AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. Hrg. 113–610

COMPILATION OF HEARINGS AND MARKUPS

HEARINGS AND MARKUPS

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST AND SECOND SESSIONS

FEBRUARY 13, 2013; FEBRUARY 27, 2013; JUNE 12, 2013; JULY 24, 2013; SEPTEMBER 17, 2013; SEPTEMBER 24, 2013; DECEMBER 11, 2013; JANUARY 29, 2014; FEBRUARY 12, 2014; MARCH 12, 2014; APRIL 9, 2014; APRIL 30, 2014; MAY 14, 2014; JUNE 25, 2014; JULY 23, 2014; SEPTEMBER 10, 2014; DECEMBER 3, 2014

COMPILATION OF HEARINGS AND MARKUPS
One Hundred Thirteenth Congress

S. HRG. 113–610

COMPILATION OF HEARINGS AND MARKUPS

HEARINGS AND MARKUPS

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST AND SECOND SESSIONS

FEBRUARY 13, 2013; FEBRUARY 27, 2013; JUNE 12, 2013; JULY 24, 2013; SEPTEMBER 17, 2013; SEPTEMBER 24, 2013; DECEMBER 11, 2013; JANUARY 29, 2014; FEBRUARY 12, 2014; MARCH 12, 2014; APRIL 9, 2014; APRIL 30, 2014; MAY 14, 2014; JUNE 25, 2014; JULY 23, 2014; SEPTEMBER 10, 2014; DECEMBER 3, 2014

Printed for the use of the Committee on Rules and Administration

Available via the World Wide Web: http://www.fdsys.gov

U.S. GOVERNMENT PUBLISHING OFFICE

93–918 WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON RULES AND ADMINISTRATION

FIRST SESSION

CHARLES E. SCHUMER, New York, *Chairman*

DIANNE FEINSTEIN, California
RICHARD J. DURBIN, Illinois
PATTY MURRAY, Washington
MARK L. PRYOR, Arkansas
TOM UDALL, New Mexico
MARK R. WARNER, Virginia
PATRICK J. LEAHY, Vermont
AMY KLOBUCHAR, Minnesota
ANGUS S. KING, JR., Maine

PAT ROBERTS, Kansas
MITCH McCONNELL, Kentucky
THAD COCHRAN, Mississippi
SAXBY CHAMBLISS, Georgia
LAMAR ALEXANDER, Tennessee
RICHARD SHELBY, Alabama
ROY BLUNT, Missouri
TED CRUZ, Texas

Note: Archived webcasts of all hearings and an electronic version of this report are available at *http://rules.senate.gov*.

COMMITTEE ON RULES AND ADMINISTRATION

SECOND SESSION

CHARLES E. SCHUMER, New York, *Chairman*

DIANNE FEINSTEIN, California
RICHARD J. DURBIN, Illinois
MARK L. PRYOR, Arkansas
TOM UDALL, New Mexico
MARK R. WARNER, Virginia
PATRICK J. LEAHY, Vermont
AMY KLOBUCHAR, Minnesota
ANGUS S. KING, JR., Maine
JOHN E. WALSH, Montana

PAT ROBERTS, Kansas
MITCH McCONNELL, Kentucky
THAD COCHRAN, Mississippi
SAXBY CHAMBLISS, Georgia
LAMAR ALEXANDER, Tennessee
RICHARD SHELBY, Alabama
ROY BLUNT, Missouri
TED CRUZ, Texas

CONTENTS

February 13, 2013

ORGANIZATIONAL MEETING

OPENING STATEMENT OF:

Hon. Angus S. King, Jr., Acting Chairman, a U.S. Senator from the State of Maine 1
Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 1

February 27, 2013

BUSINESS MEETING—TO CONSIDER S. RES. 64, AN ORIGINAL RESOLUTION AUTHORIZING EXPENDITURES BY SENATE COMMITTEES

OPENING STATEMENT OF:

Hon. Angus S. King, Jr., Acting Chairman, a U.S. Senator from the State of Maine 3
Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 3

June 12, 2013

HEARING—NOMINATION OF DAVITA VANCE-COOKS, OF VIRGINIA, TO BE THE PUBLIC PRINTER

OPENING STATEMENT OF:

Hon. Angus S. King, Jr., Acting Chairman, a U.S. Senator from the State of Maine 5
Hon. Pat Roberts, a U.S. Senator from the State of Kansas 6
Hon. Mark R. Warner, a U.S. Senator from the State of Virginia 7

TESTIMONY OF:

Mrs. Davita Vance-Cooks, Nominee to be the Public Printer 8

PREPARED STATEMENTS OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 18
Mrs. Davita Vance-Cooks, Nominee to be the Public Printer 19

MATERIALS SUBMITTED FOR THE RECORD:

Statement Submitted by American Association of Law Libraries 25
Statement Submitted by International Brotherhood of Teamsters 27

QUESTIONS SUBMITTED FOR THE RECORD:

Hon. Charles E. Schumer, a U.S. Senator from the State of New York to Ms. Davita Vance-Cooks, Nominee 28

Page

Hon. Thad Cochran, a U.S. Senator from the State of Mississippi to Ms. Davita Vance-Cooks, Nominee 36

July 24, 2013

HEARING—NOMINATIONS OF ANN M. RAVEL AND LEE E. GOODMAN TO BE MEMBERS OF THE FEDERAL ELECTION COMMISSION

OPENING STATEMENT OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 39
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 40
Hon. Tom Udall, a U.S. Senator from the State of New Mexico 41
Hon. Thad Cochran, a U.S. Senator from the State of Mississippi 42
Hon. Roy Blunt, a U.S. Senator from the State of Missouri 42

TESTIMONY OF:

Mr. Lee E. Goodman, Nominee, Federal Election Commission, (VA) 43
Ms. Ann M. Ravel, Nominee, Federal Election Commission, (CA) 44

PREPARED STATEMENTS OF:

Mr. Lee E. Goodman, Nominee, Federal Election Commission, (VA) 56
Ms. Ann Miller Ravel, Nominee, Federal Election Commission, (CA) 59

MATERIALS SUBMITTED FOR THE RECORD:

"The FEC's lame-duck overreach," Submitted by Senator Tom Udall 64
"Sabotage at the Election Commission," Submitted by Senator Tom Udall 65
Statement submitted by California Political Attorneys Association 66
Statement submitted by Catherine C. Sprinkles 68
Statement submitted by Congressman Michael M. Honda 70
Statement submitted by Congressman Robert Hurt 71
Statement submitted by Congresswoman Zoe Lofgren 72
Statement submitted by David E. Anderson 73
Statement submitted by Lynn Montgomery 74
Statement submitted by Mayor Don Gage, Gilroy (CA) 75
Statement submitted by Michael C. Genest 76
Statement submitted by Richard E. Wiley 78
Statement submitted by Ronald D. Rotunda 79
Statement submitted by Sean Eskovitz 81
Statement submitted by Thomas M. Wolf 82

QUESTIONS SUBMITTED FOR THE RECORD:

Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas to Lee E. Goodman, Nominee 84

July 24, 2013

BUSINESS MEETING—TO CONSIDER THE NOMINATION OF DAVITA VANCE-COOKS TO BE PUBLIC PRINTER AND S. 375

OPENING STATEMENT OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 86
Hon. Thad Cochran, a U.S. Senator from the State of Mississippi 86
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 87

Page

September 17, 2013

BUSINESS MEETING—TO CONSIDER THE NOMINATIONS OF ANN M. RAVEL AND LEE E. GOODMAN TO BE MEMBERS OF THE FEDERAL ELECTION COMMISSION AND S. RES. 229

OPENING STATEMENT OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 89

September 24, 2013

BUSINESS MEETING—TO CONSIDER S. RES. 253, AN ORIGINAL RESOLUTION AUTHORIZING THE EXPENDITURES OF SENATE COMMITTEES

OPENING STATEMENT OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 91

December 11, 2013

HEARING—NOMINATIONS OF THOMAS HICKS AND MYRNA PÉREZ TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION

OPENING STATEMENT OF:

Hon. Angus. S. King, Acting Chairman, a U.S. Senator from the State of Maine 93
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 95

TESTIMONY OF:

