure when they commit to running electioneering communications. FEC records show that Susan B. Anthony List Inc., a 501(c)(4), spent $32,840.00 on creating and airing a radio advertisement called "Truth." The funding for the ad came from another group, Wellspring Committee, Inc, which is clearly identified on the form.

Image# 28991364108
SCHEDULE 9-A
Donation(s) Received

PAGE 3/4

A. Full Name of Donor
Wellspring Committee, Inc

Mailing Address of Donor
9502 Nelson Ln

City	State	Zip
Manassas	VA	20110

Date of Receipt
MM 05 DD 16 YYYY 2008

Amount
41120.00

Transction ID : F92.000001

Image# 28991364109
SCHEDULE 9-B
Disbursement(s) Made or Obligations

PAGE 4/4

A. Full Name (Last, First, Middle Initial) of Payee
SRH Media

Mailing Address of Payee
2204 Countryside Drive

City	State	Zip Code
Silver Spring	MD	20905

Name of Employer | Occupation

Date of Disbursement or Obligation
MM 05 DD 19 YYYY 2008

Amount
32840.00

Communication Date
MM 05 DD 19 YYYY 2008

Transction ID : F93.000001

Purpose of Disbursement (including title(s) of communication(s))
Truth Radio Ad

§ 211-213 of H.R. 5175 would add a new and complicated bureaucratic disclosure regime to federal campaign finance law while midterm elections are in full swing.
The legislation does not provide time for the FEC to update its regulations, ensuring that groups wishing to speak would face confusion and uncertainty about the what is permitted and how to report under the new laws—perhaps the intent of incumbents wary of criticism. Groups would have to choose between disclosing all their donors (violating the right of anonymous association established in *NAACP v. Alabama*) or setting up a separate account for campaign activity (violating *Citizens United*'s holding that nonprofits, businesses and unions may spend from their general treasuries). Donors—many unsophisticated grassroots activists unfamiliar with the laws—would have to affirmatively request that their funds not be used on campaign activity to remain anonymous. Current law mandating disclosure only when funds are given to further independent expenditures or electioneering communications is sufficient to provide transparency.

Other disclosure in existing law: In addition to the above reporting requirements, existing law requires that any organization organized under section 527 of the tax code must also file its donors with the IRS. Moreover, any group whose "major purpose" is the funding of express advocacy expenditures—whether organized under section 527 or some other provision—would also become a PAC, subject to additional, ongoing reporting to the FEC, including the names of all donors to the group. Finally, under existing law all independent expenditures and electioneering communications must include "disclaimers" clearly stating who is paying for the ad.

Conclusion:
The proposals in the "DISCLOSE Act" (Democratic Incumbents Seeking to Contain Losses by Outlawing Speech in Elections) amount to nothing more than political posturing that would create another bureaucratic layer to inhibit political discussion, punishing small business owners and grassroots groups that lack the resources to comply with such onerous and unnecessary provisions. As such, we advise Members of Congress to take these concerns into serious consideration before supporting this bill.

Mr. LUNGREN. Secondly, a law review article written by Mr. Bob Bauer stating that disclosure requirements like "Stand By Your Ad" really serve the purpose of regulating speech, and third, a study from procon.org that lists the average union dues for major unions across the Nation.

[The information follows:]

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Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System

ROBERT F. BAUER

INTRODUCTION

IN THE FACTIOUS DEBATE over the regulation of political money, most participants typically show a special solicitude for disclosure. There is rarely much question about its virtues. If the law compels the production of more information about the financing of political activities, it is seen as achieving, at little or easily accepted cost, a great deal for the good. It is at once a modest measure among alternatives and among the more reliably effective. Brandeis is invariably summoned for validation: "Sunlight is said to be the best of disinfectants."[1] It is a mark of the high standing of disclosure that both proponents and opponents of extensive regulation support it: Elizabeth Garrett has rightly written that that support for disclosure is "fairly widespread," even among "those who opposed contribution and expenditure limits."[2]

The argument for disclosure rests on generally accepted rationales: the requirements of an informed electorate; the deterrence, through publicity, of corrupt conduct; and the development of information necessary to enforce other substantive requirements of the law. Some supporters of disclosure will emphasize one rationale over another; and disclosure-only advocates, having rejected a broader framework of restrictions, will omit altogether, as unnecessary and unwanted, any link between disclosure and other substantive legal restrictions.

These views have remained much the same for the better part of our country's experience with regulated politics. The question fairly asked now is whether, in the highly regulated political process of today, the nature of systematic, compelled disclosure of political money is properly judged in the same way as before.

The reliance on the informational interest of voters assumes wide voter use or interest, neither of which is established. There is something almost quaint about this view of the average citizen's stake in a database described by the Federal Election Commission as "staggering,"[3] unmanageable for even the motivated voter—and which, more generally, is not without its

Robert F. Bauer is the Chairman of the Perkins Coie Political Law Group. The views expressed here are his own. He would like to thank Joseph Doherty and Dan Lowenstein for the invitation to develop this article; The Campaign Disclosure Project, supported by the Pew Charitable Trusts, for providing the occasion and the forum for it; Donna Lovecchio for research and editorial assistance, and Rick Hasen, Sam Hirsch, and the anonymous reviewers for useful editorial and critical comments on the earlier drafts.

[1] *Buckley v. Valeo*, 424 U.S. 1 (1976), citing Louis D. Brandeis, *Other People's Money* (1914).

[2] Elizabeth Garrett, "Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy, 4 *Election L.J.* 295 (2005). Elsewhere Garrett refers to disclosure as "the campaign finance reform eliciting nearly uniform support." Elizabeth Garrett and Daniel A. Smith, "Voting with Cues," 37 *U. Rich. L. Rev.* 1011 (2003).

[3] *FEC Performance and Accountability Report* (FY 2004) at 2. The Commission notes that 8,000 committees file between 85,000 and 90,000 reports, with information on some 3 million itemized contributions. The sheer volume of fundraising and spending suggests the scale of data offered: for the 2004 Presidential and Congressional elections, spending reached approximately $5.1 billion. *Id.*

conceptual difficulties.[4] The role of disclosure in deterrence is unknowable, and it has suffered some loss of persuasiveness as reform advocates insist that, even with the steep increase in both data and accessibility, the campaign finance "system" is afflicted with "loopholes" and ravaged by "circumvention."

What has grown with the times is the role of disclosure as the cornerstone of an ambitious, advanced regulatory program. Disclosure does not function only as a monitoring device, allowing the government to track compliance. It also prepares the ground for further regulation. Compelled disclosure cannot be understood without reference to its supporting role in an expansive regulatory regime, especially one now characterized by the search for and containment of "circumvention." In this reform program, disclosure is the stake that the state drives into the ground to mark out new territory.

Stated differently, mandatory disclosure is not a self-executing reform, but a measure enacted in aid of subsequent regulatory initiatives built around the information that it produces. It signifies the extent to which the regulation of campaign finance has joined other regulatory endeavors, such as the control of food and drugs, or of environmental hazards, as an undertaking subject to continuous revision—more often than not, expansion—in the wake of more information. That government's role in controlling political money is increasingly understood in just these terms can be seen in the conscious theorizing of some of its leading exponents.[5]

This article examines this changed character of disclosure, and the issues it raises in a heavily regulated political process, and it does so in two parts, beginning with some general considerations of the traditional arguments, now in need of reevaluation, for disclosure as "the best of disinfectants." It considers two contemporary examples of how disclosure is the handmaiden of broader regulation, setting the stage for and then sustaining expanded regulatory activity. These examples are found at the frontier of campaign finance: regulation of "527" activity and of the political uses of the Internet. In the one case, disclosure has served, as it increasingly does, as the first phase of a regulatory effort that could not progress without the toehold first secured through disclosure. In the second case, questions of disclosure were also the first ones fought in the struggle over the extent to which Internet politics would be regulated. Unlike the case of 527s, however, the choice was made against disclosure, which reflected the success of the broader argument against expanded regulation of net politics.

The second, concluding part considers the question of what, as a normative matter, we should think of the transformed function of disclosure as the gateway to substantive regulation rather than merely the means of disseminating to voters useful information. When disclosure is not "only" an end in and of itself, the choice of disclosure cannot be considered a relatively simple one, justified by "public" purposes and not a threat to any "private" ones. The costs call for attention, and maybe for fresh ways of analyzing the point at which, fairly assessed, they exceed acceptable levels.

DISCLOSURE AS AID (AND LESS AS ALTERNATIVE) TO REGULATION

"General principles"

General principles: it is through these that the Supreme Court in *Buckley v. Valeo*[6] introduces its discussion of the constitutional framework for campaign finance regulation. As Brandeis' dictum has come to be understood, disclosure is arranged by the government for

[4] Proponents of disclosure may concede the absence of wide public use but still argue the public benefit of data mining and analysis by intermediaries—press, political adversaries, and professional reform organizations. But, as noted *infra* at 52–53, the role of intermediaries introduces into the use of the data a wholly new element, which is the construction of particular narratives around selected bits of information. The data are typically shaped for particular political argument. In the grand reform narrative, this argument seeks to deflect attention from the substance of campaign dialogue to the "true motivations," the latter to be inferred from the sources of financial support. In other words, what is produced is not "just" disclosure.

[5] See discussion of *Active Liberty*, *infra*, at 44; and of Judge Kollar-Kotelly's opinion in *McConnell v. FEC*, infra, at 44, n.41.

[6] 424 U.S. 1 (1976).

the benefit of the citizen in need of the information who, deprived of it, could not wisely make the required choice. Brandeis, of course, was not speaking here of politics, but instead of the "combination and control [by bankers] of other people's money and of other people's businesses . . . the amounts taken by the investment bankers as promoters' fees, underwriting commissions and profits."[7] The differences here, between the case Brandeis was addressing and the political case, merit attention at the outset, especially because the Supreme Court, in *Buckley*, has drawn on its authority in the latter, political case.[8]

The political case allegedly rests on a similar protective program, devised for the education of the citizenry for its own use and benefit. Who, in this case, is the "investor" protected by disclosure? It is seldom argued that disclosure is needed to enable citizens to follow the use made of their own money. There is one notable special case where the law offers this kind of protection—the rationale for protecting the dissenting shareholder from objectionable political uses of corporate funds[9]—but this is not accomplished by disclosure. Few Americans raise or contribute or spend political money:[10] It is this activity, conducted by a miniscule percentage of their fellow citizens, that is the focus of the current compelled disclosure regime. The rationale in major part is that Americans provided with this information can better appreciate the interests behind specific political candidates and organizations, allowing for more informed political choice. The many are empowered to keep watch over the few: the larger part of the population over the privileged or the organized "interests."

This is the "informational rationale," and while it is not the only one advanced in support of disclosure, it is unquestionably the one on which most regulatory proponents rely in arguing that disclosure is the *sine qua non* of an informed politics, salutary in both goal and effects and at little or manageable cost. As rationale, it is straightforward: it strikes a healthy democratic note, and it improves on the uncertainties of the rationale of "deterrence," which holds but cannot prove that disclosure will discourage illegal or corrupt financial relationships between special interests and political actors. Mandated disclosure *does* yield public information: of that there can be little doubt.

Over the course of the 20th century, neither in theory nor in jurisprudence has this rationale held the primary role it is so often assumed to have held. In other words, we hold to the view that we are, with disclosure, doing the average citizen a favor, but this is mainly the legacy of arguments that no longer, in a heavily regulated political process, capture the realities of disclosure's role. Just as few vote and few contribute, there is also no reason to believe that a larger number visit the FEC Public Records, or connect to an online database, to make sense of the vast quantity of disclosures made available.

The connection of disclosure to the development and expansion of other, substantive regulation better explains the contemporary significance and uses of disclosure. Where substantive laws are weak or non-existent, disclosure is also weak. This phenomenon was well-established by this country's early experience with campaign finance regulation. As Professor Heard showed in his *The Costs of Democracy*,[11] the magisterial study of the law published in 1960, the Federal Corrupt Practices Act was widely disregarded in virtually all of its particulars. Substantive contribution limits were ignored; and so, too, were the legal requirements for timely and accurate reporting. Heard understood that the one depended on the other: that disclosure, even if uninteresting to the population at large, was an essential component of a reinvigorated state enforcement effort.

Heard's analysis represented a subtle shift in the early and pioneering work on the relationship of disclosure to regulation. Louise Overacker, writing in 1932 in *Money in Elections*, hoped to advance the cause of reform by ex-

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[7] Louis D. Brandeis, "Chapter V: What Publicity Can Do," in *Other People's Money* (1914).
[8] 424 U.S. at 67.
[9] *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665–666 (1990).
[10] *See* Stephen Ansolabehere, John de Figueiredo, and James M. Snyder Jr., "Why Is There So Little Money in Politics?" 17 *Journal of Economic Perspectives* 105 (2003).
[11] Alexander Heard, *The Costs of Democracy* (1960).

amining the "possibility of more effective control" over special interest politics.[12] The "constructive program of regulation" that she aspired to develop did not, however, look to substantive restrictions such as contribution limits, about which she was quite skeptical. She argued for the infusion of public resources but also a limited role for regulation overall, to be replaced by a reliance on "publicity." She wrote: "So far as the public at large is concerned the remedy is publicity, and more publicity."[13] Overacker stressed that the beneficiaries of this publicity was the "public at large," otherwise to be freed of limits on their individual political activity:

> The real objection to the large gifts which corporations made to the Republican Party in 1904 was not that the money came from corporations but that the voters did not know who was paying the bills of the party. They [the public] were entitled to that information before they voted in the election. There is no reason to cut off these contributions, but there is every reason to bring them out into the open. Prohibiting them simply forces them under cover and out of the clarifying light of publicity.[14]

For Overacker, then, disclosure was truly an alternative to other forms of regulation: the agents of reform were the members of the public. By the time Heard came to reexamine the topic, Overacker's view had passed into history. The state had become the principal actor, imposing a wide range of substantive restrictions, and disclosure came to serve primarily *its* requirements in supporting and enhancing these restrictions, at the price of expanded intrusiveness.

The strange case and place of McIntyre v. Ohio

The shift in disclosure from an end to a means is apparent in the evolving constitutional jurisprudence of campaign finance, and it helps to explain one of its puzzling inconsistencies: the place of *McIntyre v. Ohio Elections Commission*,[15] in which the Supreme Court affirmed the privileged position of "anonymous" campaign speech but did so in a manner apparently at odds with its treatment of disclosure in campaign finance generally. In *Buckley v. Valeo*,[16] the Court had rejected the Overacker view, pressed by the appellants, that the "proper solution to virtually all the evils Congress sought to remedy" lay in disclosure.[17] The *Buckley* Court identified the three, now commonly cited purposes of disclosure, including its function as "an essential means of gathering the data necessary to deter violations of the contribution limitations."[18] Unlike other issues confronted by the Court, where constitutional analysis conducted for the most part under "strict scrutiny" prompted invalidation of some restrictions, such as limits on independent expenditures, compelled disclosure of federal campaign finance did not appear to present perplexing questions for the Justices.

Twenty years later, the *McIntyre* Court seemed to draw back from these relatively relaxed standards applied to the review of mandated disclosure. The Court struck down application of an Ohio statute requiring identification of the sponsorship of campaign literature to materials distributed by an individual citizen protesting a proposed school tax levy. The Court paid homage to what it referred to as "a respected tradition of anonymity in the advocacy of political causes."[19] The majority gave no quarter on this point, specifically separating out the authorship of a message from the value and persuasiveness of its content:

> We think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. . . . The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill

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[12] Louise Overacker, *Money in Elections* (1932) at vii.
[13] *Id.* at 202.
[14] *Id.*
[15] 514 U.S. 334 (1995).
[16] 424 U.S. 1 (1976).
[17] *Id.* at 60 (citing Brief of the Appellants).
[18] *Id.* at 68.
[19] *McIntyre*, 514 U.S. at 343.

> written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message.[20]

Justice Scalia dissented, reminding his colleagues that in *Buckley*, "the 'informational interest' was our primary rationale."[21]

Scalia would not be long alone in noting the turn in the Court's thinking. For when the Court addressed the disclosure requirements in McCain-Feingold (the Bipartisan Campaign Reform Act of 2004), *McIntyre* had fallen away to a footnote—literally.[22] The Court in *McConnell*,[23] with little apparent interest in the "complexities" of the issue, sustained disclosure requirements applied to electioneering communications, defined as those which identified a federal candidate in broadcasts aired within 30 days of a primary and 60 days of a general election.[24] The Court showed a revived interest in the "informational interest" of voters, both affirming this interest along with the others cited by the *Buckley* Court, and placing special emphasis on the need to supply timely pre-election information to "curious voters."[25]

How could the Court understand and apply the "informational interest"in a manner consistent with what it had proclaimed to be the honored place, in political dialogue, of anonymous speech? The answer lay not in the Court's explanation, with its well-traveled citation to information interests, but in the priority evidently assigned to disclosure requirements in supporting the overall, evolving regulatory scheme. This is the apparent difference between the *McIntyre* and *McConnell*: in the former case, the State could show a limited regulatory stake in the outcome, while in the latter that interest was primary.

In *McIntyre*, after all, the State asserted two interests, neither of which was much implicated by the facts before the Court. One interest was "informational," the capacity of regulation to provide information about the interests behind a political expenditure, and it was weak in application in the particular case: as Justice Ginsburg put the case in her concurrence, "The Court decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name."[26] The "sometimes" here deserves note. Mrs. McIntyre had indeed identified herself on some, but not all, of the handbills she had distributed. There was little at stake here. In fact, the government was not present in this case as high protector of its citizens: the complaint was brought against Mrs. McIntyre, retributively and after the levy was approved, by a school official unhappy with her position.

An additional interest cited in *McIntyre*, protection against fraud or libel, was no weightier. The Court noted that other provisions of Ohio law addressed these concerns: the provision before them "is not [the state's] principal weapon against fraud,"[27] operating at most as "an aid to enforcement" or "merely a supplement."[28] And so with neither interest—the informational interest or the protection against fraud or libel—did the state demonstrate that the disclosure it sought met a regulatory need. *McConnell* stood on very different ground, for there the government advanced the disclosure requirement as an integral part of a comprehensive scheme of "soft money" regulation. In fact, the statute reviewed by *McConnell* was justified in large part as a response to breakdown in the regulatory regime upheld by *Buckley*—as an exercise in law enforcement, rather than as a breaking of new policy ground.

Understood narrowly, as they should be, some of *McIntrye's* more sweeping expressions of skepticism about compelled disclosure must be discounted as little more than the argu-

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[20] *Id.* at 348.
[21] *Id.* at 384.
[22] *McConnell v. FEC*, 540 U.S. 93, 207 at n. 88 (2003).
[23] *McConnell v. FEC*, 540 U.S. 93 (2003).
[24] *Id.* at 194–202. *See also* Richard L. Hasen, "The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy," 3 *Election L.J.* 251, 253 (2004). The *McConnell Court* also sustained a requirement that candidates appear in broadcast ads to confirm their "approval" of them, and that broadcast stations preserve and make available to the public records of issue advertising they accepted for a fee.
[25] *McConnell*, 540 U.S. at 196–197, 200.
[26] 514 U.S. at 358.
[27] *Id.* at 350.
[28] *Id.* at 351.

mentative apparatus that the Court adopted for its immediate purpose. For example, the Court chose to honor the "respected tradition of anonymity in the advocacy of political causes,"[29] but it is hard to see what the Court might mean, when the statement is considered in light of extensive disclosure requirements that it had previously upheld, applicable to all manner of political fundraising and spending, including "independent" spending by individuals avoiding all coordination with affected parties or candidates. These same "independent" spenders each might well believe that, in *McIntyre's* words, "his idea will be more persuasive if his readers are unaware of his identity,"[30] but the law as currently written takes no account of this judgment and compels disclosure all the same. Unlike Mrs. McIntyre, the independent spender finds herself at the center of a highly developed regulatory enterprise dependent on disclosure for enforcement, self-evaluation and reform.

This relationship of disclosure to regulatory need is the terrain on which cases of this ilk have been fought. In *Buckley v. American Constitutional Law Foundation*,[31] the Court rejected, as lacking a demonstrated value to regulatory efforts, a requirement that petition circulators wear identification badges. The Court stressed that the state simply did not *need* the restriction at issue:

> The State's dominant justification appears to be its strong interest in policing lawbreakers among petition circulators.... The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the 'address at which he or she resides, including the street name and number, the city or town, [and] the county.' This address attestation, we note, has immediacy, and corresponding reliability, that a voter's registration may lack.[32]

In the earlier case of *Talley v. California*,[33] upholding a right to anonymity against an ordinance compelling handbills to carry printed disclosure of their true sponsors, the Court was unimpressed with the state's asserted regulatory interest in controlling "fraud, false advertising, and libel."[34] No doubt the Court suspected that something else was afoot in the application of these restrictions to handbills calling for the boycott of business practicing employment discrimination. At any rate, what the majority stressed was the absence of a clearly established regulatory function.