Mr. Thomas Hicks, Nominee, Election Assistance Commission, (VA) 97
Ms. Myrna Pérez, Nominee, Election Assistance Commission, (TX) 99

PREPARED STATEMENTS OF:

Mr. Thomas Hicks, Nominee, Election Assistance Commission, (VA) 108
Ms. Myrna Pérez, Nominee, Election Assistance Commission, (TX) 111

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by America's Congressional Black Caucus 115
Statement submitted by Democrats Abroad 116
Statement submitted by Mexican American Legal Defense and Educational Fund 119
Statement submitted by National Hispanic Leadership Agenda 121

January 29, 2014

HEARING—SENTRI ACT (S. 1728) IMPROVING VOTER REGISTRATION AND VOTING OPPORTUNITIES FOR MILITARY AND OVERSEAS VOTERS

OPENING STATEMENT OF:

Hon. Angus. S. King, Acting Chairman, a U.S. Senator from the State of Maine 123
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 124
Hon. Roy Blunt, a U.S. Senator from the State of Missouri 125

Page

TESTIMONY OF:

Mr. Matt Boehmer, Director, Federal Voting Assistance Program, U.S. Department of Defense, Washington (DC) 126
Mr. Kevin Kennedy, Director and General Counsel, Wisconsin Government Accountability Board, Madison (WI) 127
Mr. Don Palmer, Secretary of the Board, Virginia Board of Elections, Richmond (VA) 129
Hon. John Cornyn, a U.S. Senator from the State of Texas 138

PREPARED STATEMENTS OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 143
Hon. Roy Blunt, a U.S. Senator from the State of Missouri 145
Mr. Matt Boehmer, Director, Federal Voting Assistance Program, U.S. Department of Defense, Washington (DC) 147
Mr. Kevin Kennedy, Director and General Counsel, Wisconsin Government Accountability Board, Madison (WI) 152
Mr. Don Palmer, Secretary of the Board, Virginia Board of Elections, Richmond (VA) 158
Hon. John Cornyn, a U.S. Senator from the State of Texas 163

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by Hon. Richard Durbin, a U.S. Senator from the State of Illinois 166
Statement submitted by American Veterans 168
Statement submitted by Association of the United States Navy 169
Statement submitted by Common Cause 170
Statement submitted by National Association for Uniformed Services 172
Statement submitted by Verified Voting 173

QUESTIONS SUBMITTED FOR THE RECORD:

Hon. Amy Klobuchar, a U.S. Senator from the State of Minnesota to Mr. Don Palmer 175
Hon. Amy Klobuchar, a U.S. Senator from the State of Minnesota to Mr. Kevin Kennedy 178
Hon. Amy Klobuchar, a U.S. Senator from the State of Minnesota to Mr. Matt Boehmer 179
Hon. Patty Murray, a U.S. Senator from the State of Washington to Mr. Matt Boehmer 180
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas to Mr. Matt Boehmer 183

February 12, 2014

HEARING—BIPARTISAN SUPPORT FOR IMPROVING U.S. ELECTIONS: AN OVERVIEW FROM THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION

OPENING STATEMENT OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 186
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 188
Hon. Amy Klobuchar, a U.S. Senator from the State of Minnesota 188

TESTIMONY OF:

Mr. Robert F. Bauer, Co-Chair, The Presidential Commission on Election Administration, Washington (DC) 190
Mr. Benjamin L. Ginsberg, Co-Chair, The Presidential Commission on Election Administration, Washington (DC) 192

Page

PREPARED STATEMENTS OF:

Mr. Robert F. Bauer, Co-Chair, The Presidential Commission on Election Administration, Washington (DC) 208
Hon. Richard J. Durbin, a U.S. Senator from the State of Illinois 212
Mr. Benjamin L. Ginsberg, Co-Chair, The Presidential Commission on Election Administration, Washington (DC) 214

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by Verified Voting 219

March 12, 2014

HEARING—ELECTION ADMINISTRATION: INNOVATION, ADMINISTRATIVE IMPROVEMENTS AND COST SAVINGS

OPENING STATEMENT OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 220
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 221
Hon. Mark R. Warner, a U.S. Senator from the State of Virginia 222

TESTIMONY OF:

Hon. Barbara Boxer, a U.S. Senator from the State of California 223
Hon. Chris Coons, a U.S. Senator from the State of Delaware 225
Ms. Linda Lamone, Administrator of Elections, Maryland State Board of Elections, Annapolis (MD) 228
Ms. Tammy Patrick, Federal Compliance Officer, Maricopa County Elections, Phoenix (AZ) 230
Ms. Cameron Quinn, General Registrar, Fairfax County, Fairfax (VA) 232

PREPARED STATEMENTS OF:

Ms. Linda Lamone, Administrator of Elections, Maryland State Board of Elections, Annapolis (MD) 238
Ms. Tammy Patrick, Federal Compliance Officer, Maricopa County Elections, Phoenix (AZ) 243
Ms. Cameron Quinn, General Registrar, Fairfax County, Fairfax (VA) 247

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by Senator Bill Nelson, a U.S. Senator from the State of Florida 262
Statement submitted by Ms. Tammy Patrick, Federal Compliance Officer, Maricopa County Elections (AZ) 264

QUESTIONS SUBMITTED FOR THE RECORD:

Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas to Committee witnesses 266

April 9, 2014

HEARING—ELECTION ADMINISTRATION: MAKING VOTER ROLLS MORE COMPLETE AND MORE ACCURATE

OPENING STATEMENT OF:

Hon. John Walsh, Acting Chairman, a U.S. Senator from the State of Montana 270
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 271

Page

TESTIMONY OF:

Ms. Elaine Manlove, Delaware State Election Commissioner, Dover (DE) 272
Mr. John Lindback, Executive Director, Electronic Registration Information Center, Washington (DC) 274
Mr. Judd Choate, Director of Elections, Denver (CO) 275
Mr. Christopher Thomas, Director of Elections, Lansing (MI) 277

PREPARED STATEMENTS OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 286
Ms. Elaine Manlove, Delaware State Election Commissioner, Dover (DE) 288
Mr. John Lindback, Executive Director, Electronic Registration Information Center, Washington (DC) 293
Mr. Judd Choate, Director of Elections, Denver (CO) 300
Mr. Christopher Thomas, Director of Elections, Lansing (MI) 304

April 9, 2014

BUSINESS MEETING—TO CONSIDER THE NOMINATIONS OF THOMAS HICKS AND MYRNA PEREZ TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION AND S. 1728, S. 1937, S. 1947, AND S. 2197

OPENING STATEMENT OF:

Hon. John Walsh, Acting Chairman, a U.S. Senator from the State of Montana 319
Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 320
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 320

April 30, 2014

HEARING—DOLLARS AND SENSE: HOW UNDISCLOSED MONEY AND POST-McCUTCHEON CAMPAIGN FINANCE WILL AFFECT THE 2014 ELECTION AND BEYOND

OPENING STATEMENT OF:

Hon. Angus S. King, Acting Chairman, a U.S. Senator from the State of Maine 324
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 326
Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 327

TESTIMONY OF:

Hon. John Paul Stevens, Associated Justice (Ret.), United States Supreme Court 329

OPENING STATEMENT OF:

Hon. Ted Cruz, a U.S. Senator from the State of Texas 331
Hon. Tom Udall, a U.S. Senator from the State of New Mexico 333
Hon. John Walsh, a U.S. Senator from the State of Montana 335

TESTIMONY OF:

Mr. Donald F. McGahn, Attorney, Washington (DC) 336
Mr. Norman J. Ornstein, American Enterprise Institute, Washington (DC) 338
Mr. Trevor Potter, President and General Counsel, Campaign Legal Center, Washington (DC) 341
Hon. Ann Ravel, Vice Chair, Federal Election Commission, Washington (DC) . 342
Mr. Neil Reiff, Attorney, Washington (DC) 344

Page

PREPARED STATEMENTS OF:

Hon. John Paul Stevens, Associated Justice (Ret.), United States Supreme Court 361
Mr. Donald F. McGahn, Attorney, and Mr. Neil Reiff, Attorney, Washington (DC) 368
Mr. Norman J. Ornstein, American Enterprise Institute, Washington (DC) 377
Mr. Trevor Potter, President and General Counsel, Campaign Legal Center, Washington (DC) 384
Hon. Ann Ravel, Vice Chair, Federal Election Commission, Washington (DC) . 391