This attention to regulatory need worked to the advantage of Jehovah's Witnesses in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*.[35] There, as in *Talley*, the Court was not persuaded of the regulatory purpose claimed for the permitting system instituted by the Village for door-to-door canvassing or solicitation. It noted that any resident could file for protection by executing a "No Registration" form and posting "No Solicitation" signs, and it seemed that the fraud, crime, or invasion of privacy that the more blunderbuss approach of the ordinance was designed to protect against could easily slip its defenses. Justice Breyer put the point succinctly in his concurrence, writing that "It is implausible to think that Stratton's ordinance serves any government interest in preventing ... crimes."[36] In these cases, both before and after *McIntyre*, the Court was not dealing with disclosure enacted as part of a comprehensive, well-established, and comprehensively enforced regulatory regime. So the cases do not shed much light on the function of disclosure in the very different context created by the regulatory system in effect today.[37]

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[29] *Id.* at 343.
[30] *Id.* at 342.
[31] 525 U.S. 182 (1998).
[32] *Id.* at 196 (citations omitted). The Court did note with approval the value of information about initiative financing disclosed in reports filed with the government. *Id.* at 202.
[33] 362 U.S. 60 (1960).
[34] *Id.* at 64.
[35] 536 U.S. 150 (2002).
[36] *Id.* at 170.
[37] Nor does the distinction lie in the difference between issue referenda and election campaigns. As early as *Talley*, where the dissent pointed out the considerations were fundamentally the same in both cases, it has been clear that if disclosure serves a compelling informational rationale in the one case, then it is served with equal power in the other. This is a point noted by Elizabeth Garrett. Elizabeth Garrett, "*McConnell v. FEC* and Disclosure," 3 *Election L. J.* 237, 238, 243 (2004).

Disclosure within an advanced regulatory regime

Within an advanced regulatory regime, disclosure assists centrally in the state's work of policing, and, as required, improving upon the successful operation of other substantive requirements and restrictions. The state, as understood in this context, refers to the entire apparatus by which law is formulated, enforced, and justified as serving the general public welfare, and it is a mistake to confuse it with the political party or interests in charge of the state machinery at any one time. The state does respond to these interests, and it is a standing temptation for these interests to make use of state power to achieve political advantage for themselves.[38] Yet the state, as autonomous actor pursuing the design and implementation of policy, is not merely the sum of political interests competing for control.[39]

In recent decades, the problem of campaign finance (and other issues in the functioning of the political process) has become one among the range of challenges facing the regulatory state. Justice Breyer, expounding a theory of "active liberty," has judged the issue in just these terms, consistent with this long interest in evaluating the conditions for effective design and implementation of regulatory policy.[40] This same view has entered into the mainstream of the case law, playing a prominent role, for example, in the opinions of Judge Kollar-Kotelly, who is among the most experienced in deciding these kinds of cases.[41] In fact, campaign finance actively engages the "interests," specifically accounted for, of the policy-producing state, since it is the aim of regulation to limit the ways and extent to which political money "distorts" policy-making in the public interest.[42] The state's administration of these laws empowers it to structure political rights to advance explicit policy interests, ranging from the control of corrupt conduct, to the purification or improvement of election year dialogue, to the redress of inequalities in access to influence.

As a result, the regulation of campaign finance does not undergo drastic change along with changes in political control of the government, but like other regulatory endeavors, it has secured a place in the broader state regulatory agenda. Partisan control or influence may affect its direction, and not unimportantly, but campaign finance regulation appears no more likely to vanish from the portfolio of standing policy concerns than environmental or securities regulation.

State production and use of information for further regulation therefore is a "dynamic" part of the ongoing effort of policy-makers to scrutinize the effects and effectiveness of current policy in the course of evaluating what is re-

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[38] Of course, this strategic use of the law is actively debated in the literature and in the applicable jurisprudence, as the abuse of professed reforms by self-interested actors—typically incumbents but also parties—is widely recognized as a hazard of the regulatory process and a ground on which particular measures should be closely scrutinized and, as necessary, rejected. For the leading case law, *see Randall v. Sorrell*, 126 S.Ct. 2479, 2493–2494 (2006); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring). Justice Breyer presents his views on this point in his *Active Liberty* at 49. Among the various commentators, *see* Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process," 50 *Stan. L. Rev.* 643 (1998).

[39] *See, e.g., Bringing the State Back In*, Peter B. Evans, Dietrich Rueschemeyer and Theda Skocpol eds. (1985).

[40] *Active Liberty* at 41, 47. Breyer, while acknowledging the continued force of constitutional concerns, stresses that:

> . . . [I]f strong First Amendment standards were to apply across the board, they would prevent a democratically elected government from creating necessary regulation. The strong free speech guarantees needed to protect the structural democratic governing process, if applied without distinction to all governmental efforts to control speech, would unreasonably limit the public's substantive economic (or social) regulatory choices.

See also, Robert F. Bauer, "Democracy as Problem Solving: Campaign Finance and Justice Breyer's Theory of 'Active Liberty,'" 60 *U. Miami L. Rev.* 237 (2006).

[41] *McConnell v. FEC*, 251 F. Supp .2d 176, 708 (2003) (Kollar-Kotelly, J., concurring). Judge Kollar-Kotelly approvingly cites Justice White in *Citizens Against Rent Control v. City of Berkeley*, 454, U.S. 290, 310 (1981) (White, J., dissenting) for this proposition: "Every form of regulation—from taxes to compulsory bargaining—has some effect on the ability of individuals and corporations to engage in expressive activity." Kollar-Kotelly thus understands campaign finance regulation to be like other regulatory endeavors—in fact, more like them than not.

[42] The Supreme Court put these concerns very much on display in its *McConnell* opinion, pointing to the role of money in acquiring "access" even if it could not be shown to buy results. The distortions troubling to the Court were subtle in character, taken to include manipulations of the congressional "calendar." *McConnell*, 540 U.S. at 149–151.

quired for the maintenance and improvement of the regulatory regime.[43] Once the state has established its regulatory interest, poised always to act again, partisans may well seize the opportunity to turns those actions to their advantage. The state dynamic and the partisan strategic exploitation of it are separate from each other while also interdependent. John Dunn has expressed the point with power and economy: "States have an insistent ideological impulse toward coherence, efficacy and the pursuit of edifying collective purposes. They also have a relentless availability for ad-hoc appropriation for whatever purposes groups or individuals happen to find compelling."[44]

With the arrival of existing the most recent phase in campaign finance reform—the "circumvention" phase affirmed by the Supreme Court in *McConnell v. FEC*—this role of the state, both in the uses of disclosure as well as in the opportunities for "ad-hoc appropriation by various interests," has been strengthened. Activities beyond the range of existing regulation, but seen as influential with voters, become potentially the targets of suspicion as means of "circumvention." The policing of circumvention requires some effort to identify the circumventing activity—and to the degree that it is substantial in its effects and therefore worth the effort to pursue, it must be measured, exposed, and brought within the grasp of regulation. So the effort to mandate disclosure, commonly defined as a "first step" but also defended as valuable on its own terms, is a vital stage in the process of expanding the reach of the regulatory regime. Proponents of disclosure have argued for its necessity in precisely these terms, as "increasingly important at the federal level as one of the tools to combat efforts already underway to circumvent BCRA's substantive limitations."[45]

What this means in effect is that the persons subject to disclosure are answering to the state, or accounting for the suspect conduct, rather than "informing" the voter. Where the state superintends enforcement with special concern for the potential for "circumvention," the state must continually monitor the viability of its regime, defending it against the weakening effects of loopholes and other evasive practices. Disclosure of all kinds is advocated, enacted, and enforced within this relationship of the state to the regulated community. It is not expected to function as the "best disinfectant," working a magic all of its own, but to shine the light on some fugitive activity so that the state can locate and regulate it.

Consider the "stand by your ad" requirement: this is styled as a disclosure requirement; and it surely is, in some sense. And yet it is most clearly not a disclosure compelled for the benefit of the audience. Media consultants will advise anyone who asks or listens that audiences for this message are indifferent to it: they assume that any ad run has been blessed by the candidate it supports.[46] As disclosure, this requirement makes sense only if its true use is clearly identified: to regulate the content of ads. The sponsors assumed that if candidates were compelled to accept responsibility for an ad, they would hesitate before authorizing ads that are "negative," reckless, or irresponsible (which to the sponsor may all mean the same thing).[47] This is not, in other words, a disclosure to the voters, expected to enlighten them, but an obligation owed to the government, in-

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[43] This discussion of the question of whether the generation and use of information is a state "dynamic" or a partisan "strategy" responds to a question raised by Professor Daniel Lowenstein in moderating the discussion of this article at the 2006 Midwest Political Science Association meeting in Chicago. The delineation of the "state" for these purposes is beyond the scope of this presentation, but it is enough to say for present purposes that it should be taken broadly to be the administrative state that establishes comprehensive and durable regulatory regimes sustained and expanded, on delegated authority, by a corps of civil service (unelected) professionals. *See also* Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press) (1993) at 319, n. 8. (The meaning of the 'administrative state' . . . generally . . . refers to the empowering of bureaucratic agencies, staffed by unelected officials, to carry out important government functions.")

[44] John Dunn, *The Cunning of Unreason: Making Sense of Politics* (2000) at 92.

[45] Garrett, *supra* n. 37 at 237.

[46] Robert F. Bauer, "A Report from the Field: Campaign Professionals on the First Election Cycle under the Bipartisan Campaign Reform Act," 5 *Election L.J.* 105, 115 (2006)

[47] *Id.*

tended to fulfill a public goal of improving the quality of campaign "discourse."

We should resist the temptation to dismiss this as a special case, really outside the core concerns of the *McConnell* "circumvention" regime. As William Marshall has astutely pointed out, the *McConnell* case makes clear that "the government's interest in preventing corruption or the appearance of corruption has proven to be a highly elastic concept," one that is applied in various ways to protect voters from "distorted" speech and the alienation that it engenders.[48] While BCRA primarily pursues this goal with restrictions on the collection and expenditure of campaign money, including the money spent by corporations for issue advertising, "the court has also set the stage for upholding significant restrictions on campaign speech."[49] In this respect, the "stand by your ad" requirement may be the most significant of the BCRA reform measures, illustrating as perhaps no other provision the far reach of the new doctrine and the aggressive uses of disclosure that it would appear to sanction.

In accounting for the costs of disclosure, its service to the larger regulatory purposes of the state is rarely included. Disclosure proponents concede the costs but identify them as internal, in a sense, to the achievement or enforcement of disclosure *per se*. The disclosure advocates understand that organizations fulfilling disclosure requirements are burdened with record-keeping requirements, penalized by having to disgorge strategically sensitive information, or (in some rare cases) exposing their adherents to reprisal for associating themselves with particular candidates, parties or causes.[50] A price is paid, in each instance, by the disclosing entity or individual: a cost directly related to the specific information put out for public inspection and use. But it is assumed that this price is affordable,[51] or that when, in particular cases, reprisal is anticipated, remediable, and that lying on the other side are countervailing benefits to other individuals who gain access to the information. In other words, individual costs are weighed against other individual interests. What is missing here is the appreciation of another "cost"—certainly a consequence that some would treat as a cost[52]—namely, the strategic generation of this disclosure for the benefit of the state, in policing and extending regulatory boundaries.

In considering these uses of disclosure in the contemporary, advanced regulatory regime, it will be helpful to see how this has worked in recent cases testing the boundaries of BCRA (and *McConnell*): Internet and 527 regulation.

The case of the 527s

The "527" has emerged as the regulatory issue of central public prominence in the last 4 years. This is not because 527s were unknown to and therefore ignored by BCRA's sponsors. The reforms passed in 2002 included various references to 527s and imposed restrictions on officeholders, candidates and parties in their relationships to 527s.[53] Regulation fell only indirectly on the 527s themselves.

It became clear very soon that supporters of comprehensive reform considered the 527 as a sterling example of the circumvention that BCRA, as affirmed by the Supreme Court, was meant to end. These organizations were not subject to federal campaign finance laws and yet their activities appeared clearly calculated to influence federal elections. They advertised on issues having saliency in those elections, damning (or praising) the positions of candidates on those issues; and they brought this activity to the doors of voters, in some instances conducting "issues" canvasses intended to mobilize the vote around those issues. These or-

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[48] William P. Marshall, "False Campaign Speech and the First Amendment," 153 *U. Pa. L. Rev.* 285 (2004).

[49] *Id.* at 323.

[50] Garrett, *supra* n.37 at 241–242.

[51] Elizabeth Garrett writes of the "gut reaction shared by most commentators and voters [that] there can be no harm in providing more information to citizens about important aspects of democratic governance. . . ." Garrett, *supra* n.2 ("Voting with Cues") at 1011.

[52] See the third part of this article, *infra*, where I discuss further the normative implications of this view of disclosure.

[53] 2 U.S.C. §§ 441i(d), (e). Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155; 116 Stat. 81 (2002). Some of these restrictions were explicitly stated, as in the case of national party committees. Those that applied to candidates and officeholders followed from a) the general prohibition on any fundraising outside the federal contribution limits, source restrictions and reporting requirements, and b) the restrictions on spending "coordinated" with candidates. 11 C.F.R. §§ 109.20 *et seq.*

ganizations justified their escape from substantive federal regulation—from contribution limits and source restrictions—on the basis that their public communications did not include words of "express advocacy" and that their activities, including both communications and other activities, were not coordinated with or under the control of candidates and parties.[54]

Congress sidestepped the issue in 2002, but this was seen as temporary, and the reason for this forbearance was the enactment, only two years before, of a disclosure requirement imposed specifically on 527s.[55] It appears from the record that Congressional reform supporters concluded that the regulatory program for 527s was best built piece-by-piece, beginning with disclosure. 527s are creatures of the tax law—the term 527 refers to the section of the Code conferring on them tax-exempt status[56]—and the 2000 enactment mandated 527 disclosure to the IRS of receipts and disbursements on a schedule similar to that for political committees reporting to the FEC. Supporters of the measure assured their colleagues at the time that with the enactment of this measure, they would have "laid the groundwork for further legislation in this area"[57] and that disclosure functioned as "a good and necessary first step...the first step down a long road toward political campaign finance reform."[58] Senator Feingold agreed that it was "a start."[59]

In what way a start? Leaders of this effort argued that regulation would follow disclosure, since disclosure would lay bare the nature of the problem, leaving no doubt that action would be necessary. There was no question, Senator Lieberman proclaimed, that the activities of these groups were pernicious: that the groups' proliferation "poses a real and significant threat to the integrity and fairness of our elections."[60] Disclosure, while not solving "the whole problem," will have "value in itself" but will also "be a turning point that will lead us to further reform of our campaign finance laws."[61]

This expectation, that disclosure was the light needed to illuminate the path to reform, was grounded in the certainty that the public, once educated by the data, would demand the next, more substantive step. Senator Levin laid out this case in clear terms:

> We are about to shed some light, pour some sunshine on the 527 loophole. And the public will respond. I believe, when they see just how egregious this loophole is. When the disclosure required by this bill becomes law—as it will—the public will respond to the unlimited contributions which are also hidden. That disclosure, I believe, will lead to the closure of this loophole. . . .
>
> It is an ongoing struggle. It can only be said to be successful when the soft money loophole is closed, and when the 527 loophole is not just brought out into the sunshine but, hopefully, when it shrivels away and is closed because the public wants the restoration of limits on campaign contributions.[62]

With the bill enacted, 527s began to disclose, but this disclosure regime was barely underway, having not yet run through a full election cycle, when the Congress considered BCRA. The data were incomplete. Supporters of more comprehensive reform, their hands full enough with the other issues before them in the proposed legislation, put off to another day the 527 question.

The effectiveness of the disclosure regime in accomplishing its objective of broader regulation was borne out by the events of the next two years. Critics of 527s, dissatisfied with the pace of reform, pressed the Federal Election

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[54] For a general discussion of 527s and the legal arguments over their lawful (and unlawful) relationship to candidates' campaigns, *see* Richard Briffault, "The 527 Problem . . . and the *Buckley* Problem," 73 Geo. Wash. L. Rev. 949 (2005).

[55] Pub. Law 106-230; 114 Stat. 477 (2000).

[56] 26 U.S.C. § 527.

[57] 146 Cong. Rec. H5285 (daily ed. June 27, 2000) (statement of Rep. Castle).

[58] 146 Cong. Rec. H5286 (daily ed. June 27, 2000) (statement of Rep. Lewis).

[59] 146 Cong. Rec. S5995 (daily ed. June 28, 2000) (statement of Sen. Feingold).

[60] 146 Cong. Rec. S5995 (daily ed. June 28, 2000) (statement of Sen. Lieberman).

[61] 146 Cong. Rec. S5996 (daily ed. June 28, 2000) (statement of Sen. Lieberman).

[62] 146 Cong. Rec. S5997 (daily ed. June 28, 2000) (statement of Sen. Levin).

Commission to act through regulation. These initiatives were unsuccessful, at different times for somewhat different reasons, but a common problem they confronted was the relatively abstract nature of the arguments made, as yet lacking in the hard support that only extensive data made possible by compelled disclosure could be said to provide.

In 2001, shortly after the IRS disclosure measure became effective, the FEC published a Notice of Proposed Rulemaking to address the 527 issue by adjusting the definition, for federal election law purposes, of "political committee."[63] It was a complex proposal, pegging the "political committee" definition to an involved series of tests for determining when an organization had made a statutory "contribution" or "expenditure" or had, as its "major purpose," the influencing of federal elections. This regulatory initiative was uninformed, the FEC acknowledged, about any detailed information about what 527s were really up to, since the IRS reporting requirements had only recently become law. That these organizations were engaging in activities with an impact on elections was known, but the extent to which this was, in practice, a problem was still unclear. Only a general sense of the issue was available: "[T]he number of 527 organizations is thought to have increased substantially, with a concomitant increase in their spending on federal elections."[64] Without disclosure, or to that time, much of it, there was no way of really bringing out in concrete terms the nature of the "problem" to be solved.

The FEC was petitioned to return to the issue again in the hectic, highly contentious circumstances of the 2004 Presidential campaign. The Republican Party concluded that 527s posed a serious threat to the President's political interests, observing with alarm 527 spending on issue advertising sharply critical of his domestic and foreign policies. The reform community shared its concern, albeit for different reasons. As a result, an unusual alliance in support of 527 regulation formed between two Commissioners, a Democrat enjoying a favorable reputation in the reform community and a Republican who came to the agency by appointment of President Bush.[65] In the end, this initiative also failed: offered in the middle of an intense Presidential campaign, when both partisan tension and the stakes were high, it succumbed to unfavorable political conditions, and the accelerated pace for decision left inadequate time for deliberation on and successful resolution of important issues, such as the effect of the new rules on 501(c) organizations. As a result, the progressive community joined with Democrats to press the agency to defer consideration of 527 rules, which it did.

In choosing deferral, the Commission had the benefit of a recommendation of its General Counsel who noted Congress' passage of 527 disclosure legislation. "[I]t is not inappropriate," he wrote, "to seek guidance from Congress before adopting a broad rule."[66] This is how things were left until the conclusion of 2004, when the "data" took shape, as predicted, to influence the course of future events.

Soon 527 data, supplied through the IRS reporting requirements, provided a detailed view of these organizations in the now concluded Presidential election cycle. There were dramatic episodes to go with the numbers: the assault on John Kerry funded by Swift Boat Veterans for Truth and the dramatization by Progress for America of the President's compassion for the families of fallen soldiers. Yet the data defined the "problem." The most comprehensive of these reviews, authored by Steven Weisman and Ruth Hassan under the auspices of the Campaign Finance Institute, told the story by the numbers.[67] The authors concluded that these organizations, required to operate independently as a condition of avoiding FECA regulation, appeared to have complied with the law. Judged by the raw numbers, however, 527s also appeared to have

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[63] 66 Fed Reg. 13681 (Mar. 7, 2001).

[64] *Id.* at 13687.

[65] Proposed Final Regulations of Commissioners Thomas and Toner, April 30, 2004, available at < http://www.fec.gov/agenda/2004/mtgdoc04-44.pdf > .

[66] Memorandum from Lawrence Norton to the Commission, May 11, 2004) at 11, available at <http://www.fec.gov/agenda/2004/mtgdoc04-48.pdf>.

[67] Steve Weisman and Ruth Hassan, "BCRA and the 527 Groups," in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act*, available at <http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR_Chapter5_WeissmanHassan.pdf>.

flourished: they spent a lot of money, and their influence, the study's authors assumed, was more than negligible. Other commentators, concurring in the legal point, built the case for more regulation around just this demonstration of the volume of activity.[68] And it should have surprised no one that on the eve of House consideration of 527 regulation, the CFI put out new numbers, updated for 2005.[69]

The calls in Congress for regulation had been sounded. These have had a partisan cast, more than they normally would have: unlike the 2000 deliberation, the Congressional debate now in progress finds Democrats and Republicans at odds, with many Democrats in the unfamiliar position of opposing campaign finance reform, because they see it as motivated by partisan purpose rather than reform principle, and many Republicans in the awkward position of embracing a regulatory program they had long abhorred. This is a predictable cost of this sort of deliberation in an election year. On April 5, 2006, the House passed 527 regulation on an overwhelmingly party-line basis, 218-209. The legislation was not enacted by the 109th Congress, but when it next comes up, it will proceed, as the 2000 supporters of disclosure had forecast, to the next and final phase of their effort, which began with disclosure.

The case of Internet regulation

The battle over Internet regulation, recently brought to a lull by the FEC's promulgation of new, widely accepted rules, shows how the choice of disclosure is a choice for more substantive regulation, which means that the reverse is also true: once disclosure is limited, regulation overall is relaxed. The one travels with the other. In the recent fracas over Internet regulation, the argument began, as it always does, with numbers. It was apparent that Internet use for political information and speech had blossomed, and that it would sharply increase still more in the elections ahead. Was this, as in the case of 527s, the grounds for imposing more restrictive regulation? And the foundation laid for this regulation—as well as the key supporting mechanism for its enforcement—would have to be disclosure.

The FEC had elected in implementing rules for BCRA to exclude the Internet from certain of its requirements. Its most critical choice, which also sparked the larger controversy, was the exclusion of the Internet from the definition of the term "public communications."[70] This term controlled the application of other provisions, such as the rules governing (and restricting) such communications when "coordinated" with a candidate or a party.[71] The exclusion was wholesale, which provoked a lawsuit from the reform community and led to an adverse ruling by a United States District Court. The FEC was required to rewrite the rules.

The wider Internet "community" erupted into protest over the potential for new, expanded regulation. Progressive sites, like Daily Kos, made common cause with conservative ones like Red State.org.[72] As the FEC considered how to proceed, proposals circulated in the Congress for legislative measures to settle the issue. One proposal would have validated the FEC's original decision to keep Internet communications out of the definition of public communications. The other would have maintained a more regulatory position, while proposing to offer the Internet community some reassurance that individual blogging activity would not be immoderately affected.[73]

The issues were generally technical ones, but it was a simple matter to recognize, by attention to the disposition of the disclosure issues, which approaches were more rather than less regulatory. In some respects, these issues led the debate. One of the arguments for the regulation of the Internet relied on the discovery that, in 2004, one Senate candidate's campaign

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[68] Briffault, *supra* n. 55.

[69] Press Release, Campaign Finance Institute Releases Latest Data on Federal 527 Political Organizations as House of Representatives Contemplates Curbs This Week (Apr. 4, 2006), available at <http://www.cfinst.org/pr/040406.html>.

[70] 11 C.F.R. § 100.26.

[71] 11 C.F.R. § 109.21.

[72] March 9, 2006 letter to Congress from Markos Moulitsas Zúnigas and Michael Krempasky, available at <http://www.dailykos.com/story/2006/3/9/9134/22058>.

[73] *See, e.g.*, Robert F. Bauer, "Law and Lobbying on Internet Politics," available at <http://www.moresoftmoneyhardlaw.com/news.html?Archive=1&AID=643>.

had paid bloggers for favorable coverage.[74] Scholars like Richard Hasen argued that disclosure was required to prevent the exploitation of these arrangements by corporations seeking outlets for improper use of their monies to influence federal elections.[75] Yet this was the more radical of the disclosure arguments, and it could not overcome resistance from the Internet community, which pointed out that political committees making these payments were already required to disclose them and that extension of this requirement to the payees would be relatively unprecedented under campaign finance laws.

Other more subtle disclosure questions ran through the debate and serve to chart its course. For example, in an unusual turn of events, someone leaked a draft[76] circulating within the office of General Counsel, and it represented, to the view of many in the Internet community, a regulatory approach. In part, this was demonstrated by the approach to disclosure, specifically the "disclaimer" requirements, recommended in the draft. "Disclaimers" provide information in the body of printed or broadcast public communications, advising the audience or readers of the identity of those who paid for or authorized the communication.[77] The leaked draft recommended that these requirements be generally the same for Internet political communications, such as those that expressly advocated the election or defeat of candidates, as for any other form of "public communications." Most significant, the draft concluded that email should be regulated for these purposes like other forms of printed material: disclaimers would be required if the number of these political emails, substantially similar in nature, exceeded 500 in number within a 30-day period.

The draft took the same tack with websites, whether or not password protected, if they could reach more than 500 people in a period of 30 days. The draft did provide for a "low cost" exclusion, exempting from these requirements sites for which the aggregate disbursements did not exceed $250 a year. All costs were to be taken into account, including the costs for production, maintenance and promotion, and the draft also urged the adoption of a "once required, always required" rule, providing that if this threshold was exceeded in the first instance, the site would have to carry the disclaimer, from year to year, for as long as it carried the express advocacy messages or solicitations originally posted to the site.

This draft ignited strong objections from the regulated community. It was seen as a major advance toward extensive regulation of the Internet, largely because it made only a limited allowance for this "unique medium" but otherwise proceeded to treat it largely on the same terms as other modes of communication. The very particular disclosure requirements recommended by the draft were widely understood as representing more than merely bringing "sunlight" to web politics.

The Commission, when it produced official proposed rules of its own, did not follow the draft, but it did not quell the Internet community's anxieties.[78] The differences were perceptible in the treatment of emails and web sites. In the matter of web sites, the FEC NPRM distinguished sharply between political committee and other web sites, and it chose to leave regulation in place for the former but not for the latter. It noted that "with respect to most Internet sites and blogs, the burden of complying with disclaimer requirements, and the resources needed for the Commission to monitor such a requirement, could outweigh the value of disclosure."[79] For these purposes, the rule distinguished between sites generally, to which the operators posted their own material, and ones on which advertising or messages were placed for a fee. The Commission retreated also on emails, but more incrementally:

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[74] John Reinan, "Bloggers push politics aside in fight against FEC," StarTribune.com (Mar. 21, 2005), available at <http://www.startribune.com/587/story/317446.html>.
[75] Richard L. Hasen, "The Ripple Effects of the FEC's Rues on Political Blogging: Why They Will End Up Undermining Limits on Corporation and Union Campaign Finance Activities," Apr. 5, 2005, available at <http://writ.news.findlaw.com/commentary/20050405_hasen.html>.
[76] A copy of the draft may be found at <http://www.moresoftmoneyhardlaw.com/clientfiles/draft-NPRM PDF>.
77 11 C.F.R. § 110.11(a), (b).
[78] Notice of Proposed Rulemaking, The Internet and Federal Elections, 66 Fed. Reg. 50358 (Oct. 3, 2001).
[79] Notice of Proposed Rulemaking for Internet Communications, 70 Fed. Reg. 16967, 16972 (Apr. 4, 2005).

it put out for comment a proposal to apply the disclaimer requirements to emails directed to addresses "acquired through a commercial transaction," that is, purchased by the sender, where those emails solicited contributions, expressly advocated the election or defeat of a clearly identified candidate, or constituted an "electioneering communication."

The debate on these rules turned effectively on the question of whether the web was unique so that conventional campaign finance considerations did not generally apply, or was only entitled to some limited allowances, to be otherwise viewed as potentially like other forms of political communications. By examining the course of the disclosure proposals, we can see the direction taken by the debate. The more regulatory approaches were partially shaped and defined by disclosure as an essential plank in the regulatory program. It was not assumed that substantive and disclosure regulation could be separated one from the other: that the government could force disclosure for the benefit of the general public, while limiting its own more direct intervention in the deployment of net resources for political purposes.

By the time that the FEC promulgated its final rules, it made its decision: it chose the path of deregulation.[80] This was the path, also, of avoiding any extensive disclosure. The FEC affirmed that bloggers would not be required to disclose payments from candidates (other than payments received for advertising). It affirmed also that it would not require site disclaimers (other than those placed for a fee). Of greater interest, since blogging disclosure never had much of a constituency, was the agency's full retreat on the application of disclaimer requirements to emails. It eliminated them altogether.

Much the same drama occurred in the course of the Congressional debate over whether legislative action should supplant the FEC's efforts. There were, just as there was before the FEC, alternatives. One (H.R. 1606) would simply restore the exemption from the "public communication" provision, as the FEC had originally acted to provide until a U.S. District Court provided otherwise. Another, supported by BCRA sponsors and the reform community, would have preserved the Court's ruling, offering in return protection, on a conditional basis, for some activities, such as individual blogging. Just as the FEC was considering its own rules, another proposal, H.R. 4900, promoted as a middle ground by the Center for Democracy and Technology, attracted support—including from the reform community—as a compromise.

An entire section of this compromise—fairly considered its centerpiece—was devoted to the disclaimer requirements, its purpose being to apply them only where spending on Internet communications exceeded specified dollar thresholds. In its way, this proposal showed how in any battle over regulation, the decisive engagement takes place over the decision to compel disclosure. The original FEC rule would have settled the disclosure issue against compelled reporting. Its second round of rules, promulgated within the constraints of the Court decision forbidding a complete exclusion, was cast in a similar, deregulatory mold. H.R. 4900, seeking to keep Internet regulation somewhat in play, proposed to accomplish this objective in significant part by preserving disclosure requirements, but allowing for escape from them for communications treated as "low cost." This was also similar to the approach, in principle, of the leaked and rejected General Counsel's draft.

The Internet rulemaking (and lawmaking) debate marked also the first time for widespread public engagement in the rulemaking process. This is perhaps, too, the reason why it turned out differently than the Congressional and regulatory initiatives directed against 527s. Disclosure regimes and associated regulation may fare far better when its targets are political activists and others, few in number. The anti-circumvention regime cannot advance so readily, or aggressively, when those engaged in the suspect conduct are indeed the "average citizen" at the keyboard (dressed for the day or still in pajamas). The citizens confronted with the regulation of Internet activities, even at the ostensibly harmless level of "disclosure,"

[80] Final Rules on Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006).

understood that the information was not being collected, coercively, for their own benefit and enlightenment.

SHOULD WE CARE ABOUT MRS. MCINTYRE'S HEIRS?

It is a shame that *McIntyre's* cautiousness about compelled disclosure seems limited in significance to the circumstances of that particular case. There remains ample reason to take it seriously, as presented, rather than to allow it to disappear, along with the case itself, into jurisprudential obsolescence. More particularly, if there is some reason for speakers to value anonymity, because it is believed to enrich the persuasiveness of the speech, should we not try harder to vindicate this interest against the claims of the state?

So far proponents of disclosure have succeeded with the contention that, on balance, disclosure benefits the average citizen in two ways, through improving information and strengthening an anti-corruption regime put in place for their benefit. In this picture, the state is acting as fiduciary for the citizen. This argument appears somewhat suspect (or at least overstated), however, if we examine certain assumptions behind it more closely and honestly. Rather than assume that more information is informative, we might consider whether it is distortive—not so much helpful to informed decision-making as it is inimical to it or at least distracting. Rather than imagine that only the citizen's interests are at stake, we might also take some account of disclosure's effects on the spender's right in crafting a persuasive argument. And rather than accepting that the state is acting only for the benefit of the citizen, we might examine whether it might be acting also in its own interest: supplying its highly developed regulatory machinery with the sustenance required for both its maintenance and its expansion.

The uses of disclosure in the reform movement "narrative"

While the focus here will remain for the most part on the last of these considerations, the first two should receive some, even if abbreviated, attention. These are, in material respects, related. The data now provided on campaign finance are vast, and the individual citizen, whether for want of interest or capacity, is not the one who culls through and interprets it. A network of media and nonprofit organizations, dedicated to the "money in politics" narrative, provides the expertise, because it has both the resources and the interests, to make sense of the numbers. The story they choose to tell is a well-established one of "interests" jockeying, through surrogate candidate and party organizations, for control of the policy-making machinery. And this story-line is superimposed on the stories that the candidates, parties, and other political actors choose to tell with the money they collected in order to tell them. Political adversaries encourage the campaign finance storyline, with free press attacks or legal complaints, expecting to discredit substantive arguments or divert attention from them.

Disclosure then is the foundation for a competing political narrative: for every story a candidate or political actor tells, there is another competing—even conflicting—story told about "real" motivations and intentions, based on the "interests" detected in his finances. We then have a form of post-modern politics, in which truth is rarely believed to reside in the facial assertions or arguments of the primary actors making them. The reasons for this are complex, and the disclosure regime is not the exclusive cause. Still, the effect is precisely to divert attention from argument, which is an injury to the audience, and to deny control of it to the speaker, another and separate offense altogether.

To appreciate the power of this competing narrative requires no more than some attention to the industry that has grown up to develop and disseminate it. Foundations supply the money, and the full-time staffs, expert in developing, sorting, and analyzing data, build the nonprofits' capacity for narrative. The Center for Responsive Politics, for example, specializes in the exposure of what it oxymoronically refers to as "open secrets," funded by these foundations, some of which are identified here along with recently reported levels of financial support provided for CRP disclosure programs.

Carnegie Corporation of New York: $500,100 – Apr. 1, 2006 to Mar. 31, 2009
Ford Foundation: $300,000–Jan. 1, 2005 to Dec. 31, 2006
Sunlight Foundation: $325,090–Jan. 24, 2006 to Dec. 1, 2006
Pew Charitable Trusts: $900,000–Dec. 7, 2005 to Dec. 31, 2007
Joyce Foundation: $375,000–Apr. 15, 2004 to Aug. 31, 2006

It is difficult to avoid the conclusion that various disclosure projects and initiatives conducted by these organizations are organized around the purpose of regulatory reform and enforcement, not citizen education. For example, when the Pew Charitable Trust reports a grant to the University of Los Angeles in the amount of $867,000 over two years, it cites the approved project as one of "Improving the Campaign Finance System: Effective Disclosure and Meaningful Enforcement." The link between enforcement and disclosure is made still more apparent in the description of the purpose of the "task forces" funded under the grant: "to develop and promote nonpartisan recommendations for incremental campaign finance reforms."[81] The same purpose is evident from the Joyce Foundation's promotion of a program of "research, data collection, and analysis," which is associated with the overall goal of addressing "challenges to democratic governance" presented by the "alarming extent" to which "private money in the U.S. determines who is elected to public office, how policy decisions are made, and who and which viewpoints get heard. . . ."[82]

These are the key channels by which the competing narrative is developed and distributed, in the service of a particular political argument, and unlike some of the cross-fire between opponents, these foundation-supported NGO efforts are commonly credited, at least in the mass media, with seriousness and impartiality. There is immediately evident a dual purpose in the mission of the organizations putting out their narratives in competition with candidates and political organizations. In alliance with the most prominent and influential media, they are dedicated to both illuminating the "true interests" in the debate and to advancing, at the same time, the rationale for the overall regulatory regime.

Moreover, once we can see interests at work in the arguments of political actors—interests which but for disclosure would have been concealed—then as the money spent on politics increases, so does the regulatory challenge presented by those interests. This is the point at which the state becomes a party with keen interests in an expansive disclosure regime. Data support the argument for the maintenance of this regime, but also for its growth. As the numbers proliferate, so do the potential "problems" that require further regulatory intervention. If numbers are missing, as when there are new forms of political activity not yet fully measured, the appeal for disclosure is the first step toward the argument for more substantive controls.

Examining disclosure from the standpoint of its use

Comprehensive disclosure regimes are defended as entirely appropriate, indeed urgently needed, where the matters subject to disclosure are of "public" rather than "private" significance. This begs the fundamental question how the one is to be distinguished from the other. It is sometimes suggested that the public figure or official, having accepted *public* responsibilities, cannot insist on broad zones of privacy: virtually all aspects of his personal behavior are presumptively useful to the public in evaluating his performance. At other times, the emphasis lies more on the public character of the responsibilities or activities, which means that campaigns—conducted for a public purpose—should be open to public inspection.

Daniel L. Solove has shown how, in the somewhat different but related context of personal privacy law, these "public" and "private" categories don't advance the analysis very far.[83] It is not obvious that they function much

[81] <http://www.pewtrusts.com/search/search_item.cfm?grant_id=4530>.
[82] <http://www.joycefdn.org/programs/moneyandpolitics/content/zspots/sep05sunshinedatabase.html>.
[83] Daniel L. Solove, "The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure," 53 *Duke L. J.* 967 (2003).

better in evaluating the disclosure regime targeted at "political" activities. Solove does not address this point at length, as it lies outside the precise area of his concern, but this "private v. public" distinction has been put to the test, with poor results.

A good example of this is the controversy over the personal conduct of President Clinton, culminating in a House vote for impeachment. Critics of the former President's conduct insisted that it was fair game for disclosure because it reflected on his capacity for office, or even the conduct of his official activities. Even Members of Congress unprepared to support impeachment accepted that, to some extent, what might seem purely personal conduct might have public ramifications and that the President should have to account for it.[84] In other words, he should have to "own up"—to *disclose*, and in the absence of conventional legal tools for mandating this disclosure, both criminal and civil litigation, each feeding on the other, were devised to achieve the desired result.

This was a trap, however, because any disclosure was certain, as always, to encourage the next step to be taken: which was a substantive judgment, requiring concrete action to remedy the ills disclosed. Kenneth Starr both understood and also gravely overestimated this point. The graphic account of the President's conduct made part of Starr's Report to the House both mobilized the forces for his impeachment and galvanized their opposition.[85] Those pursuing the President were not satisfied with disclosure, but only with an accounting on which further action—the President's censure or removal from office—would be based. Those resisting disclosure objected to it for the opposite reason, wishing to have an end to the controversy so that the Administration's attention could be freed for other purposes.

The argument over whether the action was "public" or "private" failed to clarify the issues to general satisfaction. Solove recommends generally that the effort to make sense of this boundary line between the private and the public "should center on the relationships in which information is transferred and the use to which information is put."[86] He would attend closely to the "circumstances in which [information] is gathered, who is disclosing it, and what purpose its disclosure aims to achieve."[87] This approach is instructive even beyond the personal privacy issues at the center of Solove's concern: it is useful also in evaluating political disclosure regimes.

For it cannot be true that any political information whatever, interesting as it might be, is by its nature fit material for disclosure. The law already recognizes, though on a limited basis, that this is not the case, since it provides that minorities, engaged in political activity but fearful of potential reprisal by a hostile majority, can apply for some protection against generally applicable disclosure requirements.[88] Attention should also be paid to the "stand by your ad" requirement noted above, which was enacted as part of "soft money" reform. That provision compels candidates to state that they have "approved" their own ads. On a public-private analysis, this might seem unobjectionable, but under an approach focused more closely on "use," it becomes clearer that the disclosure is not provided within the relationship of candidate and audience, but within the very different relationship of candidate to the state, exacted in pursuit of the public policy goal of cleaner campaign speech. This analysis of use, within a carefully defined relationship, gets more to the heart of the issues at stake than the lazy (or fuzzy) manipulation of the "public" and "private" categories.

CONCLUSION

Disclosure has always seemed a privileged approach to public policy in the realm of political regulation: effective but inoffensive. It was an aid to responsible citizenship: a simple

[84] *See* "Sen. Joseph Lieberman Speaks On Clinton" *CNN allpolitics* (Sept. 3, 1998), available at <http://www.cnn.com/ALLPOLITICS/1998/09/03/lieberman>.

[85] Referral to the United States House of Representative pursuant to Title 28, United States Code, § 595(c), Submitted by the Office of the Independent Counsel, September 9, 1998.

[86] Solove, *supra*, n. 83 at 1013.

[87] *Id.*

[88] *Buckley*, 424 U.S. at 71–72.

instance of the broader wisdom of the belief that, in matters affecting self-governance, "the public has a right to know." It offered the incidental advantages of some possible effect on compliance with the law, through deterrence of improper conduct and some support for government enforcement efforts.

This may have been true once, but the function of disclosure has changed, as might have been expected as a fully regulated system came into being. Now the regulated community provides data to the state to support vigilant, steadily increasing protection against new threats to the viability of the regulatory regime, especially in the post-*McConnell* phase of reform concerned with detecting and arresting "circumvention." When mandating disclosure, the state is also and necessarily establishing the ground for more substantive regulation, and so it is that the struggle over disclosure is not only a choice of whether to make more rather than less information available, but a fundamental decision about whether to regulate at all.

How this works was clearly shown in the recent battles over 527 and Internet regulation. In the one case, 527 regulation, disclosure requirements led the way to more extensive regulatory efforts, now underway. The Internet rulemaking and legislative efforts have proved heavier going for proponents of reform, and in this instance, resistance to disclosure was the functional equivalent to resistance to reform generally, and it has been so far largely successful.

So for the committee, donor or vendor whose mandated disclosures are scrutinized by the state and allied nongovernmental "watchdogs," the disclosure regime is not only a challenge to privacy but also the gateway to entanglement with the legal process. The state is not facilitating an exchange of information with their fellow citizens primarily for their enlightenment. Aided by private organizations well funded in their commitment to campaign finance reform, it is committed to the production and availability of data for the purposes of developing the law and extending its reach. For activists and, increasingly, for politically engaged members of the general public, the consequences are large, and not just a private matter.