MATERIALS SUBMITTED FOR THE RECORD:

"A Decade of McCain-Feingold: The Good, the Bad, and the Ugly," Submitted by Mr. Donald F. McGahn and Mr. Neil Reiff 397
"Brief of United States Senators Sheldon Whitehouse and John McCain as Amici Curiae in Support of Respondents," Submitted by Senator Sheldon Whitehouse 402
Statement submitted by American Bar Association 433
Statement submitted by Center for Competitive Politics 441
Statement submitted by Democracy 21 459
Statement submitted by Dēmos 476
Statement submitted by Free Speech for People 492
Statement submitted by Fund for the Republic 496
Statement submitted by National Association for the Advancement of Colored People 499
Statement submitted by Public Campaign 501
Statement submitted by Public Citizen 505
Statement submitted by Senator Sheldon Whitehouse 521
Statement submitted by Stetson Law 524
Statement submitted by Sunlight Foundation 579
Statement submitted by Wesleyan Media Project 583

QUESTIONS SUBMITTED FOR THE RECORD:

Hon. Angus S. King, a U.S. Senator from the State of Maine to Ann Ravel, Vice Chair, Federal Election Commission 590

May 14, 2014

HEARING—COLLECTION, ANALYSIS AND USE OF ELECTIONS DATA: A MEASURED APPROACH TO IMPROVING ELECTION ADMINISTRATION

OPENING STATEMENT OF:

Hon. Amy Klobuchar, a U.S. Senator from the State of Minnesota 592
Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 592

TESTIMONY OF:

Ms. Heather K. Gerken, Yale Law School, New Haven (CT) 596
Mr. Charles Stewart III, Massachusetts Institute of Technology, Cambridge (MA) 597
Mr. Kevin J. Kennedy, Director and General Counsel, Wisconsin Government Accountability Board, Madison (WI) 599
Mr. David J. Becker, Director, Election Initiatives, The Pew Charitable Trusts, Washington (DC) 600
Mr. Justin Riemer, Former Deputy Secretary, Virginia State Board of Elections, Richmond (VA) 603

PREPARED STATEMENTS OF:

Ms. Heather K. Gerken, Yale Law School, New Haven (CT) 621
Mr. Charles Stewart III, Massachusetts Institute of Technology, Cambridge (MA) 635

Page

Mr. Kevin J. Kennedy, Director and General Counsel, Wisconsin Government Accountability Board, Madison (WI) 651
Mr. David J. Becker, Director, Election Initiatives, The Pew Charitable Trusts, Washington (DC) 659
Mr. Justin Riemer, Former Deputy Secretary, Virginia Board of Elections, Richmond (VA) 662

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by FairVote 669
Statement submitted by Doug Chapin 678
Statement submitted by IBM Center for The Business of Government 683
Statement submitted by Republican National Lawyers Association 727
Statement submitted by The PEW Charitable Trusts 766
Statement submitted by Verified Voting 778

June 25, 2014

HEARING—ELECTION ADMINISTRATION: EXAMINING HOW EARLY AND ABSENTEE VOTING CAN BENEFIT CITIZENS AND ADMINISTRATORS

OPENING STATEMENT OF:

Hon. John Walsh, Acting Chairman, a U.S. Senator from the State of Montana 780

TESTIMONY OF:

The Honorable Kate Brown, Secretary of State, State of Oregon, Salem (OR) .. 781
Dr. John C. Fortier, Director, Democracy Project, Bipartisan Policy Center, Washington (DC) 782
Mr. Harvard Lomax, Registrar of Voters (Retired), Clark County Election Department, Las Vegas (NV) 784
Ms. Rhonda Whiting, Chairman of the Board, Western Native Voice, Missoula (MT) 786

PREPARED STATEMENTS OF:

The Honorable Kate Brown, Secretary of State, State of Oregon, Salem (OR) .. 791
Dr. John C. Fortier, Director, Democracy Project, Bipartisan Policy Center, Washington (DC) 795
Mr. Harvard Lomax, Registrar of Voters (Retired), Clark County Election Department, Las Vegas (NV) 800
Ms. Rhonda Whiting, Chairman of the Board, Western Native Voice, Missoula (MT) 805

MATERIALS SUBMITTED FOR THE RECORD:

Statement Submitted by Ms. Wendy Weiser, Brennan Center for Justice 808
Statement Submitted by Common Cause 813
Statement Submitted by Douglas Chapin 854
Statement Submitted by Julie Alexander 857
Statement Submitted by Kim Wyman, Washington Secretary of State 858

QUESTIONS SUBMITTED FOR THE RECORD:

Hon. Charles E. Schumer, a U.S. Senator from the State of New York to Dr. John C. Fortier, Director, Democracy Project, Bipartisan Policy Center . 860
Hon. Charles E. Schumer, a U.S. Senator from the State of New York to Mr. Harvard Lomax, Registrar of Voters (Retired), Clark County Election Department 861

Page

July 23, 2014

HEARING—THE DISCLOSE ACT (S. 2516) AND THE NEED FOR EXPANDED PUBLIC DISCLOSURE OF FUNDS RAISED AND SPENT TO INFLUENCE FEDERAL ELECTIONS

OPENING STATEMENT OF:

Hon. Angus S. King, Acting Chairman, a U.S. Senator from the State of Maine 863
Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 865
Hon. Mitch McConnell, a U.S. Senator from the State of Kentucky 867
Hon. Tom Udall, a U.S. Senator from the State of New Mexico 870

TESTIMONY OF:

Hon. Sheldon Whitehouse, a U.S. Senator from the State of Rhode Island 872
Ms. Heather K. Gerken, Yale Law School, New Haven (CT) 874
Mr. Bradley A. Smith, Chairman, Center for Competitive Politics, Alexandria (VA) 876

PREPARED STATEMENTS OF:

Mr. Daniel Tokaji, Moritz College of Law, Ohio State University, Columbus (OH) 901
Ms. Heather K. Gerken, Yale Law School, New Haven (CT) 907
Mr. Bradley A. Smith, Chairman, Center for Competitive Politics, Alexandria (VA) 916

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by American Civil Liberties Union 936
Statement submitted by Chamber of Commerce 941
Statement submitted by Common Cause 943
Statement submitted by Democracy 21 948
Statement submitted by Scholars Strategy Network 950
Statement submitted by The Campaign Legal Center 951

September 10, 2014

HEARING—NOMINATIONS OF MATTHEW MASTERSON AND CHRISTY MCCORMICK TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION

OPENING STATEMENT OF:

Hon. Angus S. King, Acting Chairman, a U.S. Senator from the State of Maine 957

TESTIMONY OF:

Mr. Matthew V. Masterson, Nominee, Election Assistance Commission, (OH) . 959
Ms. Christy A. McCormick, Nominee, Election Assistance Commission, (VA) ... 960

PREPARED STATEMENTS OF:

Hon. Pat Roberts, Ranking Member, a U.S. Senator from the State of Kansas 968
Mr. Matthew V. Masterson, Nominee, Election Assistance Commission, (OH) . 969
Ms. Christy A. McCormick, Nominee, Election Assistance Commission, (VA) ... 972

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by NALEO Educational Fund 975
Statement submitted by National Disability Rights Network 978
Statement submitted by The Leadership Conference on Civil and Human Rights 980
Statement submitted by Verified Voting 982

Page

December 3, 2014

BUSINESS MEETING—TO CONSIDER THE NOMINATIONS OF MATTHEW MASTERSON AND CHRISTY MCCORMICK TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION

OPENING STATEMENT OF:

Hon. Charles E. Schumer, Chairman, a U.S. Senator from the State of New York 983

MATERIALS SUBMITTED FOR THE RECORD:

Statement submitted by The Leadership Conference on Civil and Human Rights 986

ORGANIZATIONAL MEETING

WEDNESDAY, FEBRUARY 13, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in Room SR–301, Russell Senate Office Building, Hon. Angus King, presiding.

Present: Senator King.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director, Professional Staff; Lynden Armstrong, Chief Clerk; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Shaun Parkin, Republican Deputy Staff Director; Matt McGowan, Professional Staff; Rachel Creviston, Republican Professional Staff; and Adam Topper, Rooms Coordinator.