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The CHAIRMAN. I will just ask unanimous consent that all articles, and various other documents be committed into the record.

Mr. LUNGREN. And may I ask one more question?

And that is, in the new disclosure requirements—not disclosure requirements, the new requirements for identification at the time of an ad, because in some cases now they double the number of people to be mentioned and the association has to be mentioned twice, at least my staff has tested it, and they utilize the names and associations of the people who appeared in the panel last week. And they found that for a 30-second ad, it could take up to an average of 13 to 14 seconds. Does anybody believe that that is something that does in fact interfere with the right of free speech when at least half of the message has got to be a repetition of who it was that sponsored it and the name of the group? Or is that just one of the breaks of the game; if you are going to do a 30-second ad, half of it is going to be taken up with the statement?

Mr. POTTER. Mr. Lungren, I venture into that territory and say that, obviously, at some point, it becomes impractical. There is a standard the FEC currently uses that says, if the disclaimer takes up so much of the ad you can't get your message out—and I am thinking of text messaging, for instance—or it is impractical—I am thinking of sky writing—you don't apply it that way. So I think there is a reasonable way to deal with a very short ad.

Mr. LUNGREN. And I was just thinking from what Ms. Lofgren said in quoting Justice Kennedy's statement about the use of new technology and so forth, you could require that there be some sort of message that is even shorter, but directs people to the Web site that contains that information that is necessary. I mean, there are ways of making sure that they have that available that would not take up the time of the ad itself, and yet not try and get around the identification.

I understand what we are trying to do; I want to know who it is. But at the same time, you either are going to get the situation where they take up too much time, or you are going to hire that guy who speaks faster than anybody else and so nobody actually understands it, and yet it might fulfill what the law is. It is just one of the practical things I think we should be concerned about.

Mr. POTTER. It is a balancing issue because you and I both know that we are most likely to hear it on the ad, and we are less likely to write it down and go to the Web site and figure out who sponsored it. So we would like it on the ad, but you have to find a way to make it practical, I agree.

The CHAIRMAN. Thank you.

Before I recognize Ms. Lofgren, I would like to say a few words.

I am either at a disadvantage—but in my view, I am at an advantage because I am not an attorney amongst all the other attorneys that are here.

But Mr. Toner, you said something about labor, that they got a good deal. I can't figure out how. I can't figure out how labor got a good deal. In order to get a contribution from a candidate from labor, it has to be in writing. If you are a corporation, you don't have to get anything in writing. In order to get a contribution out of labor, members vote on it. If I have stock in AT&T, I don't vote on it. If members of a union want to get a request—if there is a

request for a political contribution, it has to be a request made in writing, a member has to know about it. Members of the unions know about it, and members vote on it or ratify it. Nobody who is a member or a dividend owner or anybody in the corporation gets the chance to see that.

I could have, I said it before, is it still Deer Park? I don't know what we are doing here. I could have stock in Deer Park, and Deer Park can support my opponent. And the money I am buying stock with, that money goes against my opponent. That can't happen in labor. So I don't think labor is getting a good deal. I think labor has been covered under this bill forever in time, and they do have full disclosure on every piece. So I just wanted to make that comment.

I would like to now recognize Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I would like to ask unanimous consent to put a little compilation of information from, actually, Bob Bauer's position in favor of disclosure—because clearly he does favor disclosure—in the record, just to be clear on that.

[The information follows:]

May 11, 2010

Statement for the Record in response to Center for Competitive Politics Report Regarding Mr. Robert Bauer's Position on Disclosure

The notion that White House Counsel Bob Bauer is opposed to the DISCLOSE Act or to disclosure generally is completely false. Mr. Bauer supports strong disclosure rules to protect our elections from unlimited corporate and special interest influence.

Mr. Bauer has long been on the record that "disclosure [is] a light regulatory burden and a rich public good." http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/outside_groups.html?AID=1068> http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/outside_groups.html?AID=1068. Indeed, when the FEC was considering exempting corporations and unions from disclosure rules, Mr. Bauer strongly opposed that step. See id.

Moreover, Mr. Bauer has also advocated that corporations may be subject to tougher restrictions because "speech rights by individuals and by entities are weighed—have always been weighed—differently." <http://moresoftmoneyhardlaw.com/updates/the_supreme_court.html?AID=1457> http://moresoftmoneyhardlaw.com/updates/the_supreme_court.html?AID=1457. Mr. Bauer has long distinguished between corporations and individuals in the campaign spending context because corporations do not accurately represent the level of political support for any views they express. See Id.

As these statements demonstrate, the quotes offered by CCP are taken grossly out of context. For example, the quote cited by CCP under the heading "Studying Disclosure and Its Uses" references a blog post in which Mr. Bauer was paraphrasing the findings of another author, not offering his own views. This type of misrepresentation should not distract from Mr. Bauer's stated support for disclosure and concern for the special dangers of corporate influence.

Those concerns underscore why the DISCLOSE Act is necessary in a post-Citizens United world. It is notable that all of the Bauer quotes referenced by CCP are from several years ago, in the pre-Citizens United world, prior to when corporations could spend unlimited sums to influence U.S. elections. As Bauer wrote then and believes even more strongly post-Citizens United, "The potential for corruption, to say nothing of the appearance of corruption, is also surely present in independent expenditures" made by corporations, government contractors or foreign nationals – these are the precise ills the DISCLOSE Act seeks to address. See <http://moresoftmoneyhardlaw.com/updates/the_supreme_court.html?AID=1456> http://moresoftmoneyhardlaw.com/updates/the_supreme_court.html?AID=1456

As is to be expected from these distortions, the entirety of the CCP paper is similarly unfounded. In fact, the purpose of this bill is to give important new tools to American voters so they can tell just from watching a televised ad what corporate interests were behind the ad

without having to plumb through FEC records, which most casual observers are unlikely to do. As the Supreme Court noted in Citizens United, "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," thereby addressing CCP's concerns.

CCP's criticism that the bill replicates existing reporting requirements are inaccurate. This bill adds important requirements that will prevent misconduct by those determined to hide the true source of their funds from public view. For those determined to hide their expenditures by shuffling money through shell organizations, the bill expands FEC reporting requirements to provide a clear money trail. In the majority of cases where organizations are not trying to hide money, the new reporting should be easy - in which cases critics like CCP have no reason to fear new burdensome obligations.

CCP alleges that the design of the bill is to stop groups who would be embarrassed by their political speech from speaking. To the contrary, it is to ensure that groups who may be embarrassed are forced to take responsibility for their statements and be judged accordingly. Politicians must do that, so should the corporations supporting them.

Finally, if there is any concern about giving actors sufficient time to comply with the new rules, that is an argument for Congress passing this bill swiftly, not for abdicating its responsibilities and leaving special interests with the ability to spend unlimited sums on our elections without taking responsibility for their actions.

Ms. LOFGREN. I would like to get back to, you have already covered the union obligations that are found, not just in disclosure but in the Labor Management Reporting Act and the Civil Service Reform Act. I mean, there are a whole set of burdens on labor when it comes to political speech. But I would like to go back to the corporate world, once again, to further explore—let's give this example: Let's say this bill or something quite like it passes, becomes the law, and when covered advocacy happens through corporate money, there has to be disclosure of that fact. And let's say in that case, the corporation takes position A, and the people who don't support A get annoyed, and they organize a boycott, and they harm the brand of the corporation, and sales decline, and the stock value declines. And as a shareholder, I am not only getting my dividend, but my life savings just took a dive.

As I see it right now, the officers and directors are pretty much protected from liability by the business judgment doctrine. And I am just thinking, what remedy does a shareholder have in such a case? Selling it doesn't make them whole because they already took a bath because of what the directors did. And I am wondering, can you envision, Mr. Coates, a remedy where, if the directors were reckless, that the shareholder might be able to sue for damages and get past the business judgment rule? How else do you hold the officers and directors accountable in such a scenario?

Mr. COATES. I don't think that a litigation remedy is likely to be a good idea. It also would not likely work very well for reasons that I am happy to talk about at great length.

But let me just say one remedy that might work instead is, with disclosure, if enough shareholders don't like option A that the company has been pursuing, they can legally, under the laws of all the States currently, propose a bylaw which would, in the future, prevent the company from engaging in that activity.

Now, there is a problem—or two problems, one practical and one legal. The legal one is that the SEC, for reasons known only to itself, has frequently prevented those sorts of proposed by-laws from being put into the company's proxy statement and, as a practical matter, forced shareholders to have to pay for and print and distribute their own proxy statement, which then makes it practically impossible for them to get this enacted. So part of a separate potential bill would be to encourage or require the SEC to revisit some of those decisions.

But even if it is completely legal, I think you are absolutely right to focus on the fact that, for many companies, it still will not be a practical option for the 25 million shareholders of Proctor & Gamble to get together, even if 12.5 million of them dislike what management is doing, and adopt something. And so that then leads to the kind of thing that I was talking about earlier, which is a federally mandated vote before political expenditures——

Ms. LOFGREN. But what do you do if it is pre-IPO? Many of my constituents are working 18 hours a day, and they are doing stock options in the hopes that someday they are going to be worth a lot. As a matter of fact, they are more victim to something like this than a publicly traded entity. There is no market for this stock; you can't sell it. There are no shareholder meetings. They are just out of luck. What remedy for them, what is going to deter the directors

and the officers from having fun with other people's money—always a temptation—if there is no possibility of ever being held to account?

Mr. COATES. I think the point you are making is a good reason that Citizens United perhaps should be reconsidered from time to time by the Court, but I don't see a practical remedy for many shareholders in that situation.

Ms. LOFGREN. Mr. Chairman, the bells have rung, and you had announced previously that we would adjourn as soon as they did. So I will yield back, even though it is on yellow, and I have a——

Mr. LUNGREN. Could I ask the gentlelady a question, though, before she yields back?

The only theory I had not heard about the problem with Proctor & Gamble last week was what was just suggested. I am going to investigate that and see if it was some statement of political activity that was made by the chairman of the Board.

The CHAIRMAN. I thank the members, and I thank the panel of witnesses. I appreciate your participation. This hearing is now adjourned.

[The information follows:]

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May 10, 2010

The Honorable Robert A. Brady
Chair, Committee on Administration
House of Representatives
Washington, D.C. 20515-6157

Dear Congressman Brady:

This letter updates comments I made in the January 25, 2010 edition of the Financial Times, in connection with your consideration of H.R. 5175, The Disclose Act.

Earlier in January, the Supreme Court ruled in *Citizens United* that the Congressional limit on corporations and labor unions advertising for and against political candidates violates free speech principles.

I leave to constitutional law scholars, the media and the public the inquiry as to whether corporations should be entitled to free speech protections and the extent to which Congress may revisit campaign contribution limits and public funding. After all, a corporation is an aggregation of interests — shareholders, managers, boards of directors, and employees. One might have argued before *Citizens United* that as long as each of these players had fully protected speech rights, their aggregation in a corporation needed no further constitutional protection and the aggregation's involvement in political campaigns would be a fit subject for congressional regulation.

But, as I said, I leave such issues to those who would address the constitutional issues. Rather, I focused there, and focus here, on the potential corporate, business and economic consequences of the decision, which have the potential to be profound. Conservative and business media have thus far favored the decision as helpful to business; but it's not at all clear that it is favorable to the economy. It's likely to hurt the dynamism of the American economy.

The Court's decision will strengthen the hand of incumbent interests over unorganized emerging interests. That is not good. Incumbent business interests often see upstarts as competing unfairly, as needing to be regulated, and as deserving of being suppressed. Incumbent businesses would like politicians to squelch new entrants. With their checkbooks now opened up, they will support politicians who seek to regulate and suppress upstarts.

Upstarts do not have money yet to finance their own political campaigns, they are disorganized, and they don't yet know the ropes in Washington and the state legislatures. They are new, weak, and inexperienced. Some do not even have a business up and running yet. Existing

businesses and interests already have the advantage that they know what their problems are and can get themselves heard by legislators. Businesses that aren't yet even ideas cannot be so easily heard.

Consider whether it would have been easy for upstarts with weak funding to emerge to counter-balance, for example, efforts IBM would have been able to make under this new regime to suppress new competitors decades ago? Could Bill Gates, or Steve Jobs in his garage, really have matched IBM in campaign funding back then?

The campaign finance decision will encourage pernicious corporatist tendencies. Consider the most recent example of these tendencies: unions and incumbent corporate interests in the auto industry managed to get about $80 billion in subsidies last year. Even without the ruling in favor of direct campaigning, the steel industry has often been able to suppress international competition. If incumbent industries' corporate and union leaders see a common cause in Washington, we should expect them to use the campaign process further to increase the number of friends they have in Congress. There has always been a public-oriented rationale – the economy needs this industry or, more convincingly, the decline in an industry should be dampened because of the human cost – but now there will be more muscle behind the campaign.

Overall, these kinds of possibilities are not good for the dynamism of the American economy: politicians can suppress upstarts and they will now have more reason than before to curry favor with incumbent business interests. Yet, new business entry when the old guard stumbles or sits on its laurels is what keeps the American economy moving. It has been one of our major advantages over continental European economies during recent decades, as politicians there were more beholden to existing industrial sectors and less interested in encouraging upstarts and innovation.

There's a second inauspicious consequence. The ruling will further strengthen the hands of CEOs, managers, and directors inside large American companies. They, after all, are the ones who decide whether to contribute to political campaigns, not shareholders.

Corporate and securities law in the US already strongly favors managers over shareholders. Usually, it's just fine that shareholders are distant from the corporation and its directors; shareholders don't know the company's business, while directors and managers do. But when directors or CEOs stumble, American shareholders (in contrast to British and other nations') today have only weak tools to influence or replace the faltering chief executive.

Senators or regulators at the Securities and Exchange Commission who want to weaken managers and strengthen the hand of shareholders, as several have sought to do in the past couple of years, face a tougher time. Chief executives and directors now have another powerful tool to punish politicians and regulators who cross them.

Combine these two scenarios – strengthened managers inside a company who can now secure more rules that protect their position, and incumbent businesses (sometimes with allied unions) having more power to suppress upstart competition – and we have the potential for sclerosis.

True, if a populist Washington decided to attack the foundations of capitalism directly, business interests would better be able to defend themselves now. But even if there are whiffs of populism in the air today, none of it threatens core capitalist institutions. With the corporate campaign finance ruling, it's even less likely to do so. In that dimension, the Court's decision is good for American capitalism.

In the other business and economic dimensions, it is not.

Very truly yours,

/s/ Mark J. Roe

Mark J. Roe

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Testimony of
The Brennan Center for Justice at NYU School of Law[1]
Before the Committee on House Administration
U.S. House of Representatives
May 11, 2010

Introduction:

Citizens United granted corporations and unions a novel right to use general treasury funds to influence American elections. These new rights should be accompanied by commensurate responsibilities of full transparency.

"The Democracy Is Strengthened by Casting Light On Spending in Elections" Act (the DISCLOSE Act) provides this meaningful transparency. As illustrated below, the Act's reporting and disclaimer provisions are necessary to prevent the corrupt use of money in American politics and to ensure that voters have enough information to cast informed votes at the polls. These provisions build on a century of federal disclosure laws seeking to reveal money in politics to the voting public.[2] And, they stand on solid constitutional ground—similar disclosure laws have been upheld again and again, including by eight members of this Supreme Court in *Citizens United.*

For over 60 years—under restrictions imposed by Taft Hartley, Federal Election Campaign Act (FECA) and Bipartisan Campaign Reform Act (BCRA)—corporations and unions were barred from spending general treasury funds on elections. Instead, they used fully-transparent political action committees (PACs) to engage in election-related spending. Now, any union and any corporation in America, whether nonprofit or for profit, may spend freely in elections. With this increase in entrants into the political sphere, clear reporting requirements are crucial.

Similarly, history and current events have both demonstrated that American elections are too often besieged by political advertisements from unnamed sources, making it difficult for citizens to properly weigh these messages. This is particularly true when those advertisements take the form of 30 second attack ads where the source is only vaguely identified. As President Obama recently

[1] This testimony is the product of the collaborative efforts of several lawyers at the Brennan Center including Susan Liss, Democracy Program Director; Ciara Torres-Spelliscy, Counsel; Angela Migally, Counsel; and Mimi Marziani, Katz Fellow and Counsel.
[2] A full discussion of the history of federal campaign finance disclosure laws is set forth in Appendix A.

stated, "the American people also have the right to know when some group like 'Citizens for a Better Future' is actually funded entirely by 'Corporations for Weaker Oversight.'"[3]

Below we describe how the DISCLOSE Act closes disclosure loopholes in current law. Next, we explain that the Supreme Court has repeatedly upheld laws similar to the DISCLOSE Act. We then illustrate the problems that the DISCLOSE Act is meant to address, including examples of covert spending at the state level. Finally, we urge Congress to pass additional reforms to address the problems created by *Citizens United,* including the Fair Elections Now Act, which would put in place small donor public financing for Congressional races, and the Shareholder Protection Act, which would require shareholder votes to authorize corporate political spending.

Part I. By Strengthening Reporting and Disclaimer Requirements for Campaign-Related Spending, the DISCLOSE Act Plugs Holes in Existing Law

As detailed more below, the flaws in the current federal reporting requirements are numerous. The DISLCOSE Act closes these loopholes, which could lead to limitless veiled corporate and union spending if left unaddressed. Experience from states where corporations were permitted to engage in unrestricted political spending before *Citizens United* illustrates why it is so critical to pass the DISCLOSE Act. State examples show that if the current federal loopholes remain open, corporations and unions will likely use them to make undisclosed expenditures.

A. Enhanced Reporting Requirements

Under the DISCLOSE Act, H.R. 5175, all covered organizations[4] must report all of their campaign-related spending to the Federal Election Commission (FEC). "Campaign-related spending" includes "independent expenditures" and "electioneering communications" as those terms are defined by the Act. The Act clarifies the definition of "independent expenditures" to include any communication that expressly advocates for the election or defeat of a clearly identified candidate as well as any communication that is the "functional equivalent of express advocacy."[5] The definition of "electioneering communication" is widened slightly by the Act. This term still covers only broadcast advertisements that refer to a clearly identified candidate, target the relevant electorate, and air soon before an election, but expands the reporting window to 120 days before a general election.[6] Expanding these definitions is key to capturing the way modern political campaigns are run—often, ads lacking the classic "vote for" or "vote against" language begin to air many months before an election.

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[3] Remarks of President Barack Obama, Weekly Address (May 1, 2010), http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-calls-congress-enact-reforms-stop-a-potential-corpor.

[4] "Covered organizations" include business corporations, labor unions, political organizations organized under section 527 of the Internal Revenue Code, and non-profit organizations organized under sections 501(c)(4), (5), or (6) of the Internal Revenue Code. H.R. 5175, 111th Cong. §211(a) (2010).

[5] H.R. 5175 expands the definition of independent expenditures to include communications: "that, when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness for office…" H.R. 5175, 111th Cong. §201 (2010).

[6] H.R. 5175, 111th Cong. §202 (2010) (changing electioneering communications from starting 60 days before a general election to 120 days before the general election).

Under existing law, organizations must report their electioneering communications within 24 hours of spending or contracting to spend $10,000 or more for production or broadcasting costs within a calendar year of the election.[7] Under the DISCLOSE Act, electioneering communications are subject to this same schedule but, as noted, the period for electioneering communications is expanded.

Under current law, individuals and committees report within 48 hours of spending $10,000 on independent expenditures until 20 days before an election. In the 20 days before an election, individuals and committees must report within 24 hours of spending $1,000 on independent expenditures. The DISCLOSE Act imposes a similar regime: at any time up to 20 days before an election, organizations must report their independent expenditures within 24 hours of spending $10,000 or more.[8] After that date and until election day, organizations must report their independent expenditures of $1,000 or more within 24 hours.

In addition to disclosing their own campaign-related spending, organizations will be required to reveal the identities of their funders. Organizations are given a choice as to how they want to structure this disclosure. They can either (a) report all donors in the previous year of over $1,000 or $600 (depending on the type of campaign-related spending involved),[9] or (b) set up a Campaign-Related Activity Account through which to fund their campaign-related spending. If an organization chooses this second option, it is only required to report donors of $1,000 or $600 (again, depending on the type of campaign-related spending involved) who donate specifically to the organization's Campaign-Related Activity Account. Accordingly, if an organization exclusively receives and disburses campaign-related expenditures through its Campaign-Related Activity Account, it need not report the identities of those who donated to the organization's general treasury. This closes a major loophole in current FEC reporting. As discussed in greater detail in Part III, present FEC rules do not require political advertisers to identify their funders unless a funder expressly earmarks his or her contribution.