OPENING STATEMENT OF SENATOR ANGUS S. KING Jr.

Senator KING. The Rules Committee will come to order. This is our first meeting of the 113th Congress, the Committee's organizational meeting. Welcome. There are two items on the agenda—the adoption of the Committee Rules of Procedure and an original resolution which will fund the Rules Committee during the 113th Congress. We currently do not have a quorum needed to adopt the Committee rules and approve the Committee budget. So, the Committee is recessed, subject to the call of the chair. We will let your office know when we will meet, hopefully off of the floor this afternoon, to vote on the items.

[Whereupon, at 10:06 a.m., the Committee was recessed to the call of the Chair.]

[The Committee reconvened on Wednesday, February 27, 2013 at 12:21 p.m., in Room S–219, United States Capitol, Hon. Charles E. Schumer, Chairman of the Committee, presiding.]

Present: Senators Schumer, Feinstein, Durbin, Pryor, Udall, Warner, Leahy, Klobuchar, King, Roberts, Chambliss, Shelby, and Blunt.

OPENING STATEMENT OF SENATOR SCHUMER

Chairman SCHUMER. The Rules Committee will come to order for the continuation of its organizational meeting. Good afternoon, thank you for coming. I would like to warmly welcome our new Ranking Member, Senator Roberts and our new Members, Senator Amy Klobuchar, Senator Angus King, and Senator Ted Cruz. We have a legislative quorum of 10 members, so let's take our two

votes. Is there any further debate? I move we adopt by voice the Committee Rules of Procedure—is there a second?

Senator LEAHY. Second

Chairman SCHUMER. All in favor, say "aye"

[a chorus of "ayes."]

Chairman SCHUMER. All opposed, say "nay"

[No response.]

Chairman SCHUMER. The "ayes" have it. Now, I move that we adopt by voice vote the 7-month authorizing resolution for the Rules Committee budget. Is there a second?

Senator FEINSTEIN. Second

Chairman SCHUMER. All in favor, say "aye."

[Chorus of "ayes."]

Chairman SCHUMER. All opposed, "nay."

[No response.]

Chairman SCHUMER. The "ayes" have it. Since there is no further business, the Committee is adjourned and we thank you for making this meeting our most successful yet.

[Whereupon, at 12:24 p.m., the Committee was adjourned.]

BUSINESS MEETING—TO CONSIDER S. RES. 64, AN ORIGINAL RESOLUTION AUTHORIZING EXPENDITURES BY SENATE COMMITTEES

WEDNESDAY, FEBRUARY 27, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:00 a.m., in Room SR–301, Russell Senate Office Building, Hon. Angus S. King, presiding.

Present: Senator King.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director, Professional Staff; Lynden Armstrong, Chief Clerk; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief; Shaun Parkin, Republican Deputy Staff Director; Matt McGowan, Professional Staff; Rachel Creviston, Republican Professional Staff; and Adam Topper, Staff Assistant.

[Committee gavel.]

Senator KING. The Rules Committee will come to order for the mark-up on its omnibus funding resolution for the Committees. Welcome. We currently do not have a quorum needed to pass the resolution, so the Committee is recessed, subject to the call of the chair.

[Committee gavel.]

The Committee reconvened on Thursday, February 28, 2013 at 3:00 p.m., in Room S–216, United States Capitol Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Feinstein, Durbin, Pryor, Warner, Leahy, Klobuchar, King, Roberts, Chambliss, Shelby, Blunt, and Cruz.

[Committee gavel.]

OPENING STATEMENT OF SENATOR SCHUMER

Chairman SCHUMER. The Rules Committee will come to order for the continuation of the mark-up on its omnibus funding resolution for Committees. You were all sent the resolution yesterday. We have a legislative quorum of ten members, so let's take our vote. Is there any further debate?

[A chorus of no.]

Chairman SCHUMER. I move that we adopt by voice vote the 7-month omnibus authorizing resolution for Senate Committees. Is there a second?

Senator FEINSTEIN. Second.

Chairman SCHUMER. All in favor say "aye."

[A chorus of "ayes."]

Chairman SCHUMER. All opposed?

[No response.]

Chairman SCHUMER. The ayes have it. Since there is no further business, the Committee is adjourned.

[Committee gavel.]

HEARING—NOMINATION OF DAVITA VANCE-COOKS, OF VIRGINIA, TO BE THE PUBLIC PRINTER

WEDNESDAY, JUNE 12, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in Room SR–301, Russell Senate Office Building, Hon. Angus S. King, Jr., presiding.

Present: Senators King, Klobuchar, and Roberts.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Ellen Zeng, Elections Counsel; Sharon Larimer, Assistant to the Staff Director; Abbie Sorrendino, Professional Staff; Nicole Tatz, Legislative Correspondent; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Adam Topper, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Communications Director; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF SENATOR KING

Senator KING. The United States Senate Committee on Rules and Administration shall come to order. Good morning.

On today's agenda is the consideration of the nomination of Davita Vance-Cooks for the position of Public Printer of the United States Government Printing Office.

Chairman Schumer is unable to attend today's hearing and asked that I extend his congratulations to Mrs. Vance-Cooks on her nomination. Without objection, I ask that his statement be submitted for the record.

[The prepared statement of Chairman Schumer was submitted for the record:]

Senator KING. I would also like to welcome Mrs. Vance-Cooks' husband, Cliff Cooks, who is joining us here today.

The Government Printing Office opened its doors the day that Abraham Lincoln was inaugurated as the 16th President of the United States in 1861. For more than 150 years, the GPO has played an instrumental role in keeping the nation informed and providing permanent public access to government information. GPO publishes the nation's important government information in both digital and print forms. It publishes official documents for Congress and the executive branch, created and maintains the Federal Digital System, an enormous Web site and database of digital documents, and also supports the Federal Depository Libraries all over the country.

A broad operational review of the GPO conducted by the National Academy of Public Administration in 2012 concluded that under the guidance of the Acting Public Printer, our nominee here

today, GPO has made significant progress in rebooting the agency from a print-based organization to one that focuses on publishing content in many forms.

Mrs. Vance-Cooks came to us with a distinguished 34-year career that includes 25 years in the private sector and nine years of management and executive experience at the GPO itself. As Acting Public Printer, she has worked to modernize the process of making information available to the public in digital as well as print form.

Senator, welcome.

On May 9, the President nominated Mrs. Vance-Cooks to be the Public Printer. If confirmed, she would be the 27th person to hold this position, the first African American, and the first woman. As Deputy Public Printer, she assumed the responsibilities of Acting Public Printer on January 4, 2012.

On behalf of the committee, I want to welcome Mrs. Vance-Cooks to today's hearing and we look forward to her testimony.

Senator Roberts, do you have any opening remarks?

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Yes, Mr. Chairman.

This will be somewhat repetitive, but it deserves repeating because of the qualifications of Mrs. Vance-Cooks, and I would like to welcome her here today. Thank you for paying a very nice courtesy call to my office prior to this hearing and thank you for your willingness to serve as the Public Printer.

I want to formally acknowledge the great work that the GPO does. They produce all of the printing and information products ordered by Congress and Federal agencies, which is the equivalent of nearly $700 million of work annually. Praise is due to the good work of the 1,900 GPO employees who work tirelessly on behalf of Congress.

And I want to commend the implementation of technology that has made the GPO more efficient, has allowed the agency to function with fewer resources, publish more information, make it more accessible to the public, and still meet the increasing demands of Congress on a day-to-day basis—no small job. I also want to stress the importance of innovation as the GPO continues to make the shift from print to digital documents.

The committee looks forward to hearing Mrs. Vance-Cooks' remarks and her vision for the future of the GPO. She is eminently qualified, and I will hold my remarks in the effort to expedite this confirmation, which she deserves.

Senator KING. Thank you, Senator.

Senator Warner is a member of this committee and one of the Senators from Mrs. Vance-Cooks' home State of Virginia. He had hoped to introduce the nominee here today but is tied up in another committee markup, which is the order of the day around here this week. I would like to read part of his introductory statement and, without objection, ask that the statement in its entirety be included in the committee record at this point.