The bill contains two provisions geared to prevent circumvention of the above-described disclosure requirements. First, if an organization transfers money to another entity for the purpose of engaging in campaign-related spending, that organization will be treated as if it engaged in campaign-related spending directly.[10] Second, if an organization transfers $10,000 or more from its general treasury funds to its Campaign-Related Activity Account, the organization must then disclosure the identify of donors of unrestricted funds over $10,000 or $6,000 (depending on the type of campaign-related spending involved). This, of course, is necessary to prevent an organization from shielding political funders by simply moving money around.[11] These

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[7] 11 C.F.R. § 104.20(b) (2010).

[8] This threshold is calculated by aggregate spending during the calendar year. H.R. 5175, 111th Cong. §201 (2010).

[9] An organization engaged in campaign-related spending must disclose donors of $1,000 or more when their funds are used for electioneering communications. When an organization engages in independent expenditures, it must disclose donors of $600 or more whose funds went towards that spending. H.R. 5175, 111th Cong. §211 (2010).

[10] An organization will be deemed to have transferred money for the purpose of campaign-related spending, if the transferring organization: (a) transferred funds in response to a solicitation of funds for that purpose; (b) had "substantial discussions about such expenditures" with the transferee; (c) transferred the money to an entity that engaged in campaign-related spending in the last election cycle or the current cycle; or (d) knew or should have known that the transferee intended to make campaign-related expenditures with the money. H.R. 5175, 111th Cong. §211 (2010).

[11] Without this provision, an organization could avoid disclosing its political donors by spending through its Campaign-Related Activity Account while funding that spending through its general treasury funds.

requirements will be particularly important to close another loophole under current law—the use of trade associations, organized under 501(c)(6) of the tax code, to cloak donations from for profit business corporations. This trade association problem is explained more fully below.

If a donor specifies in writing that he or she does not want to fund any campaign-related spending, an organization is strictly prohibited from using his or her donation in that way. In such a case, that donor's identity would not be revealed to the FEC, even if the organization chooses to use other general treasury funds for campaign-related spending. This provision protects donors who wish to give to nonprofits but do not want to fund political ads.[12]

Finally, any organization that submits regular, periodic reports to its shareholders, members or donors, must include information about any campaign-related spending during the period covered by the report. Specifically, the organization must disclose the date of the independent expenditure or electioneering communications, how much it cost, the name of identified candidates, and any transfer of funds to another organization for the purpose of campaign-related spending. In addition to including this information in periodic reports, an organization must post information detailing campaign-related expenditures on its website within 24 hours of reporting such to the FEC.[13] This addresses the current lack of disclosure between companies and their shareholders which will be explained in Part III.

B. Enhanced Disclaimer Requirements

The Act also imposes enhanced disclaimer requirements on broadcast independent expenditures and on electioneering communications (which, by definition, are broadcast via radio or television). Specifically, the Act imposes a new "stand-by-your-ad" rule that requires the highest ranking official of an organization to announce his or her name and position and then expressly approve of the message. In addition, if the advertisement was substantially paid for by another person or organization, that funder must also "stand by the ad" by making a similar statement. Finally, an organization must list the top five funders whose donations paid for the advertisement. This should prevent corporations or unions from using a "sham" group to run political ads, and will inform the voting public of the major financial backers in one snap shot.

Part II. The DISCLOSE Act's Disclosure Provisions are Constitutional

As explained above, the DISCLOSE Act imposes enhanced reporting and disclaimer requirements on business corporations, labor unions, and nonprofit organizations engaged in campaign-related spending. The Act thus ensures that those responsible for such expenditures—namely, the sponsor and those who fund the activity—are reported to the FEC and clearly identified to the public. As explained below, Supreme Court precedent leaves little doubt that the Act's reporting and disclaimer requirements are constitutionally sound.

In *Citizens United*, this Supreme Court upheld the disclosure and disclaimer requirements imposed by BCRA by an eight to one vote.[14] By so holding, the Court added to a long line of cases approving laws requiring the disclosure of money in federal elections.[15]

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[12] H.R. 5175, 111th Cong. §325 (2010).
[13] H.R. 5175, 111th Cong. §201 (2010).
[14] *Citizens United v. FEC*, 130 S.Ct. 876, 913-16 (2010).

The Court's first significant examination of federal disclosure laws occurred in 1934 in the case of *Burroughs v. United States*. There, the Court upheld the reporting requirements imposed by the Federal Corrupt Practices Act of 1925. In upholding this law, the Court emphasized that disclosure of campaign spending serves crucial anti-corruption interests:

> To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[16]

In the 1976 case of *Buckley v. Valeo*, the Court again embraced robust disclosure—this time, by validating the extensive reporting requirements imposed by FECA.[17] The *Buckley* Court recognized that FECA's disclosure provisions could burden individual rights and might even deter some individuals from engaging in political activity. Despite the possibility that disclosure might curb some political activity, the Court concluded that disclosure is generally "the least restrictive means of curbing the evils of campaign ignorance and corruption . . ."[18]

The *Buckley* Court also found that disclosure serves three key governmental interests, which typically justify any burden imposed on political rights:

> (1) "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent";
>
> (2) "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and
>
> (3) "disclosure requirements are an essential means of gathering the data necessary to detect violations" of other campaign finance regulations.[19]

In 2003, the Court affirmed this triumvirate of state interests in *McConnell v. FEC* when it upheld BCRA's electioneering communications reporting provisions by a vote of eight to one.[20] The *McConnell* Court—following the lead of the district court in the case—paid particular attention to voters' informational interest in knowing who funds political ads so that they can make informed decisions at the ballot box. The Court was troubled by evidence that independent spenders regularly shield their true identities while trying to influence federal elections:

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[15] *See McConnell v. FEC*, 540 U.S. 93, 194-202 (2003); *Buckley v. Valeo*, 424 U.S. 1, 69-81 (1976); *Burroughs v. United States*, 290 U.S. 534, 540-45 (1934); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.").
[16] *Burroughs*, 290 U.S. at 545.
[17] *Buckley*, 424 U.S. at 60-82.
[18] *Id.* at 68.
[19] *Id.* at 66-68.
[20] *McConnell*, 540 U.S. at 196 (citations omitted).

> BCRA's disclosure provisions require [] organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. . . . Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. . . .[21]

Given this line of precedent, it is not surprising that the Supreme Court in *Citizens United* reaffirmed the constitutionality of BCRA's reporting and disclaimer provisions for electioneering communications. In so ruling, the Court reiterated that such disclosure requirements impose no ceiling on campaign-related activities and prevent no one from speaking.[22] Disclaimers, the Court explained, play a particularly important role in keeping voters fully informed. By clearly identifying who is paying for political advertisements, BCRA's disclaimer requirements ensure that voters are in the best position to evaluate competing arguments in the months before election day.[23]

Clarifying an unsettled area of law,[24] *Citizens United* also specified that disclosure requirements may be imposed in contexts where other regulation would be impermissible:

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. . . . In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found [the corporate expenditure ban] to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.[25]

By expressly approving of disclosure in connection with a variety of campaign-related expenditures, the *Citizens United* Court thus sanctioned expansive disclosure. It is therefore likely find the DISCLOSE Act's disclosure provisions constitutional as well.

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[21] *Id.* at 196-97 (*quoting McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)).
[22] *Citizens United*, 130 S.Ct. at 914 (citing *Buckley*, 424 U.S. at 64 and *McConnell*, 540 U.S. at 201).
[23] *Id.* at 914, 915.
[24] Specifically, *Citizens United* rejected importing the so-called "functional equivalence" test articulated in a prior decision on campaign finance law into the disclosure context. Under that logic, disclosure would only be permitted for independent expenditures that were the functional equivalent of express advocacy. Before *Citizens United* clarified that disclosure could, in fact, be required for a wide range of election-related communications, lower courts had split over this issue.
[25] *Citizens United*, 130 S.Ct. at 915.

Part III. The DISCLOSE Act Will Limit Current "Black Box" Political Spending

The DISCLOSE Act is designed to address several loopholes in the current federal disclosure regime that allow political spenders to hide their true identity and shield exactly who is funding independent political spending. Currently, business corporations and other organizations can spend through intermediaries such as confidential trade associations. If the resulting advertisements are not funded through a PAC, the FEC's lax reporting requirements rarely capture the underlying donors. Similarly, current disclaimer requirements do not always catch who is paying for political advertisements. Moreover, for shareholders and investors, there is a lack of transparency surrounding corporate political activity.

A. Voters, Shareholders, and Investors in the Dark

Today voters and shareholders often know very little about the beneficiaries of corporate political expenditures.[26] This matter is particularly problematic for publicly traded companies which are currently under no legal duty to disclose political spending directly to shareholders.[27] Accordingly, as one legal scholar has explained, "[p]olitical 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."[28] An average shareholder thus has little hope of fully understanding the scope of the companies' political expenditures.[29] Even worse, shareholders may unwittingly fund political spending at odds with their own political philosophies.[30]

More robust disclosure from corporate spenders is needed to remedy this lack of information between a corporation, its shareholders, and the voting public. Shareholders need periodic disclosure of where corporate money is being spent during elections, including the names of candidates supported or opposed, party affiliation and office sought and it should be reported directly to shareholders and members. And, this is precisely what Section 327 of the DISCLOSE Act would do.

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[26] Bruce F. Freed & John C. Richardson, *Company Political Activity Requires Director Oversight*, ALI-ABA COURSE OF STUDY MATERIALS, 3 (Dec. 2005).

[27] Ciara Torres-Spelliscy, *Corporate Campaign Spending, Giving Shareholders a Voice* (Brennan Center 2010), http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice.

[28] Jill Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006).

[29] The lack of board approval is the norm. However three states (Louisiana, Missouri and Iowa) do require board approval of political donations before they are made. *See* La. Rev. Stat. Ann. § 18:1505.2(F); Mo. Ann. Stat. § 130.029; Iowa Senate File 2354, An Act Relating to Campaign Finance, Including Political Campaign Activities and Independent Expenditures by Corporations, Making Penalties Applicable, and Including Effective Date Provisions (2010), *available at* http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=SF2354.

[30] Freed & Richardson, *supra* note 26, at 2-3; *see also* Victor Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 YALE L. J. 235, 237 (1981) (stating "[t]he use of that wealth and power by corporate management to move government toward goals that management favors—with little or no formal consultation with investors—is also a phenomenon that is generally undeniable."); *id.* at 239-40 (noting "unless investor approval is obtained, the funds of some investors are being used to support views they do not favor.").

B. Holes in FEC Reporting

1. Disclosure Holes

Even before *Citizens United*, a small class of ideological non-profits spent in federal elections under the "*MCFL* exemption."[31] Since 1986, *MCFL* 501(c)(4)s—called "Qualified Nonprofit Corporations" (QNCs) by the FEC—could already use general treasury funds to pay for independent expenditures and electioneering communications in federal elections. But there was a major gap in what was disclosed: the FEC's forms only required *MCFL*s to report earmarked contributions.[32] In other words, so long as a donor does not earmark the donation for the ad, that donor remains anonymous.[33]

Nonprofit organizations have made significant amounts of independent expenditures in federal races without ever having to disclose the identity of their funders. For example, in 2008, the NRA and the Defenders of Wildlife, both 501(c)(4)s, spent $17 million and $3 million respectively on independent expenditures advocating for the election or defeat of federal candidates.[34] The current disclosure regime, however, does not require disclosure of the sources of the funds used to pay for such expenditures—as a result, the funders of these ads remain unknown.

Similarly, the Committee for Truth in Politics, a 501(c)(4) ironically dedicated to "honesty in government," aired deceptive television advertisements attacking financial reform and Senators Max Baucus and Jon Tester just this year. The Committee for Truth in Politics has refused to make the minimal disclosures required by current law.[35] But even if it had complied with existing law, it still would not have to identify the source of its funds.

Federal disclosure requirements need to be strengthened so that those who fund these ads are actually disclosed to the public. Section 211 of the DISCLOSE Act ends this anonymous donor problem by requiring, for the first time, that all donors over certain dollar thresholds be named in public reports to the FEC.

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[31] The name of this exemption comes from the 1986 Supreme Court case, *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*) which held the prohibition on corporate and union treasury spending on independent expenditures found in 2 U.S.C. § 441b could not apply to ideological nonprofits that do not take corporate or union money. 479 U.S. 238, 263 (1986).

[32] Federal Election Commission, FEC Form 5 Report of Independent Expenditures Made and Contributions Received to be Used by Persons (Other than Political Committees) including Qualified Nonprofit Corporations (2009) http://www.fec.gov/pdf/forms/fecfrm5.pdf; *see also Instructions for FEC Form 05 and Related Schedules*, 3 (Sept. 2005).

[33] FEC, *Instructions for Preparing FEC FORM 9 (24 Hour Notice of Disbursements for Electioneering Communications)* 4 (undated), http://www.fec.gov/pdf/forms/fecfrm9i.pdf ("[i]f you are a corporation, labor organization or Qualified Nonprofit Corporation making communications permissible under [11 C.F.R.] 114.15 and you received no donations made specifically for the purpose of funding electioneering communications, enter "0" (zero)"); *see* Notice 2007–26, *Electioneering Communications, Federal Election Commission Final Rule and Transmittal of Rule to Congress*, 72 Fed. Reg. 72911 (Dec. 26, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf ("Donations made for the purpose of furthering an EC include funds received in response to solicitations specifically requesting funds to pay for ECs as well as funds specifically designated for ECs by the donor."). However, the solicitation prong was invalidated by the DC Circuit late last year. *Emily's List v. FEC*, 581 F.3d 1, 18 (D.C. Cir. 2009).

[34] Center for Responsive Politics, *Independent Expenditures: 2008 Committees* (undated), http://www.opensecrets.org/indexp/summ.php?cycle=2008&type=M (last visited May 6, 2010).

[35] Zachary Roth, *Ad Uses Luntz Framing To Bamboozle Voters On Financial Reform*, TPM MUCKRACKER, Feb. 11, 2010, http://tpmmuckraker.talkingpointsmemo.com/2010/02/ad_uses_luntz_framing_to_bamboozle_voters_on_finan.php.

2. Disclaimer Flaws

Currently, federal disclaimers only require identification of the sponsoring organization. Too often, however, this organizational name is that of a benign-sounding shell entity created solely for the election. Use of front groups veil that underlying funders are actually business corporations with specific, profit-driven agendas. Examples from the states illustrate this problem.

In a recent Colorado ballot measure election, for example, a group called "Littleton Neighbors Voting No" spent $170,000 to defeat a zoning restriction that would have prevented a new Wal-Mart. When the disclosure reports for these groups were filed, it was revealed that "Littleton Neighbors" was exclusively funded by Wal-Mart, and not a grass roots organization. The DISCLOSE Act's top donor disclaimer approach would have made Wal-Mart's participation evident on the face of the advertisements and empowered voters with the information necessary to make an informed decision.

The top five donor disclaimer would also have helped identify that in Florida's 2006 gubernatorial primary, the US Sugar Corporation funneled approximately $1 million in independent expenditures through deceptively-named fronts—"Florida's Working Families" and "The Coalition for Justice and Equality."[36] US Sugar was the largest contributor to each of these committees, providing $700,000 of the $1 million spent by the Coalition for Justice and Equality and $200,000 of Florida's Working Families' $275,000 budget.[37] These expenditures were all made in support of Candidate Rod Smith and totaled 30% of the expenditures that candidate Smith spent in the primary.[38] Had Florida required disclaimers analogous to the DISCLOSE Act's major donor disclaimers, the public would have been well aware of US Sugar's leading role in these seemingly grassroots committees, thereby providing valuable voter information and allowing detection of any *quid pro quo* arrangements.

Similar ads from veiled political actors could be seen in the federal sphere as soon the midterm elections. This is yet another reason that the DISCLOSE Act is necessary.

C. Hidden Spending through Trade Associations

The DISCLOSE Act will also address a very serious problem that has allowed trade associations to shield corporate political spending from the public eye. Trade associations organized under section 501(c)(6) of Internal Revenue Code are currently not required to divulge the identity of those funding their political activities; similarly, most corporations do not reveal how much they have given to trade associations.[39] Thus, corporations have long made anonymous contributions to

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[36] 2006 Campaign Finance Reports for the Coalition for Justice and Equality, Florida Division of Elections' Campaign Finance Database, http://election.dos.state.fl.us/campaign-finance/expend.asp; 2006 Campaign Finance Information for Florida's Working Families, Center for Responsive Politics, http://209.190.229.100/527s/527cmtedetail_donors.php?cm=223864624&cycle=2006.

[37] *Id.*

[38] 2006 Campaign Finance Reports for Rod Smith, Florida Division of Elections' Campaign Finance Database, http://election.dos.state.fl.us/campaign-finance/expend.asp.

[39] BRUCE F. FREED & JAMIE CARROLL, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING 1 (2006), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932.

trade associations, allowing them to engage in political spending for corporate interests.[40] The effects are severely troubling:

> The use of trade associations as conduits for political spending allows companies to give political money and then claim they didn't know that it ended up supporting organizations and candidates with which they may not want to be publicly associated. It also prevents investors and directors from learning about indirect corporate political spending and being able to evaluate the risks that trade association spending creates for shareholder value.[41]

Trade associations pose a particularly troublesome problem after *Citizens United.* As noted above, federal law pre-*Citizens United* required trade associations to pay for express advocacy through a PAC.[42] Now, trade associations can spend directly out of their corporate treasuries which, in turn, can be funded by the corporate treasuries of their members.[43] Thus, trade associations hold the potential for an end-run around disclosure of unrestricted corporate election-related spending.

The threat of secretive trade association spending is not a theoretical fear. This is already a demonstrated problem in several states. For instance, in a 2000 Michigan senate race, Microsoft used the US Chamber of Commerce to fund $250,000 in attack ads against a candidate. Microsoft's involvement in the election would have gone unreported but for the efforts of an investigative journalist who exposed the expenditure.[44] Unfortunately, the Chamber has been allowed to keep the underlying contributing corporations secret. Consequently, "the public will never know who is funding the Chamber's attack ads and get-out-the-vote efforts because the Chamber … is not required to itemize its political activities."[45]

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[40] *Id.* at 1-2 ("Trade associations are now significant channels for company political money that runs into the tens if not hundreds of millions of dollars. In 2004, more than $100 million was spent by just six trade associations on political and lobbying activities, including contributions to political committees and candidates. None of this spending is required to be disclosed by the contributing corporations."); Nell Minow, Testimony for the Hearing on Corporate Governance after the *Citizens United* Decision before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises House Committee on Financial Services 3 (Mar. 11, 2010), http://www.house.gov/apps/list/hearing/financialsvcs_dem/minow.pdf ("The use of secondary entities like trade associations is even more removed from any transparency or oversight. Not only do corporations secretly funnel money for political purposes into these trade associations, they too often use them to oppose the very policies their public statements endorse.").

[41] Freed & Carroll, *supra* note 39, at 7.

[42] Kenneth A. Gross, Ki P. Hong & Lawrence M. Noble, *Political Activity by Trade Associations*, 1624 PLI CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 325, 333 (Oct. 2007) (internal citations omitted) (Pre-*Citizens United*, "[g]enerally, political involvement of trade associations is limited to the solicitation of voluntary contributions to a separate segregated fund or PAC that is established and administered by a trade association. As a consequence, transfers of [trade association] dues receipts to a PAC are severely restricted.").

[43] 501(c)(6)s cannot, however, have political activities as its primary activity. Once they do, they risk losing their tax exempt status from the IRS. REV. RUL. 67-368; 1967-2 C.B. 194 (ruling that an organization whose primary activity was rating candidates using non-partisan criteria did not qualify for § 501(c)(4) status); I.R.S. GEN. COUNS. MEM. 34,233 (Dec. 30, 1969) (applying similar reasoning to § 501(c)(6) organizations).

[44] *See* Freed & Carroll, *supra* note 39, 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.

[45] Shayla Kasel, *Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions*, 33 J. CORP. L. 297, 298 (Fall 2007).

Moreover, as the Chamber acts as a black box cloaking the political spending of its corporate members, the Chamber itself can cloak its role in politics by hiding behind other groups. A recent example of this was revealed in the case *Voters Education Committee v. Washington State Public Disclosure Commission*.[46] As this litigation unearthed, the Chamber had given $1.5 million dollars to a group called the "Voters Education Committee," which spent the money on political television advertisements in a state attorney general election without disclosing information about its contributions and expenditures.[47] The DISCLOSE Act's transfer provisions would have made spending like this transparent in the federal context.