[The prepared statement of Senator Warner was included for the record:]

Senator WARNER. I wish I could be there in person to introduce fellow Virginian and President Obama's nominee to be Public Printer, Mrs. Davita Vance-Cooks.

Davita is exceptionally well-qualified to carry out the duties and responsibilities of Public Printer. She brings more than 30 years of private sector and federal government experience to her current role as Deputy Public Printer. Davita joined the Government Printing Office in 2004 and has held a succession of senior management positions. In one of her previous roles as Deputy Managing Director of Consumer Services, Davita oversaw the award of a $50 million contract for the production of the 2010 census materials. This was one of the largest procurements in the agency's history.

Additionally, as Managing Director of GPO's Publications and Information Sales business unit, Davita led GPO's effort to partner with Google to sell federal publications in an eBook format, launched an award winning government book blog, modernized GPO's customer contact center, and oversaw the renovation of the agency's retail bookstore in Washington, D.C.

Recognized for her hard work and successful efforts, Davita was named GPO's Chief of Staff in January 2011, where she continued to have a positive impact on the organization. In only eleven months she created and implemented an agency-wide strategic performance plan while managing the day-to-day operations, budgets, and performance goals of the executive offices. In December of that same year she was once again promoted—this time to the appointed position of Deputy Public Printer.

As a former businessman, I'd also like to highlight Davita's success in the private sector. Before joining GPO she served as General Manager of HTH Worldwide Insurance Services. Before that she was Senior Vice-President of Operations for NYLCare MidAtlantic Health Plan. Prior to that, she worked for several Blue Cross/Blue Shield plans, where she was Director of Customer Service and Claims, Director of Membership and Billing, and Director of Market Research and Product Development. Her wide range of experience as a business executive should not be overlooked.

Virginians are proud to call Davita one of their own. She is a member of the Northern Virginia Alumnae Chapter of Delta Sigma Theta, Inc., a national sorority that will celebrate its centennial this year. She and her husband Clifford Cooks are active members of the Antioch Baptist Church in Fairfax Station, and they are the proud parents of Chandra and Christopher, both of whom graduated from James Madison University. For the past several years, while serving as a senior manager at GPO, Davita has coached girls basketball for the Springfield Youth Club and the Braddock Road Youth Club in Fairfax County. Cliff is an assistant coach for the boys JV basketball team at Bishop Ireton High School. Despite Davita's nomination, it's a tough week in the Cooks household—Davita is a Spurs fan and Cliff roots for the Heat.

I would like to extend a warm welcome to Davita and her family, who have so much to be proud of. I enthusiastically support Davita, and urge the committee to favorably report her nomination and look forward to working towards her swift confirmation on the Senate floor.

Senator KING. Senator Warner's statement says, in part, "Mr. Chairman, I wish I could be there in person to introduce fellow Virginian and President Obama's nominee to be the Public Printer, Mrs. Davita Vance-Cooks. Davita is exceptionally well qualified to carry out the duties and responsibilities of the Public Printer. She brings more than 30 years of private sector and Federal Government experience to her current role as Deputy Public Printer.

"Virginians are proud to call Davita one of their own. She is a member of the Northern Virginia Alumni Chapter of Delta Sigma Theta, the national sorority that will celebrate its centennial this year. She and her husband, Clifford Cooks, are active members of the Antioch Baptist Church in Fairfax Station and they are proud parents of Chandra and Christopher, both of whom graduated from James Madison University.

"For the past several years, while serving as a Senior Manager at the GPO, Davita has coached girls' basketball for the Springfield Youth Club and the Braddock Road Youth Club in Fairfax County. Cliff is an assistant coach for the boys' JV basketball team at Bishop Ireton High School.

"Despite Davita's nomination, it has been a rather tough week in the Cooks' family household because Davita is a Spurs fan, and I understand that Cliff roots for the Heat. So last night must have taken—been some satisfying for you, Davita.

"I would like to extend a warm welcome to Davita and her family"—these are the words of Senator Warner—"who have so much to be proud of. I enthusiastically support Davita and urge the committee to favorably report her nomination and look forward to working towards her swift confirmation on the Senate floor."

Now, Mrs. Vance-Cooks, please make your statement to the committee.

STATEMENT OF DAVITA VANCE-COOKS, OF VIRGINIA, NOMINATED TO BE THE PUBLIC PRINTER

Mrs. VANCE-COOKS. Thank you. Mr. Chairman and members of the Committee on Rules and Administration, I am honored to be here this morning to assist in your consideration of my nomination by President Barack Obama to be the Public Printer of the United States Government Printing Office.

Before I begin, I would like to formally introduce you to Clifford Cooks, my husband and my best friend of 33 years, back there.

In the interest of time, I will briefly summarize my prepared remarks, which have been submitted for the record.

I am currently the Deputy Public Printer and I have been serving in the capacity of Acting Public Printer for the past 18 months. For 152 years, GPO has faithfully carried out its mission of keeping America informed about the business of the government, first by traditional printing, and today by digital technology.

Clearly, the GPO is no longer just a printing business. Today, we operate in an environment that is dominated by constantly evolving technology, the proliferation of content available through multiple formats and devices, rapidly changing and demanding stakeholder expectations, and significant financial budget pressure. In response, we have repositioned our core business of ink on paper to emphasize the development of a digital information platform for

the delivery of a growing variety of options to access government information.

As I have detailed in my prepared statement, my educational background, which includes an MBA from Columbia University, 25 years of private sector experience with progressively challenging leadership roles, nine years of GPO management and executive business experience, all have prepared me to lead this wonderful agency at this particular time, in this environment, and during this digital transformation.

My career at the GPO began when I directly managed our nationwide print procurement business, and then I became responsible for the print and E-commerce information sales operation, and later, I oversaw the administrative business units. I facilitated GPO's entry into the E-book market with the establishment of E-book partnerships with Google and other providers. And as the Chief of Staff, I guided the conduct of an agency-wide buyout, resulting in a restructured workforce and the lowest staffing level at GPO in more than a century, but still maintaining a high level of customer service.

This background has provided me with a broad knowledge of GPO's mission, our customers, our partners, operations, capabilities, employees, and organizational culture. If confirmed by the Senate, I will not need a learning curve to lead the agency as the Public Printer.

Furthermore, during my year-and-a-half as the Acting Public Printer, the collaboration between management and employees has resulted in a number of achievements, and I am so very proud of those achievements. I would like to list some of them for the record.

We completed fiscal year 2012 with positive net income and reduced our overhead costs to 2008 levels. To date, in fiscal year 2013, we have managed to absorb the effects of the sequestration while continuing to carry out the program of doing more with less. We developed a five-year strategic plan. We pioneered new mobile apps for the delivery of government information to mobile devices, one of which won a Digital Government Service Award. We expanded the scope of information made available by the Federal Digital System. We opened a Secure Credential Operations site for the increased demand of secure cards. We delivered the work supporting the 2013 Presidential Inauguration. We added new professional certifications for our plant operations so we are now designated as Best in Class. And we initiated the Federal Depository Library State Forecasting Project to ensure the digital future of the program in collaboration with the Depository Libraries. And most importantly, the National Academy of Public Administration, after a ten-month Congressionally mandated study, validated our mission and our program of digital transition.

So in developing and carrying out our plans for moving the GPO forward, I have been and will always be committed to consulting with Congress and our stakeholders, and I have an unwavering belief in the vital mission of GPO, which is to keep America informed. And I will ensure that GPO stays dedicated and true to that mission.

So in closing, I would like to state for the record that I have the deepest admiration and respect for the GPO employees. They are the agency's strongest and most important assets. They are the nation's experts in the production and dissemination of the information that is needed by the public. And for the past nine years, I have been fortunate to work with the dedicated and talented men and women of the GPO, and I look forward to continuing to work with them if I am confirmed as their Public Printer.

Mr. Chairman and members of the Committee on Rules and Administration, thank you again for the opportunity to be here today. I must admit, I am absolutely thrilled about this opportunity, and this concludes my prepared statement and I am prepared to answer any questions that you may have.

[The prepared statement of Mrs. Vance-Cooks Submitted for the Record:]

Senator KING. Thank you.

Before we get to questions, Senator Klobuchar has joined us. Senator, did you have an opening statement of any kind?