Finally, there is already evidence that these covert spending examples from the states may repeat themselves in federal elections as soon as this Fall. Just a few weeks after *Citizens United*, one of the country's largest law firms advised its corporate clients that trade organizations could provide "sufficient cover" from disclosure.[48] The press has also reported that the Chamber plans to spend at least $50 million on political races and related activities in 2010—a 40% increase from 2008. It expects to focus on about 10 Senate races and up to 40 House districts where it will target vulnerable Democrats with campaign advertisements, among other efforts.[49] Since corporate contributions to federal candidates are banned, it is almost certain a significant portion of this money will be spent on independent expenditures. The shear magnitude of the Chamber's spending capabilities makes disclosure of the Chamber's funders essential, especially when that spending is compared to average expenditures by candidates. (In 2008, winning Senate candidates spent $7.5 million on average, and winning house candidates spent $1.4 million—far less than the Chamber's capabilities.[50])

Indeed, some veiled spending by trade organizations in the 2010 elections is already underway. Americans for Job Security, a 501(c)(6), has reportedly spent over $1 million on advertisements attacking a candidate in the Arkansas democratic congressional primary.[51] Although Americans for Job Security need not disclose the identity of its contributors under current law, the targeted candidate has filed a complaint with the FEC demanding that the underlying donors be identified.[52] The DISCLOSE Act would eliminate this black box spending by requiring trade associations who fund electioneering communications and independent expenditures to name their donors over a certain dollar threshold.

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[46] 161 Wash.2d 470 (2007).
[47] *Id.* at 474.
[48] Tim L. Peckinpaugh & Stephen P. Roberts, *Citizens United: Questions and Answers Public Policy and Law Alert*, K&L Gates Client Alert, Feb. 12, 2010, http://www.klgates.com/newsstand/Detail.aspx?publication=6214.
[49] Dan Eggen, *U.S. Chamber of Commerce Sets Sights on Democrats Ahead of Midterm Elections*, WASHINGTON POST, Mar. 16, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031602040.html?referrer.
[50] Center for Responsive Politics, Statistics on Average Cost of Congressional Races in 2008 (2010), http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&Type=W&Display=A.
[51] Max Brantley, *Halter complains about stealth group*, ARKANSAS TIMES BLOG, May 6, 2010, http://www.arktimes.com/blogs/arkansasblog/2010/05/halter_complains_about_stealth.aspx; Greg Sargent, *Shadowy outside group spending $1.5 million to influence Arkansas Dem primary*, WASHINGTON POST BLOG, May 6, 2010, http://voices.washingtonpost.com/plum-line/2010/05/shadowy_outside_group_spending.html; Robb Mandelbaum, *With a Provocative Ad, Another Business Group Backs Lincoln in Arkansas*, NYTIMES BLOG, May 7, 2010, http://boss.blogs.nytimes.com/2010/05/07/with-a-provocative-ad-another-business-group-backs-lincoln-in-arkansas/?src=busln.
[52] FEC Complaint of Arkansas Lt. Gov. Bill Halter, May 6, 2010, *available at* http://www.arktimes.com/blogs/arkansasblog/fechalter.pdf.

Part IV. Beyond Disclosure to Full Reform

The public anger surrounding *Citizens United*[53] provides Congress with a ripe opportunity to strengthen federal disclosure and disclaimer provisions to ensure that voters are fully aware of who is trying to sway their vote in national elections. There is no doubt that the DISCLOSE Act will improve our system of funding elections—Congress should certainly pass it without hesitation. By itself, however, it cannot remedy our democracy's deeper malfunctions. To put voters back in the center of our democratic process, additional reforms are necessary.

First, as we have detailed in previous testimony before this Committee, Congress has the authority to modify the securities law to address the problem of corporate managers using other people's money in politics.[54] Congress should provide shareholders in publicly traded companies the right to vote on corporate political expenditures and require that corporate boards authorize particularly large political expenditures. The Shareholder Protection Act, H.R. 4790, would provide these safeguards for shareholders who are presently unwittingly footing the bill for corporate political spending.

Furthermore, and on a more fundamental level, Congress should embrace small donor public financing like that proposed by the Fair Elections Now Act (FENA), H.R. 1826. FENA would provide qualified candidates an initial grant, plus a four-to-one match of individual contributions of up to $100. The multiple matching funds component would not only amplify the influence of small-donor citizens, it would encourage candidates to seek contributions from a broad, and presumably more diverse, constituent base.

We encourage this Committee to hold hearings on FENA as soon as possible so that members and the public can learn more about this vital reform measure. Moreover, Congress should push FENA to the front of its legislative agenda—our democracy is in urgent need of a systemic reform to improve the dynamics of campaign fundraising and cannot afford to wait any longer.

Conclusion

The DISCLOSE Act closes longstanding loopholes that have permitted veiled political actors to escape full transparency. We urge Congress to pass this legislation as quickly as possible in order to ensure the source of corporate money in the upcoming election is fully self-evident.

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[53] Washington Post-ABC News poll conducted from February 4 to February 8, 2010 found "[e]ight in 10 poll respondents say they oppose the high court's Jan. 21 decision to allow unfettered corporate political spending, with 65 percent 'strongly' opposed." *See* Dan Eggen, "Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing," WASHINGTON POST, Feb. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.

[54] Testimony of Ciara Torres-Spelliscy Counsel at the Brennan Center for Justice at NYU School of Law before the Committee on House Administration, U.S. House of Representatives (Feb. 3, 2010), http://cha.house.gov/UserFiles/282_testimony.pdf.

Appendix A – History of Federal Disclosure Laws

Corporate contributions were outlawed in 1907 to prevent excessive corporate influence during the Gilded Age. As illustrated below, corporate political spending was restricted from then on, until *Citizens United* turned history on its head.

A. Early Disclosure Laws

In the words of Professor Frank Pasquale,

> The story of campaign finance reform properly begins in the "Gilded Age," when a variety of political reform movements began to question the growing influence of trusts and other organized economic interests within the American democratic system. Political developments of this era alarmed many. Graft and corruption had reached astonishing levels.[55]

Or, as satirist Mark Twain put it in 1873, "I think I can say, and say with pride that we have some legislatures that bring higher prices than any in the world."[56]

From that time on, corporations have used their enormous coffers to wield significant control over government. Since as early as 1890, reports surfaced that the railroad industry in Pennsylvania wielded so much influence that it "dictated who shall represent the state in the United States Senate, selects its own candidates for Governor."[57] A newspaper even reported that the employees of railroad companies would often speak and sometimes preside over legislative sessions, despite the fact that they were not elected officials. Referring to William Latta, then General Agent of the Pennsylvania Railroad, *The New York Times* reported that

> [Latta] for many years worked openly and above board as the recognized representative of the Pennsylvania Road and has a seat in the select council chamber at its regular meetings every Thursday, and uses his privilege with so much freedom that he calls the pages, sends notes to the members, and simply indicates to them what he wants done and directs what they shall do.[58]

Despite the troubling, outsized influence corporations yielded, it took decades and the New York Life Insurance Scandal of 1905 before Congress would step in to try to address the problem through federal contribution limits and disclosure laws.

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[55] Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 603 (2008).

[56] MARK TWAIN, CHARLES D. WARNER & ALBERT B. PAINE, THE WRITINGS OF MARK TWAIN VOL. VII 211 (1925).

[57] *The Pennsylvania Ring: How Quay Attained His Position As "Boss,"* N.Y. TIMES Sept. 21, 1890. The Pennsylvania Ring was a corrupt group that involved the office of the State Treasury and corporations. *See e.g., Quay Receives Orders: That He Does Not Think It Wise To Disobey*, N.Y. TIMES, June 23, 1890 (discussing how Standard Oil and the Pennsylvania Railroad ordered U.S. Senator Matthew Quay to award the Republican gubernatorial nomination to state Senator George Delamater). *See also, Quay's Man Delamater: Publicly Accused of Bribery, Perjury and Forgery*, N.Y. TIMES, Sept. 27, 1890 (discussing Delamater's use of Standard Oil funds to purchase votes, insuring his seat as Senator and furthering his ambitions to be governor).

[58] *Quay and the Democrats: The Boss and the Pennsylvania Railroad at Work*, N.Y. TIMES, June 14, 1890.

The problem of veiled corporate political expenditures dominated the national consciousness in 1905.[59] This was the year when the public discovered that the biggest insurance companies in the country had given vast sums of money to the Republican Party using policy holder money, including for the 1904 re-election of Theodore Roosevelt.[60] Besides the problem of using other people's money in politics, the public was outraged when they learned that this spending had been done covertly as a series of secret backroom deals.

Congress' response was two-fold. First, it passed the Tillman Act in 1907, prohibiting corporations from making contributions to candidates for federal office.[61] Shortly thereafter, Congress passed the Publicity Act of 1910, the first federal law to require public disclosure of financial spending by political parties.[62] This law required political committees to disclose the names of all contributors of $100 or more and identification of recipients of expenditures of $10 or more was also required.[63] In 1911, the Act was revised to include conventions and primary campaigns.[64]

Following the Teapot Dome scandal, a pay-to-play scheme where oil companies gave payoffs to federal officials in exchange for oil leases, the federal disclosure requirements were expanded in the Federal Corrupt Practices Act of 1925.[65] That Act required political committees to report total contributions and expenditures, including the names and addresses of contributors of $100 or more and recipients of $10 or more in a calendar year.[66] The 1925 Act was largely a dead letter because of lack of enforcement.[67]

B. FECA

The Federal Election Campaign Act of 1971 ("FECA 71") replaced the 1925 law.[68] It was signed into law by Republican President Richard Nixon who would soon be entangled in its

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[59] Arguably, the problem pre-dates the 1905 scandal. *See* Marc Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 639 (1989) ("[C]oncern with corporate power over democratic processes in America grew sharply toward the close of the nineteenth century as concentrations of private capital, in the form of corporations and trusts, reached unprecedented size and power. These huge pools of capital raised the frightening prospect that candidates and elections might actually be bought in systematic fashion.").

[60] As Professor Adam Winkler has detailed in his seminal law review article, "Other People's Money", in the press of the day, the corporate managers who made these political expenditures were characterized as embezzlers and thieves, but they were not subject to criminal sanctions. (Had they been, they could have been guilty of grand larceny). Adam Winkler, *'Other People's Money': Corporations, Agency Costs, and Campaign Finance Law*, 92 GEORGETOWN L. J. 871, 893-94 (June 2004); *see also id.* at 914-15 (one insurance executive involved in the 1905 scandal was charged with grand larceny, but the criminal charges were thrown out by the New York courts).

[61] *See United States v. U.S. Brewers Ass'n*, 239 F. 163 (W.D. Pa. 1916) (upholding the Tillman Act and finding "[t]hese artificial creatures [*e.g.*, corporations] are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed.").

[62] Act of June 25, 1910, c. 392, 36 Stat. 822.

[63] *Id.* at §§ 1, 5-6, 36 Stat. 822-824.

[64] Act of Aug. 19, 1911, § 2, 37 Stat. 26; *see also United States v. Auto Workers*, 352 U.S. 567, 575-576 (1957). As reformer Congressman Perry Belmont, an advocate for this legislation, explained, "[l]egislation dealing with campaign publicity is founded upon the theory that contributions and expenditures in elections are public acts for public purposes." PERRY BELMONT, AN AMERICAN DEMOCRAT: THE RECOLLECTIONS OF PERRY BELMONT 472 (1940).

[65] 43 Stat. 1070.

[66] *Id.* at § 305(a), 43 Stat. 1071; *see also Burroughs v. United States*, 290 U.S. 534 (1934) (upholding the 1925 Act).

[67] Pasquale, *supra* note 55 at 607.

[68] Kurt D. Dykstra, Comment, *Sending the Parties "PAC-ing"? The Constitution, Congressional Control, and Campaign Spending After* Colorado Republican Federal Campaign Committee v. Federal Elections Commission, 81 MARQ. L. REV. 1201, 1210 n.35 (1998).

mechanisms.[69] FECA 71 established procedures for monitoring and auditing campaign funds and applied to both primary and general elections.

One of the many unseemly revelations from the investigation of Nixon's Watergate scandal was the extent of corporate political involvement, despite the corporate contribution ban:

> [O]ne of the most disturbing findings was the large number of illegal corporate campaign contributions. Nineteen companies pleaded guilty to charges by the Watergate special prosecutor that they had violated a federal criminal statue barring corporations from contributing their funds to candidates for federal office.[70]

Moreover, the Watergate investigations revealed that corporations were not properly disclosing how their money was being spent, leaving investors and voters in the dark. For example, oil companies were caught giving large, illegal and secretive contributions to Nixon's Committee to Re-Elect the President (CREEP).[71] But the oil companies were hardly unique. Other industries also gave covert and illegal contributions too.[72]

Post-Watergate, FECA was amended in 1974 to address these problems as well as others. Under FECA 74, corporations and labor unions were prohibited from using their general treasury funds to "make a contribution or expenditure in connection with any election to any political office."[73] FECA 74 also established a comprehensive disclosure regime, requiring that contributions to candidates and political committees by fully disclosed and that independent spender disclose money spent on express advocacy.[74] Finally, the law created the Federal Election Commission (FEC) as an independent agency with the authority to administer and enforce campaign finance laws.

C. BCRA

While corporate bans were in place in the 1990s, corporations found two loopholes to insert their money into the electoral process. One was by giving soft money donations to political parties. Another tactic was funding sham issue ads—ads which purport to be about an issue but attack or

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[69] ANDREW RUDALEVIGE, THE IMPERIAL PRESIDENCY 95-96 (2005), *available at* http://www.press.umich.edu/pdf/0472114301-ch3.pdf.

[70] Michael D. Holt, *Corporate Democracy and the Corporate Political Contribution*, 61 IOWA L. REV. 545, 545 (1975); *see also* HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 18 (4th ed. 1992) (reminding us that "twenty-one companies pleaded guilty to charges—brought against them by Watergate special prosecutor Archibald Cox—of making illegal corporate contributions totaling $968,000.").

[71] LAWRENCE M. SALINGER, ENCYCLOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME, Vol. 2, 584 (2005); MARSHALL BARRON CLINARD & PETER C. YEAGER, CORPORATE CRIME 158-159 (2006) (listing secret political contributions from oil companies including over $1 million from Gulf Oil).

[72] MICHAEL A. GENOVESE, THE WATERGATE CRISIS 23 (1999) (listing airlines, a tire company, and oil companies as illegal corporate campaign donors); George Lardner Jr., *Watergate Tapes Online: A Listener's Guide* (2010), http://www.washingtonpost.com/wp-srv/nation/specials/watergate/watergatefront.htm ("The milk producers contributed more than $1 million to the president's re-election campaign and the President then allowed a higher parity level for milk and dairy products.").

[73] 2 U.S.C. § 441b.

[74] Although the original language of the law did not impose this "express advocacy" limitation, the Court read the requirement narrowly to avoid constitutional problems with vagueness. *Buckley*, at 76-81. Today, the definition of "independent expenditure" reflects language used in *Buckley*.

praise a candidate for federal office right before his or her election. Funders of these sham ads often hid behind fake or misleading names.[75]

In spite of these problems, it took the implosion and bankruptcy of Enron, a huge campaign contributor to both political parties, before BCRA was finally passed after years of attempts.[76] BCRA closed both the soft money and the sham issue ad loopholes. Of particular relevance here, BCRA created regulations for electioneering communications, including a comprehensive disclosure regime for such communications. As explained above, these provisions were upheld by the Court in *McConnell* and *Citizens United* eight to one.

As this historical review shows, there have been long cycles of grave scandals followed by reform efforts. Congress need not wait for a crisis, however, before it acts. Instead, given what we have learned from the past, Congress should set reasonable disclosure rules now so that the next scandal is prevented or mitigated.

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[75] *See McConnell*, 540 U.S. 196-97 (*quoting McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)) ("The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry)).

[76] Al Hunt, *Enron's One Good Return: Political Investments*, WALL STREET JOURNAL, Jan. 31, 2002 (arguing Enron "played with funny money. But their political investment helped prolong the Ponzi scheme."); Anthony Corrado, *The Legislative Odyssey of BCRA in* LIFE AFTER REFORM 37 (MICHAEL MALBIN, ed., 2003) *available at* http://www.cfinst.org/pdf/books-reports/LAR/LAR_ch2.pdf ("the bankruptcy of the Enron Corporation and other corporate scandals were matters of national attention, and raised alarming questions about the role political contributions played in policy decisions favorable to Enron and other corporations.").

CHRIS VAN HOLLEN
8TH DISTRICT, MARYLAND

COMMITTEE ON
WAYS AND MEANS

COMMITTEE ON OVERSIGHT AND
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Congressman Kevin McCarthy
1523 Longworth House Office Building
Washington, DC 20515

April 23, 2010

Dear Congressman McCarthy,

I have received your letters of March 3rd and April 15th of this year. As you know, in response to the Court's decision in this case, we released a legislative framework in February that proposed various legislative initiatives. We did this to stimulate debate and to solicit legislative suggestions.

Since then we have received a significant amount of input from Republicans and Democrats alike on how to best address any changes to campaign finance law as a result of this decision. We have incorporated many of these suggestions into the legislation. In fact, upon consideration of the proposal in your letter of March 3, 2010, we are adding a provision that, while leaving the statutory limits in place, would give party committees more flexibility to work with their candidates.

The main thrust of this bill is to provide greater disclosure and accountability regarding the sources of political expenditures and to ensure that, as a result of the decision, foreign interests would not be able to influence U.S. elections.

Yesterday, I circulated an updated summary of the bill to legislative staff on both sides of the aisle. We will continue to consider all suggestions as we finalize the bill in anticipation of introduction. Moreover, we look forward to working with you, and the other members of your Committee, as we move forward through the legislative process to address the Court's decision.

Sincerely,

Chris Van Hollen

Cc: Chairman Robert Brady
Cc: Congressman Daniel Lungren
Cc: Congressman Gregg Harper

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Congress of the United States
Washington, DC 20515

April 29, 2010

Dear Colleague:

On January 17th of this year the Supreme Court overturned two decades of precedents that prohibited corporate and union expenditures in political campaigns. In a 5-4 decision, the Supreme Court in *Citizens United v. Federal Election Commission* , permits these organizations to now spend unlimited amounts of treasury funds to expressly advocate for the election or defeat of candidates for federal office.

It has been the policy of the country for more than a century to prevent the use of corporate and union funds to influence federal campaigns to prevent these private entities from exerting too much influence over government decisions. This decision turns that around and enables larger financial interests to drown out the voice of ordinary citizens.

Moreover, through this decision, the Supreme Court has opened the door to foreign corporations to spend money through foreign controlled domestic subsidiaries and for major recipients of taxpayer dollars to funnel these funds into political activities.

In response to this decision, we are introducing the DISCLOSE ACT, HR 5175. The central purpose of this bill is to promote openness in government, and compel disclosure of the money that is being used to finance elections. We believe the American people have the right to know who is spending money to influence this country's elections. Furthermore, it will close loopholes to prevent foreign influence and major beneficiaries of taxpayer money from financing political campaigns.

The American people have a right to know who is funding political campaigns. We urge you to join us in support of this bill. A summary of the bill is attached but the basic tenets are as follows:

- **ENHANCE REQUIREMENTS FOR DISCLOSURE OF POLITICAL SPENDING**
- **REQUIRE SPONSORS AND FUNDERS OF POLITICAL ADS TO IDENTIFY THEMSELVES**
- **STRENTHEN PROHIBITIONS ON COORDINATION OF POLITICAL ACTIVITIES**
- **PREVENT FOREIGN INFLUENCE IN U.S. ELECTIONS**
- **BAN PAY-TO-PLAY**

PRINTED ON RECYCLED PAPER

We have an obligation to provide transparency and integrity in our political process. We urge your support in cosponsoring this bill that is important to the protection of our democracy. Please contact Karen Robb, on 5-0227 or email her, karen.robb@mail.house.gov or christina.crooks@mail.house.gov if you are interested in cosponsoring this bill.

Sincerely,

Mike Castle

Chris Van Hollen

Walter B Jones

Robert A. Brady

CITIZENS UNITED V. FEC

QUOTES ON DISCLOSURE FROM THE SUPREME COURT DECISION

When the Supreme Court by a 5 to 4 vote ruled last January in the *Citizens United* case that a ban on corporate spending in federal elections was unconstitutional, the Court also made clear that Congress could constitutionally require corporations to disclose these activities.

The Supreme Court in upholding corporate disclosure by an 8 to 1 vote noted:

> "In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 U. S., at 66.

The Court went on to state:

> 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." 540 U. S., at 259 (opinion of SCALIA, J.); see MCFL, supra, at 261. The First 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.

Fuller Set of Quotes on Disclosure From Citizens United:

Page 51: "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 (internal quotation marks and brackets omitted)."

Page 51-51: "In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 U. S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§201 and 311. 540 U. S., at 196. There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" *Id.*, at 197 (quoting *McConnell I*, 251 F. Supp. 2d, at 237). The Court therefore upheld BCRA §§201 and 311 on the ground that they would help citizens "'make informed choices in thepolitical marketplace.'" 540 U. S., at 197 (quoting *McConnell I, supra,* at 237); see 540 U. S., at 231."

Page 52-53: "The disclaimers required by §311 "provid[e] the electorate with information," *McConnell, supra*, at 196, and "insure that the voters are fully informed" about the person or group who is speaking,

Buckley, supra, at 76; see also *Bellotti*, 435 U. S., at 792, n. 32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party."