Senator KLOBUCHAR. No, I think we should just move on to questions, but I welcome the nominee and congratulate her and her family. Thank you, and thank you for your good work.

Senator KING. Mrs. Vance-Cooks, I understand that one of the first things you did when you took over as Acting Public Printer was hold Town Hall meetings with your staff. The feedback we got was very positive from that, that they appreciated your transparency and your willingness to listen.

You made it through, as you noted in your comments, the sequester pressure, and I wondered how you view the next couple of years. As you know, the sequester is not a one-year event, but unless it is modified, it is in the law for the next nine years. How do you see that relating to your ability to carry out your mission?

Mrs. VANCE-COOKS. First of all, thank you for acknowledging the Town Hall meetings. I made it an objective to have Town Hall meetings around the clock every quarter with the employees, and since we are, in fact, a 24-hour by seven operation, we have Town Hall meetings that go around the clock, and it is very important for us to communicate with our employees to let them know where we are going and why we are moving in that direction. I have found that when we communicate with our employees, we tend to get better buy-in, and that buy-in allows us to make hard decisions, but decisions which they, in fact, understand, and that leads me to the point about the sequester.

In February, I had a series of Town Hall meetings to talk to them about what I called the Perfect Storm. At that point, it was the sequestration; it was the Continuing Resolution and the debt ceiling. And I explained to them that it is important for us to manage our expenses very carefully. And I wanted them to understand that when we manage our expenses, is to make sure that we are a viable operation. So they understand why we have to cut back on training sometimes or why we have to cut back on some of the technological investments that had been planned for the future.

The way in which I understand, or the way in which we have planned to make it through the next few years with the sequestration is to make sure we understand our expenses. Our expenses are

at the lowest level right now. We have reached all the way down to the 2008 level. But it is what I call targeted expenses. It is not a slash across the board. It is making sure that we target the right areas, and we will continue to do that.

We also will continue to try to increase our revenue. Our financial model is set up so that only 16 percent of our budget is due to appropriations. The 84 percent balance, we actually earn it. And so that earned revenue is what we will target to make sure that we can ride through the sequester. That earned revenue will come from procurement business and will come from other types of information, such as secure cards and passports.

So the balance between our expenses and managing our revenue will allow us to go further. But I want to stress that it is targeted revenue opportunities and it is targeted expense opportunities, and it is also making sure that we collaborate with our employees so that they understand our vision.

Senator KING. Thank you. The Depository Library Program, the localized program that helps ensure public access to Federal Government documents, is an old and tried and true program. However, how does that program fit in, in your vision, with digital access? Do we need Federal Depository Libraries if everybody can access all the information from their living room?

Mrs. VANCE-COOKS. Well, first of all, we definitely need Federal Depository Libraries. That is a guaranteed issue. Yes. In fact, you know that we have 1,200 Depository Libraries spread throughout the United States. We need it because of the fact that not everyone is on digital. Not everyone is on a digital platform. And the libraries are needed to serve the underserved, those individuals who do not have access to digital content. And I know for a fact that we have a lot of pockets like that.

Now, I will admit that the FDLP Program is moving towards a digital platform. We need to help them manage the digital platform. They have identified a number of issues, such as they want improved access online. They want enhanced catalog records. They want the information to be easily discoverable. They want us to digitize more historical content. They want more flexibility in terms of how we manage the collection according to Title 44. And they want preservation.

We hear them. We agree with them. And that is why, back in 2012, we initiated a study called the State Forecasting Project. It is a collaborative project with all of the libraries, and we asked them, how can we as GPO best help to serve you? How can we help you to serve your patrons, whether digital or whether tangible? We have been working on all of the analysis, all of the recommendations, and we intend to present a National Federal Digital Program Plan by October to address all of those issues.

Senator KING. Thank you.

Senator Roberts.

Senator ROBERTS. Well, I thank the Acting Chairman and I thank you, Mrs. Vance-Cooks. What is the appropriate title after your confirmation here? I have got Chief Executive Officer. CEO seems a little—Madam CEO does not quite get it. What do you take as the proper title?

[Laughter.]

Mrs. VANCE-COOKS. Well, you know, I like Madam CEO.

[Laughter.]

Senator KLOBUCHAR. I would like the record to reflect I also think that is a good title, Senator Roberts.

[Laughter.]

Senator ROBERTS. It is now four-to-zero. I can understand that. Okay.

Well, Madam CEO, you have already responded to about three of my questions and they were asked in a very timely fashion by our Acting Chairman. I have got a question. In your view, what is the appropriate mix of agency printing that should be performed by GPO and will you continue to support a robust private sector printing industry?

Mrs. VANCE-COOKS. Today, we have an in-plant operation and we have a print procurement operation. Our in-plant operation primarily handles Congressional products and inherently government information, such as the Federal Register. Our Print Procurement Program handles the Federal agency printing. And, as you know, a number of Federal agencies come to us for printing. We know that approximately 70 percent of the mix that comes in, or 70 percent of the work orders that come in, are for the Federal agencies.

That work is sent out to our nationwide network of businesses that are printers. And we know that when we send that out, about 80 percent of those printers who actually get business from us are employees or employers with fewer than 20 employees. So, basically, we are funding the small business network for printers.

I believe strongly in the Print Procurement Program because it is a way to leverage a tremendous amount of buying capability to get competitive prices. It is a competitive bid process, and it is a longstanding partnership between the government and private sector. And, in fact, when I started at GPO, I started managing that Print Procurement Program, so I am very much familiar with it. It will continue. It generates about—well, in fiscal year 2012, it generated about $350 million in revenue for all these private businesses.

This is, however, an area that I am very concerned about for the sequester, because when the sequestration hit, the Federal agencies, of course, the first thing they looked at were different line items about which they can cut. And one of the things they probably will start to cut will be printing, and that is, of course, because they might think about how they can put things online or they might think that they may not need as many orders.

So this is what I am calling the rippling effect. When they submit fewer orders to us, we, in turn, will submit fewer orders to the private businesses. So we are watching that very carefully. Right now, since the sequester has come on board, we are seeing about an eight to ten percent decline in printing on that side.

Senator ROBERTS. When you make those adjustments, you are talking about the small business community and your average was 22 people or less. Obviously, if you have an eight to ten percent cut, that is going to hit, if it is across the board. How are you going to manage that? Are you going to pick and choose, or——

Mrs. VANCE-COOKS. No. This is a competitive bid process. Right now, we have about 16,000 vendors on our master list, and so when

an order comes in, we then send it out to all the businesses to bid. They actually bid on the particular order. And then we give it to the best possible price.

Senator ROBERTS. All right. I appreciate that.

You have got about one million—well, not about—you have got exactly 1,431,600 square feet of total space in four buildings over there. I have been there on several occasions, but not lately, so I have got to get back over. And about 437,200 square feet of that space is classified as being unusable. We are talking about pipes, stairwells, mechanical rooms, et cetera, et cetera. With costs that are significantly rising to maintain the aging buildings, what kind of advice can you give us on getting the best economic value out of the usable space while continuing to meet the core needs of the GPO and the Congress?

Mrs. VANCE-COOKS. We are leasing that space. In fact, I always tease Andy Sherman, sitting behind me, and Jim Bradley on the other side, because I call them my RE/MAX salesmen because of the fact that we had that——

Senator ROBERTS. You do not have a reverse mortgage or anything like that, do you?

Mrs. VANCE-COOKS. No, I do not. No.

[Laughter.]

Mrs. VANCE-COOKS. No. But we do lease the space. In fact, we have four renters now and they contribute about $1.7 million annually, and that funding is used to defray the cost of operating the building.

We are in the process of looking for additional renters. Again, I will admit, the sequestration has sort of slowed that process. But that is what we intend to do.

Senator ROBERTS. I appreciate that, and the red light is blinking, Mr. Chairman, so let us move on.

Senator KING. Senator Klobuchar.

Senator KLOBUCHAR. Very good. Again, welcome, and as Senator Roberts is now aware, the Public Printer is the Chief Executive Officer——

Mrs. VANCE-COOKS. Right.

Senator KLOBUCHAR. —of the GPO, and in this capacity, you are responsible, or will be responsible for leading and managing the organization. I know you have had significant experience in both the public and private sector. Could you talk a little bit about how your experiences in the private sector will inform your decision making as the CEO of the GPO?

Mrs. VANCE-COOKS. Thank you for that CEO title. Thank you very much.

My private sector experience actually has given me a unique perspective on the organizational challenges of the GPO. In my private sector experience, I specialized in operations management, change management, and strategic planning. When I became the Chief of Staff, I immediately took my strategic planning emphasis and brought it to the GPO. I have developed a very coordinated, very standard process for strategic planning.

We developed a five-year strategic plan several years ago. It is a dynamic plan. By that, I mean we continually update it. It is updated every year to go to the next year. On top of that, every six

months, we have a report that identifies where we stand in terms of our operational plans. And every year, at the end of that year, we identify what we have accomplished. All of that information is open and transparent and it is on the web so you can see exactly what our plans are going forward.

In terms of operations management from the private sector, I have brought that here because I understand how to manage. I can manage and I can strategically plan. And then my change management experience is also helpful because this is an organization that is going through a lot of transformation and we need that kind of skill set to make sure that we understand where we are going and get the buy-in.

Senator KLOBUCHAR. As you talk about change, I know that Senator King asked you some questions, which I thought were very good, on the new, the digital, and referenced that. Are you doing anything with social media, with Facebook, Twitter?

Mrs. VANCE-COOKS. Absolutely. We have a Facebook. We have YouTube, which is half Pinterest, which I think is kind of interesting, okay. And we believe in social media. Social media is the best way to get out our name. It is the best way to communicate what we do. It is also a reference to the fact that there is a new generation coming and this is how they communicate. This is how they learn about us. So we cannot wait for them to come to us. Social media allows us to go to them. And we also have a Twitter account.

Senator KLOBUCHAR. Have you ever thought that the name should be changed?

Mrs. VANCE-COOKS. Absolutely.

Senator KLOBUCHAR. From Government Printing Office——

Mrs. VANCE-COOKS. To Government Publishing Office.

Senator KLOBUCHAR. Well, there we go. We have a goal now. But it does seem like that might be a good idea, because it is hard for you to say on social media, to use the Government Printing Office when you are giving them digital access.

Mrs. VANCE-COOKS. Exactly. And the Government Printing Office title, the name is a great name full of history. It is steeped in tradition. But it is limiting. It makes people think that the only thing we do is printing.

Senator KLOBUCHAR. Exactly.

Mrs. VANCE-COOKS. We actually publish digital information. So we are a digital publisher. We have E-commerce through E-books. We create mobile apps.

Senator KLOBUCHAR. And then people will stop saying, well, why do you have to exist when you are the Printing Office?

Mrs. VANCE-COOKS. Exactly.

Senator KLOBUCHAR. Okay.

Mrs. VANCE-COOKS. Thank you.

Senator KLOBUCHAR. We have a goal.

Mrs. VANCE-COOKS. All right. Thank you.

Senator KLOBUCHAR. You talked with Senator King about the importance of the depositories, even in the digital age, a place for everyone to access the records, and I found out, which I did not know, getting ready for this, that the University of Minnesota is the Regional——

Mrs. VANCE-COOKS. That is right.

Senator KLOBUCHAR [continuing]. Depository Library for Minnesota and South Dakota and Michigan, housing more than a million volumes of government publications. Can you talk about how that works? I know you mentioned, was it 1,200——

Mrs. VANCE-COOKS. There are 1,200 Depository Libraries——

Senator KLOBUCHAR. But these are regional ones, and so what role do they play and how do you work with the universities?

Mrs. VANCE-COOKS. Okay. The regional role—the Regional Libraries are responsible for coordinating with the Depository Libraries, and I think of the Regional and the Depository Libraries as actually collaborating with each other to make sure that they have the right documents on file, to make sure that they are not duplicating efforts, and to make sure that they serve the patrons.

So in terms of how they work with the universities, it is the same thing. What do the universities want? Let us make sure we have the information that they need.

And I would also like to say that with all of these libraries that cover a number of areas, it is academic, it is law, it is public. It goes on and on.

Senator KLOBUCHAR. Okay. The National Academy of Public Administration report found that, based on a conservative set of assumptions, the GPO only has the cash necessary to offset operating losses and fund modest investment for another seven years. Do you agree with that assessment and what do you think can be done with your business background to ensure a brighter financial future?

Mrs. VANCE-COOKS. I do not agree with that assessment. I believe that the GPO has a bright future and a good financial strong future and we will be here for a very long time. We earn our revenue, as I said, with the 84 percent. It comes from passports, and we are in the process of coordinating with the State Department for the next generation of passports. I think most people know that we have been working with the State Department since the 1920s on our passports. We leverage that expertise with our passports to create secure credentials. We consider the secure credential market to be a very large market opportunity for us.

Our print procurement is also an area of opportunity for us because we believe that we should do more market outreach to the Federal agencies to let them know that we are here to assist them with their printing needs because printing will not go away. Tangible print is here and it will always remain, it is just that there will be a balance between tangible print and online.

Now, because I mentioned earlier that we intend to reposition our core business, by that, I mean the traditional printing, we are looking for market niche opportunities to support it. So that would be print on demand. That would be E-books. That would be all of those type of market opportunities to bolster the revenue to move forward.

I think we are going to be just fine.

Senator KLOBUCHAR. Okay. Well, I would love to work with you on the name change——

Mrs. VANCE-COOKS. Well, thank you.

Senator KLOBUCHAR [continuing] Because I just realized you can still be the CEO of the GPO—

Mrs. VANCE-COOKS. That is right.

Senator KLOBUCHAR [continuing]. Because it would be the Publications Office. That would make it easier for everyone in Washington to keep the same acronym.

Mrs. VANCE-COOKS. And it does not bother our letterhead too much.

Senator KLOBUCHAR. Yes. Then we save money and we can keep the old letterhead. Okay. We are ready to work on it.

Mrs. VANCE-COOKS. All right.

Senator KLOBUCHAR. Thank you.

Mrs. VANCE-COOKS. Thank you.

Senator KING. Thank you, Senator Klobuchar.

Before closing the hearing, there is so much talk these days in terms of bad news, particularly sometimes focusing on Federal employees. I just want to take this occasion to thank you and the people at GPO that go to work every day quietly, do their job in a quality manner serving the public in responsive and creative ways and just thank you for that, and please convey the thanks of this committee to your loyal and creative and good serving employees. Would you do that for me?

Mrs. VANCE-COOKS. I will. Thank you very much.

Senator KING. Thank you. On behalf of the Rules Committee, I want to thank you for your testimony this morning.

The record on this hearing will remain open for five business days for additional comments. There may be post-hearing questions submitted in writing for the nominee to answer. We plan to consider this nomination in a timely manner, hopefully within the next few days, so the Senate can have an opportunity to confirm Mrs. Vance-Cooks as the next Public Printer in an expeditious manner.

With no further business to come before the committee, the committee is adjourned.

Mrs. VANCE-COOKS. Thank you, sir.

[Whereupon, at 10:39 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

STATEMENT BY U.S. SENATOR CHARLES E. SCHUMER, CHAIRMAN SENATE COMMITTEE ON RULES AND ADMINISTRATION NOMINATION HEARING OF DAVITA VANCE-COOKS, NOMINEE FOR PUBLIC PRINTER OF THE UNITED STATES
June 12, 2013

I am pleased to support the nomination of Davita Vance-Cooks for Public Printer of the United States, to lead the Government Printing Office. She comes to us with a very strong record of 25 years in the private sector and nine years in management at GPO. I believe she is uniquely well-prepared for this opportunity. The confirmation of Ms. Vance-Cooks also would be historic; she would be the first woman and the first African-American confirmed as Public Printer.

Ms. Vance-Cooks has been serving as Acting Public Printer since January 4, 2012. Under her guidance, GPO has faced a fast-moving digital environment and the fiscal constraints of budget cuts followed by further reductions under sequestration. These challenges are being met by Ms. Vance-Cooks with innovation and keen understanding. In February 2013, Vance-Cooks met tirelessly with GPO employees to discuss GPO's sequestration plans. She has managed the sequester so far without furloughs, and while maintaining GPO's essential services. At the same time, she is building for the future by modernizing the agency and pursuing profitable new products.