Page 53:54: "The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. See, e.g., MCFL, 479 U. S., at 262. In Buckley, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U. S., at 75–76. In McConnell, three Justices who would have found §441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U. S., at 321 (opinion of KENNEDY, J., joined by Rehnquist, C. J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States* v. *Harriss*, 347 U. S. 612, 625 (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). For these reasons, we reject Citizens United's contention that thedisclosure requirements must be limited to speech that is the functional equivalent of express advocacy."

Page 54: "Citizens United also disputes that an informational interest justifies the application of §201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of §201 to these ads, it is not necessary to consider the Government's other asserted interests."

Page 55: "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. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. See McConnell, 540 U. S., at 128 ("[T]he public may not have been fully informed about the sponsorship of so-called issue ads"); id., at 196–197 (quoting McConnell I, 251 F. Supp. 2d, at 237).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." 540 U. S., at 259 (opinion of SCALIA, J.); see MCFL, supra, at 261. The First 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."

Bloomberg.com

Most Americans Oppose Campaign Financing Decision, Poll Shows

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By Kate Andersen Brower

Feb. 17 (Bloomberg) -- Most Americans oppose a U.S. Supreme Court decision that freed companies to conduct advertising campaigns for or against political candidates, a poll shows.

The **ABC News/Washington Post** poll released today found that eight in 10 respondents oppose the court's Jan. 21 ruling that struck down decades-old restrictions on corporate campaign spending, reversing two of its precedents. Seventy-two percent support legislation to reverse the ruling, the poll found.

The poll found bipartisan agreement on the issue. Eighty- five percent of Democrats polled said they were opposed to the decision and 76 percent of Republican poll respondents said they disagreed with the ruling. Eighty-one percent of the independent voters polled said they opposed the ruling.

Poll results will hearten critics of the decision, including President **Barack Obama** and congressional Democrats who are working on legislation to limit its impact. Three congressional committees held hearings on the ruling earlier this month.

Republican lawmakers have hailed the ruling as a boon for free speech. Senate Minority Leader **Mitch McConnell** and other Republicans have suggested they would oppose any legislation to reverse the decision.

The president, with Supreme Court justices in the audience during his State of the Union address, said the decision could allow foreign money to influence elections. U.S. subsidiaries of foreign-owned corporations now can spend money through political action committees as long as they are funded by donations from American workers and local officials decide how to spend the money.

Court Decision

The 5-4 high court ruling, invoking the Constitution's free-speech clause, said the government lacks a legitimate basis to restrict independent campaign expenditures by companies. The decision went well beyond the circumstances in the case before the justices, a dispute over a documentary film attacking then- presidential candidate **Hillary Clinton**.

Companies, which had been barred since 1947 from using general-treasury dollars in support of or in opposition to a candidate, now can spend millions of dollars on their own campaign ads, potentially punishing or rewarding lawmakers for their votes on legislation.

The ABC/Washington Post poll was based on telephone interviews with a random national sampling of 1,004 adults conducted from Feb. 4-8. The poll has a margin of error of plus or minus 3 percentage points.

To contact the reporter on this story: **Kate Andersen Brower** in Washington at **Kandersen7@bloomberg.net**

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The DISCLOSE Act

Mimi Marziani
May 10, 2010

During this year's State of the Union address, President Barack Obama and Justice Samuel Alito Jr. had a memorably public disagreement over the case of *Citizens United v. FEC*. "With all due deference to separation of powers," the president said, "the Supreme Court reversed a century of law that I believe will open the floodgates for special interests...to spend without limit in our elections." "Not true," mouthed Alito from his front-row seat, shaking his head vigorously to ward off the thunderous applause following Obama's remarks. Ignoring Alito's unorthodox reaction (traditionally, the justices sit stone-faced throughout the address), Obama urged Congress to save America's democracy from commercialization.

On April 29, Sen. Charles Schumer (D-N.Y.) and Rep. Chris Van Hollen (D-Md.) heeded the president's cry by introducing legislation designed to curb corporate influence in federal elections. There are many things to like about the Democracy Is Strengthened by Casting Light On Spending in Elections Act (DISCLOSE Act). Most importantly, the act would enhance current disclosure and disclaimer requirements, forcing corporations to electioneer in the plain view of voters. Also key is a provision requiring corporations to disclose all political spending to their shareholders, thereby ensuring that a business's equitable owners know how their money is being spent.

The DISCLOSE Act is a necessary first response to the problems wrought by unbridled money in politics, and its sponsors should be applauded. By itself, however, it cannot remedy our democracy's deeper malfunctions.

Here's why: The skyrocketing costs of political campaigns drive candidates to seek the support — either direct or indirect — of big-money backers. Once these candidates are elected, they feel grateful, perhaps even indebted, to those who donated substantial dollars. And big bucks connected to corporate interests have flowed freely for years, even before *Citizens United,* via corporate political committees, employee contributions and lobbyists.

Consider Citigroup Inc. As shown by OpenSecrets.org, the investment bank contributes millions of dollars to federal candidates of both parties each election cycle. In 2008 alone, it gave almost $4.9 million. On top of that, the bank then spent more than $5.5 million lobbying Congress in 2009. Is it any wonder that Citi is routinely hailed as one of the most influential players inside the Washington beltway?

In this way, both Obama and Alito had it right. The *Citizens United* decision did — in breathtakingly bold strokes — strike down long-standing limits on corporate political spending. On the other hand, Washington was swimming in corporate dollars long before *Citizens United* "opened the floodgates."

So, the problem is bigger than *Citizens United;* the answer must be too. Public funding of political campaigns offers the most comprehensive solution. Rather than trying to restrict the "supply" or flow of potentially corrupting money in politics by restricting contributions or expenditures, public financing systems offer a demand-side solution. Public financing allows candidates to run a viable, competitive campaign through grassroots outreach alone. Candidates can proudly run "clean" elections, leaving voters assured that their interests will be faithfully represented.

For these reasons, the Fair Elections Now Act (FENA) — currently pending in the Senate and House — must be Congress' next move. FENA would provide qualified congressional candidates an initial lump-sum grant, plus a four-to-one match of individual contributions of up to $100. The multiple matching funds component will not only amplify the influence of small-donor citizens; it will also encourage candidates to seek contributions from a broad, and

presumably more diverse, constituent base.

There is no doubt that the DISCLOSE Act will improve our system of funding elections — Congress should pass it without hesitation. But to put voters back in the center of our democratic process, we need FENA too.

Mimi Marziani is an attorney at the Brennan Center for Justice at New York University School of Law.

The Washington Post

Corporate money in politics

Sunday, May 9, 2010; A16

THE SUPREME COURT'S ruling in the *Citizens United* campaign finance case opened a dangerous pathway for corporations to spend money in direct support of -- or in opposition to -- candidates for federal office. Under the decision, corporations -- and labor unions -- still can't give money directly to federal candidates, but they can spend unlimited sums in independent expenditures for or against them. Even more dangerous, because of preexisting gaps in campaign disclosure laws, the money can be spent, in effect, anonymously. The entity spending the money -- say, Americans for Really Good Government (ARGG) -- would have to register with the Federal Election Commission and report its activities, but ARGG would not have to disclose its donors. So Corporation A or Labor Union B could give unlimited sums to ARGG to run ads going after Candidate C -- and the public would have no clue. This troubling situation should be fixed in time for the next election.

Congressional Democrats, joined by two brave House Republicans -- Michael N. Castle (Del.) and Walter B. Jones (N.C.) -- introduced measures to blunt the impact of the *Citizens United* ruling. The legislation, crafted by Sen. Charles E. Schumer (D-N.Y.) and Rep. Chris Van Hollen (D-Md.), addresses the Citizens United ruling in two ways: first, by imposing limits on the kind of corporations that are allowed to try to influence elections, and second, by expanding disclosure rules. We have some concerns about the first part of the effort but enthusiastically support the second.

One piece of the legislation would prohibit companies that do business with the federal g overnment from making campaign expenditures. This so-called "pay-to-play" provision goes too far; any company with a government contract or sales worth more than $50,000 would be barred from such spending. We would prefer a world in which no corporation or labor union could spend money advocating the election or defeat of federal candidates, but that is not the world that the Supreme Court has said is constitutionally permitted. However, it makes sense to protect against influence by foreign corporations. The measure would do that by prohibiting even U.S.-based corporations from making campaign expenditures if

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The Washington Post

Corporate money in politics

foreign ownership exceeds 20 percent or if "one or more foreign nationals have the power to control the decision-making process of the company" in its U.S. operations.

The most important provision, however, is disclosure. Here, the proposal would go beyond addressing the particular problems created by the *Citizens United* ruling and improve on existing law. It would require disclosure of the underlying donors in independent expenditures and broaden disclosure requirements for what are termed "electioneering communications" -- broadcast ads that mention particular candidates but do not advocate their election or defeat.

The Senate version of the bill would require disclosure of donors if the advertising mentioning the candidate is run at any time from 90 days before the primary through the general Election Day; in addition, groups such as trade associations, which are now exempt from reporting donors, would be covered. (The House time frame is shorter.) There are legitimate free-speech concerns involved, but the proposal addresses those by letting donors keep their identities private if they specify that their money is not to be used for campaign spending; organizations can further protect donors' identities by establishing a separate "campaign-related activities account" and only reporting the identities of donors to that fund. This strikes an eminently reasonable balance.

Corporate money in politics is bad enough. Secret corporate money is intolerable.

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May 2, 2010

Shine a Light on Campaign Financing

By ALBERT R. HUNT

WASHINGTON — The U.S. senator forcefully advocated full and "real" disclosure of campaign contributions, questioning, "why would a little disclosure be better than a lot of disclosure?"

This wasn't John McCain or Russ Feingold, the architects of recent Senate efforts to overhaul U.S. campaign-finance laws; it was Senator Mitch McConnell, Republican of Kentucky, on the NBC program "Meet the Press" 10 years ago.

Mr. McConnell has been the leading foe of Mr. McCain and Mr. Feingold over the years. He has lost in the legislative chamber, while winning more in the courts, particularly since John G. Roberts Jr. became the U.S. chief justice five years ago.

The latest, and most stinging, judicial setback for a campaign-finance overhaul was this year, when the court, in the Citizens United case, ruled that corporate money can be spent directly to support political candidates.

Critics and many detached observers believe the 5-4 decision will significantly increase the influence of special-interest money in national elections.

This wasn't a partisan response. Republicans like the former Supreme Court Justice Sandra Day O'Connor and Senator Olympia Snowe of Maine had worried about the danger that Chief Justice Roberts and the court's conservative majority created with this decision, overturning years of laws.

Representative Chris Van Hollen, a Maryland Democrat, and Senator Charles E. Schumer, Democrat of New York, are trying to minimize these effects with a bill that would force full

disclosure of these activities and try to crack down on a few other loopholes opened by the Roberts court.

President Barack Obama endorsed the push to re-establish disclosure requirements in his weekly radio address on Saturday. "What we are facing is no less than a potential corporate takeover of our elections," he said.

The supporters of no rules on campaign spending have been contemptuous of the disclosure initiatives that many of them, while trying to fend off contribution and spending limits, once cited as the only reform needed in campaign laws.

Organizations, including corporations, labor unions and nonprofit groups, would have to disclose to the Federal Election Commission and the public any campaign-related expenditures or transfer of money for the purpose of making campaign expenditures to other groups within 24 hours. Thus, vested interests couldn't surreptitiously use an umbrella group like the Chamber of Commerce to support or oppose a candidate.

Moreover, the head of the organization making a campaign-related expenditure would have to certify that he or she "approves" the message. And it would have to be fully reported to shareholders or members on the organization's Web site.

The Van Hollen-Schumer measure extends beyond disclosure. One provision would ban any U.S. corporation that is owned or controlled by a foreign entity from making campaign-related expenditures. Foreign corporations have long been barred from such activity, but the Citizens United decision opened a loophole here.

Supporters say it would preclude organizations like Citgo Petroleum Corp., the oil company controlled by the Venezuelan government of President Hugo Chávez, from influencing U.S. elections. It would also put foreign-owned U.S. subsidiaries like Anheuser-Busch, T-Mobile USA and Research in Motion at a competitive disadvantage, though they could still participate through their political action committees.

And the initiative would prohibit any company that receives funds from Treasury's Troubled Asset Relief Program or has government contracts in excess of $50,000 from making campaign-related expenditures. Legal experts say this provision may run into constitutional

hurdles before the current court; Mr. Van Hollen says the provisions of the bill are "severable," meaning if one is thrown out, the others still would take effect.

But the general concept of disclosure was endorsed by the Roberts court. "Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," the court declared in its opinion. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

Yet few Republicans have rushed to embrace Van Hollen-Schumer; quite the contrary. Among the party's lawmakers, the bill has attracted support in the House from Mike Castle of Delaware and Walter Jones of North Carolina — but so far from no one in the Senate.

The U.S. Chamber of Commerce, which plans to spend more than $50 million on this year's congressional elections, has blasted the Schumer-Van Hollen effort. Thomas Donohue, the trade group's president, says the bill "is nothing more than a thinly veiled attempt to hijack the political playing field" to aid Democrats in November.

Mr. Donohue declined an interview request to elaborate. It will be interesting to hear why he believes fuller disclosure — for unions and corporations as well as nonprofits — helps one side. The Supreme Court, in the Citizens United case, did say that disclosure requirements might be thrown out if there is a "reasonable probability" that contributors will be subject to "threats, harassment, or reprisals."

What is vital to any legislation, says Anthony Corrado, a campaign finance expert and professor at Colby College in Waterville, Maine, is to ensure that companies or unions can't disguise efforts to help or hurt candidates by using front groups.

"It's important to get disclosure of the first resort," says Mr. Corrado, who is less enthusiastic about some of the nondisclosure provisions in the Van Hollen-Schumer proposal.

Mr. Van Hollen is optimistic the measure can clear the House by early summer, in time for the midterm elections. It's a tougher slog in the Senate. Mr. McCain, who for the past decade would have been leading the charge, is hiding, fearful of his tough conservative primary challenge in August.

It will be up to disclosure advocates like Maine's Republican senators, Ms. Snowe and Susan

Collins, to buck Mr. McConnell's likely efforts to block this measure.

Mr. Van Hollen says the bill is predicated on the late Supreme Court Justice Louis Brandeis's observation that "sunlight" is "the best of disinfectants": "If you're not afraid of sunlight, transparency and accountability, you're not afraid of this bill," Mr. Van Hollen says.

Congressional Republicans, salivating over expected huge gains in November, have already miscalculated by futilely trying to sidetrack a financial-regulation overhaul. Those prospects would dim if they now decide to fight sunlight.

Bloomberg News

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Justice Kennedy's Mistake in *Austin*: The Contribution/Exper Distinction in the Realm of Source Restrictions
Posted: 8/7/09

With all eyes on Justice Kennedy, Court watchers, campaign finance lawyers, members of the political community and people with strange hobbies anticipate the Court's reconsideration of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). If *Austin* dies, corporations may come alive in federal elections as independent, free spenders. Justice Kennedy objected to Austin's blockage of independent corporate political speech. Dissenting vigorously, he was moved to protest by the belief that the Court had departed violently from precedent. His brief against the decision is made up of two related parts: that the case disregarded settled free speech rights enjoyed by corporations, and to the extent that corporate speech in elections is restricted, the limits apply to contributions to candidates and not to expenditures made independently of them.

Justice Kennedy's position largely won the PR war. Many who hear about *Austin* will repeat that it is an "outlier," a curious break with reasoning—such as it has been—in other cases. Hence the view, expressed here and there, that the Court, if it revisits *Austin*, is just cleaning up after itself, innocent of uprooting settled, respectable law.

This view seems mistaken. *Austin* is not a renegade decision; it inhabits familiar territory established by precedent. And Justice Kennedy incorrectly identifies the constitutional challenge for the Court. The corporate spending prohibition is a source restriction—the question being the type of money rather than amount spent—and the contribution/expenditure distinction is misapplied in this context. Source restrictions call instead for close attention to the requirements of narrow tailoring.

The more superficial charge against Austin—its supposed infidelity to corporate spending precedent—has been greatly overplayed. *Austin* is well grounded in the case law—in *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982) and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). True, the opinion for the Court, authored by Justice Marshall, is no masterpiece of clarity, and a concurrence by Justice Brennan, inspired perhaps by the sense that the Marshall writing fell short, fails to achieve a major improvement. As a case undistinguished or obscure in presentation, *Austin*

suffers a weakness certainly shared with other campaign finance cases. It may have been decided correctly and presented poorly. A critique of *Austin* should transcend frustration with its expository shortcomings.

Justice Kennedy lodges a more fundamental doctrinal objection to *Austin*. He believes that campaign finance law holds the Court to a clear line between contributions and expenditures, and that, in all cases, "independent expenditures are entitled to greater protection than campaign contributions." 494 U.S. at 702. For Kennedy, independence dispels the dangers of corruption and deprives the State of the power to act. But is it true that the contribution/ expenditure distinction easily resolves the issue, because the independence of the corporation, the absence of coordination with the candidate, mitigates as a constitutional matter the danger of corruption? Or did Justice Kennedy overlook the problems of applying the contribution/ expenditure distinction to a source restriction, that is, a statutory determination that corruption (or its appearance) inheres in the source of funds rather the amount spent?

Justice Kennedy contended that source was irrelevant. He challenged the Court's failure to explain satisfactorily the special harm in the corporate form that rendered the corporation somehow ineligible for independent expenditures. To Justice Kennedy, independence is independence: an independent corporation is quite the same as an independent, wealthy individual, and each should have the right to use their funds as they chose, neither posing any danger of corruption if they eschewed coordination with candidates.

Source, however, is entirely relevant. Corporations cannot contribute to federal candidates—at all, in any amount. The smallest contribution, $1 or $5, is barred by law, and source is the justification. Justice Kennedy, in *FEC v. Beaumont*, 539 U.S. 146 (2003), concurred in a decision upholding the absolute prohibition on corporate contributions. He assumed then that if the contribution/expenditure distinction held, it would support the regulation of direct contributions. What he missed was the question of whether the distinction holds in the sphere of source restrictions. How is it that, on an anti-corruption theory, a corporation cannot give $5 to a candidate but may expend a fortune for the benefit of the same candidate "independently"?

Prohibited sources are in a class by themselves, and the Court has yet to catch up with the doctrinal

challenge they pose. For example, foreign nationals, as a prohibited source, cannot contribute to candidates or spend independently. 2 U.S.C. §§ 441e(a)(1)(A),(C). Few argue that foreign national contributions should be impermissible but their independent expenditures allowed. One hears that foreign nationals are a special case, regulated on a basis other than the standard anti-corruption rationale, but this is to assert a difference without really explaining it.

Fortunately, we can look to another contribution ban, one clearly founded on a corruption rationale, to better grasp the limits of the contribution/expenditure distinction: the ban on contributions by federal contractors. 2 U.S.C. § 441c. An individual federal contractor, operating as a sole proprietor, cannot make a contribution to a federal candidate, nor may she solicit funds for that candidate. 11 C.F.R. § 115.5. The statute is silent on expenditures. Assume Congress broke its silence and, as in the case of foreign nationals, it provided that the federal contractor barred from contributing or fundraising was also prohibited from spending independently. Would this be constitutional?

Congress might be expected to generate a record in support of this measure, and it is not hard to imagine what it might look like. If the source is the problem, the logic of which dictates a contribution ban, Congress could easily show that a ban on independent expenditures is complementary and essential to the achievement of the regulatory goal. A federal contractor's political contributions threaten the procurement process with the rot of "pay to play." Both the contributions and the expenditures—and more the unlimited expenditures than the limited contributions—put at risk the integrity of the procurement process. Both enable the spender to exercise illicit influence, and the corruptive element is found in the source of funds. The potential for corruption, to say nothing of the appearance of corruption, is also surely present in "independent expenditures."

For different prohibited sources, we may have different rationales—different forms and risks of corruption, its potential and its appearance. The foreign national is ineligible to participate by virtue of nationality; the federal contractor is disqualified by the commercial ties to the government. A corporation—as the Court has repeatedly stated—is a special business entity that enjoys, through the corporate form, state-supplied advantages and protections in amassing formidable wealth. None of the sources are shut out

completely—corporations have ample means of participation, through PACs and otherwise, as do government contractors, and even foreign nationals, by ruling of the Federal Election Commission, can volunteer in campaigns. But all in various and significant ways must abide by restrictions imposed at the source.

There is another example of these types of restrictions and how poorly they come within the analytic framework supplied by the contribution and expenditure distinctions. Minor children may give, but the source is suspect and so the law heavily conditions the political activity of minors, effectively prohibiting the smallest children from making contributions or expenditures. 11 C.F.R. §§ 110.19(a)-(c). Incapacity is one concern: Congress fears that even if the funds donated are by law the children's, minors will do as directed by adults, having no opinion (or even desire or ability to formulate one) on their own. Here the contribution/ expenditure distinction breaks down completely: it has no bearing on what the legislature is trying to accomplish. No one argues that the child barred from contributing should be able to spend independently.

Source restrictions present, then, an unresolved challenge for campaign finance theory, and misplaced reliance on the contribution/expenditure distinction only confuses the issue. Justice Kennedy is looking in the wrong direction. Tailoring is the primary constitutional requirement for managing source restrictions. If Congress may single out sources of funds for special regulation, then it must attend carefully to the task of narrowly tailoring the restriction to serve the compelling anti-corruption interest it has established. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 232 (2003) (invalidating ban on minor children contributions and explaining that "Even assuming, arguendo, the Government advances an important interest, the provision is overinclusive. The States have adopted a variety of more tailored approaches...." Sources barred from contributing are provided with other avenues of participation, but not necessarily the right to makeunlimited independent expenditures. It does not follow that the source barred from contributing at all may go for broke on an independent basis.

The corporate spending cases have proven to be hard work, and the task is far from complete, because of the issues presented by nonprofit corporations. In *Massachusetts Citizens for Life*, and then again in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), the Court labored to meet the tailoring demands of

regulating the nonprofit form. It did so in *Austin*, but there a knotty problem complicated the work still further: the nonprofit, the Chamber of Commerce, was funded and controlled by for-profits. Was it a nonprofit or a for-profit case?

For this reason, it is a mistake to believe, as some do, that the Supreme Court will necessarily use the *Citizens United* case to cut the corporate spending ban out of the law entirely, liberating profits and nonprofits alike from the limits of the law. *Citizens United* is a tailoring case and should be seen that way. The Court may decide that its approval of Title II of BCRA was wrong, because the fit of justification to regulation was poor. It may conclude that the provision allows for excessive regulation of non-campaign speech, or that its like treatment of for-profit and nonprofit corporations is untenable. It is hard to see that the Court has cause to go beyond this and free all corporations from major constraints under the campaign finance laws.

If it does so, it is not relieving this class of speaker from discriminatory, disfavored treatment. The opposite would be true. The Court would radically adjust the balance established for corporate spending, very much in these speakers' favor. This is the action that would demand justification, and a tall order that would be. A close review of tailoring is the task facing the Court, and it cannot take refuge in the contribution/expenditure distinction, which is no help in resolving the constitutional questions presented by source restrictions.

Bob Bauer

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First Thoughts on the FEC's Wisconsin Right to Life Rulemak
Many Questions, So Little Time
Posted: 8/24/07

The FEC is giving no ground on ambition: it is **asking** for comments on proposed rules, including possible changes even beyond those mandated by the Supreme Court in *Wisconsin Right to Life*, and it plans to receive and consider the comments, hold hearings, and vote on final rules by the end of November. For an agency fairly or unfairly taken to task for sluggishness, this is a show of considerable energy.

Ambition and its Risks. The question is whether, in the definition of the issues and the presentation of alternatives, the agency has made for a more complicated and confusing process than he calendar allows. The Court held that corporations and unions could finance speech on issues—grassroots lobbying —prior to an election, that may refer to a federal candidate in communications to the relevant electorate. The FEC goes further and asks: "Does *WRTL II* also provide guidance regarding the constitutional reach of other provisions of the Act." *Notice of Proposed Rulemaking* at 11.

The FEC, for example, has construed broadly the term "express advocacy"— the express advocacy of the election or defeat of a candidate—and this is the foundation on which it has rested recent enforcement actions against 527 organizations. The FEC's questions about the scope of WRTL and its significance for the regulatory regime include one about the continued viability of this express advocacy definition. "Does WRTL II require the Commission to revise or repeal any portion of its definition of express advocacy...?" *Id.*

We don't have to answer for Jim Bopp, among others, but we can guess his answer. But if the rulemaking enters into this territory, it will make for a long, cold fall: the *New York Times* will be publishing special editions warning of the catastrophes that lie ahead, and what the agency needs to accomplish will be swamped in collateral controversy. The agency's hands would seem full enough with just the specific question before it--corporate and union pre-election spending for "grassroots" lobbying"—and may be imprudent for it, on this compressed schedule, to grasp for more. It is hard to see that it can arrive at a persuasive and reasoned conclusion that will allow for a stable result to emerge from this proceeding.

The Reporting Question—and its Risks. The agency does single out, correctly, one issue it will have to

address: does an exemption for grassroots lobbying extend to its disclosure? The WRTL does not force the issue. The FEC asks, however, whether it should act any way to dispense with the reporting requirement along with the flat prohibition on corporate and union spending for broadcast lobbying ads. This is a key difference between the two alternatives the FEC proposes for comment: one would leave reporting rules in place, and the other would remove them from the books.

Arguments could be made both ways, but the agency, if it acts on disclosure, will be sure to be criticized for a step it did not have to take, in an area—disclosure—widely considered a light regulatory burden and a rich public good. It may be better for the agency to do what the Court has bid that it do, and not aim for more, which will cloud the result and assure a fresh litigation. The whole point of the FEC's quick move to enact a rule is to establish reasonably clear dependable—which is to say, non-controversial-- rules on the central issue, prior to the onset of active electioneering (on the airwaves).

The Basic Rule: And Questions, Questions. What about the basic task here, which is to craft a rule consistent with the Court's ruling? The FEC proposes a general standard, which exempts communications "susceptible of a reasonable interpretation other than an appeal to vote for or against a clearly identified candidate." *Id.* at 54-55. "Grassroots lobbying" is defined as a "safe harbor" under the general standard—that is, it would be deemed one such communication that could be reasonably interpreted in other than electioneering terms and that could therefore be paid financed by a corporation or a union. The FEC stays fairly close to the path laid by the Court in WRTL, defining an exempt grassroots lobbying communication as one that discusses a pending legislative issue, urges action on the issue, avoids election-related terms, and "does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." *Id.* at 55.

The Commission notes sticky questions. For example, what background facts—about whether an issue is truly "pending"—may the Commission consider in enforcing the rule? The Court had counseled that the Constitution prohibited consideration of context; it emphasized the controlling importance of the text of the communication, rather than the intent of the speaker or other facts in the "background". The Commission asks: "What information beyond the 'four corners' of the communication may the Commission consider as 'basic background information'"? *Id.*16. On

this question, as on others and as discussed below, the Commission is considering whether to provide examples.

Then there are questions about the so-called "exclusionary factors", which are matters, like the personal characteristics of the candidate, that exempt ads ought not to address if they are to be reasonably interpreted to have other than an election-related purpose. Assume that an ad refers to a candidate's prior position: could the treatment of a prior position "implicate", improperly for purposes of the exemption, "the character, qualifications, or fitness for office" of the officeholder? *Id.* at 25. How does the Commission determine that such an "implication" has occurred? Then there is the Jane Doe type ad, discussed by the Court, in which the candidate's character is not attacked but her position on an issue is identified and "condemned". The Commission asks: "Does eligibility for the [grassroots lobbying] exemption depend on the strength of the condemnation or on whether the condemnation is the sole or main content of the advertisement." *Id.*at 26.

One question sure to draw interest is whether exempt grassroots lobbying may be directed toward a candidate who is not yet a Federal officeholder. "For example", the Commission asks, "could a communication that asks a Federal candidate who is not an officeholder to sign a pledge to support a particular issue if elected be reasonably construed as other than an appeal to vote for or against that candidate?" *Id.* at 20. If an officeholder is a state officeholder, running for a Federal office, may the issues "lobbied" under the exemption be limited to state rather than federal issues—the issues over which the official has current influence or authority? Id. at 19.

Give Me An Example! The Commission asks how much weight it should put on examples-whether it should include them in the rule or, by way of less formal illustration, in the Explanation and Justification issued along with the final rule. The Commission invites comment on specific ad texts. It also gives examples of what might be considered disqualifying references to "elections" (such as pictures of a ballot box); candidacies (such as "images reasonably suggesting candidacy"); political parties (such as references by nickname or proxy, e.g. ' the War party in Washington'); and colorful metaphors for rejecting the incumbent opposing candidate ("It's time to take out the trash....") *Id.* at 23-24.

Not Personal, Just Business (or Charity). The

Commission, has proposed to add an exemption for advertising that advertises or promotes a candidate's business or commercial operations (practice, product or service). These exempt communications would have to be in the ordinary course, and they would have to be devoid of any mention of candidate or party or voting.

And if these business promotions could be fairly viewed as broadcast for reasons other than electoral ones, what about public service announcements or the promotion of charitable events? The FEC reminds its readers that the exemption for grassroots lobbying is based on a standard that applies generally to communications "susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate." Grassroots lobbying communications are not the only ones of the kind.

But they are the ones before the Court, the ones giving rise to the sharpest political controversy and constitutional doubt. The FEC should start—and probably for the time being, end—there.

For the rest: well, all in good time.

Bob Bauer

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Austin and the Link between Corporate Spending Rights and Support

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One of the more provocative propositions in the *Austin v. Michigan Chamber of Commerce* (494 U.S. 652 (1990)) case holds that corporations are properly barred from making political expenditures disproportionate to the level of their political support. *Austin* at 659-660 (citing the power of legislatures to address "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").

This provoked Justice Scalia, one source among others of his exasperation with the majority. He could not see how a corporation was different in this respect from wealthy individual. One was just like the other: each should be able to promote a point of view without regard to its popularity or prevalence. *Id.* at 685 (Scalia, J., dissenting). Contrary to the *Austin* Court's denial, Scalia retorted, it was decreeing that speech be equalized.

As the government recently maintained, in a brief filed in the pending case of *Citizens United*, this is not the only or correct interpretation. It urges that the requirement of "political support" be read as the defense of shareholders against the unapproved political uses of their money. *Austin*'s ambiguities invite just such disagreements, and the government reasonably suggests this **alternative reading**.

After all, the Court in *Austin* did deny that it was laying down an equality mandate so objectionable to Justice Scalia. This is to be taken seriously and alternative readings considered. In a complex case—and the long-standing corporate spending prohibition presents its share of complexities—multiple readings are not necessarily incompatible. Multiple goals, variously explained, have motivated and sustained the long-standing federal prohibition on corporate contributions and independent expenditures.

Austin's critics aspire to dissolve all this complexity into a simplistic choice between speech and suppression. In attacking the "political support" language of *Austin*, they take it to be something strange, an import into the jurisprudence of a notion at odds with core First Amendment values. What they miss is its surprising ordinariness. The *Austin* case was

getting at something important, even—one could say—basic to the mechanisms within the campaign finance laws for isolating the corruptive threat of aggregated group or associational spending.

The Linkage of Group Spending Rights to Political Support

The campaign finance laws have long connected group spending rights to the sources of political support. As unique forms of association funded by committed and wholly voluntary memberships, political parties have special "in-kind" giving authority — "coordinated expenditures"—through their state and national committees. 2 U.S.C § 441a(d). Parties in general also enjoy the larger contribution limit of $5,000 (versus $2,400) per election, made available to so-called "multicandidate" committees able to demonstrate a certain breadth of political support. And the party's Senatorial committees share with their national committees a still higher contribution limit, in Senate races, of $42,600.

Another example: partnership contributions. Partnership contributions, because they are traced through to their individual partners are, in essence, counted twice. In the end, a partnership cannot give a candidate more than $2,400 per election, regardless of the number of partners, but every partnership contribution is reported as a contribution by the partnership and also, on an attributed basis, by the individual partners. 2 U.S.C. §§ 441c; 11 C.F.R. § 110.1(e). The giving power of a partnership is in this way directly related to the level of its actual support, not taking into account business or investment income.

Here, then, are connections, rough in architecture, between giving and the underlying basis of political support. And it works to promote as well as limit spending: party spending is strengthened, partnership spending limited, direct corporate spending prohibited.

The balance of spending promotions and restraints varies with the association, and it is complex as it applies to particular spenders. For example, the individual sole proprietor who is also a federal contractor may not make a federal contribution from personal, business or any other funds under his or her control. 11 C.F.R. § 115.5. But the corporate federal contractor may establish a PAC, as may any other corporation, allowing its executives to pool funds within their individual limits to support particular candidates. This is very clearly a measure to take political support into account in setting limits.

Are these connections suppressive in design and

effective, offending the First Amendment in the manner described by Justice Scalia? The answer depends on the purposes assumed. As a doctrinal matter, it seems greatly oversimplified to state that these limits operate as a restriction on speech *per se*. *Buckley v. Valeo* stands, if anything, for the proposition that money is not pure speech, and it is not *not* speech. To say, as Scalia does, that limiting corporate political expenditures violates speech rights is to assert a sweeping conclusion without going to the trouble of defending it.

The Analysis of Political Support and the Concern with Corruption

Austin's linkage of spending rights to political support is one additional dimension to the analysis of how far the Government may go in limiting associational or group spending in the service of its anti-corruption interest. Pooled speech lacking political support or having very little of it is not constitutionally defenseless. Its protections remain broad. Yet the wealthier the group and the more lavish the spending, the greater the potential that the exercise of speech rights is more the raw exercise of economic power, threatening corruption or its appearance. Relating wealth to political support helps to isolate the corruptive threat of group spending and to adjust limits—and constitutional protections —accordingly.

Scalia's conviction that the Court was smuggling into the Constitution a right to spending equality is refuted by examining how the political support factor works. Focus on political support actually preserves inequalities in the volume of spending. One group can outspend another, by a large margin. An equality-based regime would have volume as a target, as, for example, do public financing schemes that condition the receipt of public funds on compliance with the same spending limit for all.

By contrast, a corruption-centered rationale considers volume only in relation to political support, and only in consideration of the dangers identified in dominating, group spending. It is a check, a guide, a consideration, in the very difficult and approximate business of dealing realistically with corruption, and its application varies, necessarily, by type of entity.

Return to the example of partnerships. Assume a large partnership with business or investment income sufficient to generate substantial contributions, or independent expenditures. Assume, too, only 6 individual partners, whose contributions are limited

like all other individual contributions. The partnership expenditures are a form of pooled speech—but the amounts spent could, if derived from business operations, far exceed what the individual partners could generate in their personal capacities. The law gives the partnership a chance to speak as a partnership, insisting at the same time that the individual interests behind it are disclosed and relevant to the limit-setting function. Limits are keyed to political support.

And it works in the other direction. The major parties enjoy special limits as organizations presumed to have broad support and, for this reason, an expansive mission and costly responsibilities. Other political parties may qualify for similar spending allowances, if not to the same extent. The Congress has a basis in this demonstrated political support to relax the concern with corruptive potential in aggregated giving.

Group Expenditures and the Corruption Rationale

The opposing points of view in *Austin* came eventually to the contribution-expenditure distinction. For Justice Scalia, here again was a shining example of the majority's carelessness with precedent and its disguised venture into resource equalization. The Court in *Buckley* had sanctioned contribution limits as a measure against corruption, but it stopped at independent expenditures, reasoning that the corruptive element was too attenuated if the spender proceeded without the cooperation of the candidate who had then less reason to reward the favor. Before the Court in *Austin* was an independent expenditure: for Justice Scalia, case closed.

To this the majority answered ineptly, giving its critics in future years ample ammunition for dismissing the case as an "outlier." It seemed to suggest two types of corruption—one of the classic kind, involving the threat of quid-pro-quo exchanges of spending for political favor, and another, "different type." *Austin* at 660. The majority denies that this other "type" looks to the enforcement of rough equality among speakers. Yet, it left itself open to this suspicion with its reference to the dangers that large corporate expenditures could "unfairly influence" elections. *Id.*

To the extent that the Court, in a brief analysis, had more to say, it was that corruption lurked, too, in " 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." *Id.* The key link here is between the

amount of money the group could spend—"immense"—and its sources in political support, described as little or none. In this gross misalignment, the Court seems to say, are the grounds for refusing to recognize a safe harbor for even independent expenditures.

This is where Court's presentation fails badly. But it is not hard to see how the fear of corruption in the more traditional and accepted sense might be embedded in these concerns. An organization amassing wealth outside the political process might deploy "immense" resources to dominate elections, and by doing so, intimidate candidate and legislators. The issue, as the *Austin* Court stated it, is "corporate domination" of the political process." *Austin* at 659. Whether the spending is coordinated with the candidate (or a party) is beside the point. On a large enough scale, dominant in effect, lavish independent spending can establish a controlling, illicit influence, bearing the barest (and if any, coincidental) relationship to the power of ideas. Certainly this was the view taken by Justice Kennedy in *Caperton v. Massey*, 129 S.Ct. 2252 (2009), where he disregarded the independence of expenditures in a judicial campaign, emphasizing instead how immensity spending violated litigant due process. His opinion for the Court glossed over the distinction between contributions and expenditures: to him, on these facts, same difference. See **here**.

Central to this analysis in the case of corporations and other groups is the absence of a connection between "immense" resources and political support or activity. Parties do not compete in stable conditions of equality, and one campaign may greatly outspend another, conceivably to the point of "domination." These competitive advantages follow from political strengths—from the ability to raise more money within legal limits that are the same for all. Disparities are constitutionally protected, safe from Congressional interference, if rooted in differences in the success of *political* activity.

It is not, then, the sheer volume of money that accounts for the "corrosive and distorting" influence in aggregated giving or spending. Volume disconnected from political support in this context—the spending of groups or associations, and in this instance corporations—justifies disregarding the contribution/expenditure distinction in the corruption analysis.

The Notion of "Political Support"

To critics of *Austin*, the very reference to "political

support" stirs anxiety about the free speech deck being stacked in favor of those with clout. Does this mean that those with power have the upper hand, the more liberal access to rights purchased with superior resources? Obviously, framed this way, the notion seems antithetical to First Amendment sensibilities and doctrine.

It also, on its face, highly doubtful that this was the *Austin* Court's intended meaning. The trouble here is one the Court brought on itself: there were other ways to put the point—surely ways to elaborate it—less certain to slip from critical context and fall into misunderstanding. Justice Scalia seized the opportunity presented by the Court's inarticulateness; he demanded to know how, on this reasoning, individuals could spend freely, as they do, without a foundation of popular support for their ideas. What Justice Scalia declined to accept was the function of the "political support" analysis in weighing, with reasonable care, the corruptive impact of large-scale and potentially dominant group, association or corporate spending.

The substantial resources a group may spend on political speech will reflect political support or business success, or other sources of nonpolitical support. But the immensity of spending coupled with weak or non-existent political support marks the point at which the concern with corruption reasonably arises. For it is tolerable—indeed the prize of successful political competition—when domination or, less than that, strong influence, are the fruits of successful politics, of any politics at all. Absent politics, where the assertion of dominance relies on no more than the power of the purse, the group's call on protection is weaker and Congressional authority to guard against corruption is stronger.

As noted, the principle works in both directions, for and against spending rights. The more that politics is the generative force behind group political resources, the less resistance is found in the law to massive spending, even spending to the point of dominance. Then the group's strengths are political: the support it enjoys is derived from political practice, the hard business of gaining adherents and enlisting allies.

It is noteworthy that certain critics of corporate spending restrictions take a markedly different point of view of union spending for political purposes. They are quick to approve restrictions on the use of institutional funds not traceable to "political support." Justice Scalia, for example, wrote for the Court in *Davenport v. Washington Education Ass'n*, upholding an

affirmative consent requirement for the use of nonmember agency shop fees for election-related activities. 551 U.S. 177 (2007). The state was free, he wrote, to protect the "integrity of the electoral process" through this requirement. *Id.* at 189. True, the Court, in *Davenport* and elsewhere, tends to cast the issue as one of concern for the rights of individuals, but the result might be seen as functionally the same: a limitation on political spending to what are deemed its voluntary, political sources.

Reflection on the union cases, like consideration of the campaign finance laws suggests that the "political support" analysis of group or association spending rights is not the alien presence in free speech jurisprudence it is so often made out to be.

Re-reading "Austin

Readers of *Austin* have to do much of the work, refusing to be deterred by the ambiguities and outright failures of exposition. They may well then conclude that what *Austin* had to say about the relationship of political support to group spending rights is not outlandish, not a sharp swerve from the path of precedent or sanctioned Congressional practice. Group spending—large sums expended—raises directly a reasonable set of questions about corruption and its appearance where vast resources amassed and spent have no or little relation to political support.

Justice Scalia cites the case of wealthy individuals, able to spend independently without regard to political support, but individuals are a case apart: speech rights by individuals and by entities are weighed—have always been weighed—differently. And in addressing the spending by different entities, the question of their political support has always been relevant to the task before the Congress in judging, hard as it may be, corruptive potential or appearance.

In *Austin*, then, the Court was gesturing, albeit awkwardly, at what has long been true of the Congressional struggle to get the constitutional balance right: large, aggregate political spending is a challenge to Congress' constitutionally sanctioned mission of controlling corruption. What the Court had to say on this may have been poorly or ambiguously stated but not, for that reason, wrong.

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[Whereupon, at 6:35 p.m., the committee was adjourned.]