GPO has been undergoing a transformation from a printing operation to a broad-based publishing operation with specific emphases on digital information platforms and secure credentials such as passports. GPO is a large, complex operation that requires outstanding leadership to fulfill its obligations to Congress, the executive branch, and the public. Ms. Vance-Cooks has just what GPO needs as it continues to transform itself from an ink-on-paper operation to a full-service publisher of digital and print products.

Under Ms. Vance-Cooks, GPO has made great strides to diversify its services in many areas. Apps of Congressional and other government information have been introduced for mobile devices, more e-books have been created, and tickets and other materials for the 2013 Presidential Inauguration were completed on time. GPO continued to increase business for passports and secure IDs, producing 10 million passports in 2012. The State Department has asked GPO to develop the next generation of passports, to be issued starting in 2015.

The Rules Committee is using the new "smart form" developed in consultation with Senate by the White House working group established by the Presidential Appointment Efficiency and Streamlining Act of 2011 (P.L. 112-166). I worked with Senator Alexander, who strongly advocated and worked tirelessly for such a form. It will help streamline the confirmation process and reduce inadvertent errors in reporting information. The Senate Rules Committee is one of the first Senate Committees to agree to use the form for its nominations.

As Chairman of the Senate Committee on Rules and Administration and Chairman of the Joint Committee on Printing, I believe Ms. Vance-Cooks has demonstrated that she will be the right person at the helm of GPO to continue its transformation. I am pleased to support her confirmation, and I urge my colleagues to move expeditiously on her nomination.

Executive Summary of Statement by Davita Vance-Cooks before the Committee on Rules and Administration, U.S. Senate June 12, 2013

Thank you for inviting me to appear before the Committee on Rules and Administration to assist in your consideration of my nomination by President Barack Obama to be Public Printer of the U.S. Government Printing Office (GPO). I am currently the Deputy Public Printer. I have been serving in the capacity of Acting Public Printer since January 2012.

GPO has been undergoing a transformation from a printing operation to a publishing operation and a provider of secure credentials. We have repositioned our core business to emphasize the development of a digital information platform for the delivery of a growing variety of options for accessing Government information. Today we operate in an environment that is dominated by constantly evolving technology, rapidly changing stakeholder expectations, an ongoing shift to digital content via multiple formats and devices, and financial budget pressure. Set against this backdrop is the GPO, an agency that – for 152 years – has been committed to its mission of *Keeping America Informed,* first in tangible print and now in digital format.

As I have detailed in my prepared statement, I believe my educational background, private sector experience, GPO management experience, and GPO executive experience have prepared me to lead this agency. This background has provided me with a broad knowledge of GPO's mission, customers, partners, operations, capabilities, employees, organizational culture, and the requirements for moving the agency forward.

I am proud to say that GPO has had many successes over the past year and a half. We completed fiscal year 2012 with positive net income and reduced overhead costs to 2008 levels. We have continued our financial program of "doing more with less" into 2013 and have managed so far to absorb the effects of the sequester while continuing to carry out our services for Congress, Federal agencies, and the public.

We developed and introduced mobile apps for several congressional and agency publications; expanded information offerings via our Federal Digital System; initiated the Federal Depository Library Program (FDLP) Forecast Study to ensure the digital future of the Program; increased our production capability for smart cards with the establishment of a second production site; produced the work required by the 2013 Presidential Inauguration; and attained additional professional certifications for our plant operations. We re-branded GPO as the *"Official, Digital, Secure"* provider of the Federal Government's information products and services. And we successfully emerged from a congressionally-mandated independent study of our operations that validated our mission and our program of digital transition.

I believe in the value of communicating. In developing and carrying out our plans for moving the GPO forward, I am committed to consulting with Congress and our stakeholders who share in our mission of *Keeping America Informed.* I have a strong belief in GPO's mission, and I admire the ability of the men and women of GPO to perform difficult and exacting work under pressing deadlines to ensure this mission is carried out every day. I look forward to continuing to work with them if I am confirmed as Public Printer.

OFFICIAL | DIGITAL | SECURE

Davita Vance-Cooks

Prepared Statement before the Committee on Rules and Administration, U.S. Senate, on the Nomination as Public Printer

---

301 Russell Senate Office Building

Wednesday, June 12, 2013
10:00 a.m.

U.S. GOVERNMENT PRINTING OFFICE | KEEPING AMERICA INFORMED
www.gpo.gov | www.fdsys.gov | http://www.fdlp.gov/ | http://bookstore.gpo.gov

Mr. Chairman and Members of the Committee on Rules and Administration, I am honored to be here this morning to assist in your consideration of my nomination by President Barack Obama to be the Public Printer of the United States Government Printing Office (GPO).

I am currently the Deputy Public Printer. In that position, and as required by law, I have the responsibility to perform the duties of the Public Printer—which are to take charge of and manage GPO—until a successor is appointed. I have been serving in the capacity of Acting Public Printer since January 2012, which is about a year and a half ago.

GPO has been undergoing a transformation from a printing operation to a publishing operation and a provider of secure credentials. We have repositioned our core business to emphasize the development of a digital information platform for the delivery of a growing variety of options for accessing Government information. This transition has been underway for many years, underscored by the enactment in 1993 of the GPO Electronic Information Enhancement Act, which statutorily mandated the provision of digital information dissemination services to the public.

This Act effectively began the change in GPO's business model from a traditional "ink on paper" operation to a digital platform. Consequently, the leadership of this agency must possess knowledge and experience in the management of not just printing but of serving the needs of Congress, Federal agencies, and the public for access to digital Government information. This is especially critical in our current environment, which is dominated by constantly evolving technology, changing stakeholder expectations, the ongoing shift to digital content through multiple formats and devices, and financial budget pressure.

I firmly believe my educational background, private sector experience, GPO management experience, and GPO executive experience have prepared me to lead this agency. I am a seasoned business executive with more than 30 years of private sector and Federal Government experience. In 2012, OutputLinks Communications Group named me as one of the year's Women of Distinction for my professional achievement, leadership, and contribution to the printing and digital industries.

My education includes a BS in Psychology from Tufts University and an MBA from Columbia University with an emphasis in Marketing and Finance. I am trained in marketing theory in how to apply the tools of that discipline in the development of competitive marketing strategies. I am also trained in organizational financial requirements, so I understand the strategies that are required to maintain financial stability. Both of these areas are critical to leading GPO through an organizational transformation under tight financial constraints.

I have 25 years of private sector experience with progressive leadership roles specializing in effective operations management, organizational change, marketing, and strategic planning. I was the Senior Vice-President of Operations for NYLCare MidAtlantic Health Plan where, among other duties, I was responsible for a digital print work center for the production of variable data printing products. I also worked for several Blue Cross/ Blue Shield Plans and served multiple roles such as the Director of Customer Service and Claims, Director of Membership and Billing, and Director of Market Research and Product Development. I have significant experience in business management and the process of identifying and successfully responding to organizational challenges.

I have been with the GPO for almost nine years, during which time I have held a succession of senior management and executive positions in printing, information dissemination, and administrative support operations. This background has provided me with a broad knowledge of our mission, customers, partners, operations, capabilities, employees, and organizational culture. I am proud to say that, while at GPO, I have been working with some of the best experts in the industry regarding the production and dissemination of Government information products. If confirmed by the Senate, I will not need a learning curve to lead the GPO.

From 2004-2008, I served as the Deputy Managing Director of Customer Services, where I was responsible for the print procurement side of the business, overseeing (at that time) the procurement of approximately $500 million annually in Federal printing and information product requirements from the private sector. I oversaw the development of GPO Express, a contract with FedEx Office that provides quick turnaround print jobs, and was responsible for the establishment of GPO's Online Paper Store. In addition, I managed corporate print procurement, 15 regional print procurement offices nationwide, the sales team, quality control, internal acquisitions, and a market/product research function.

From 2008-2011, I was responsible for the sales side of GPO's information dissemination business as Managing Director for Publications and Information Sales. I oversaw our online and e-commerce sales program, content acquisition, the management of GPO's warehouses in Pueblo, CO, and Laurel, MD, and the operation of GPO's Contact Center. I led the renovation of the GPO main bookstore, the establishment of e-book partnerships with Google and other providers, implemented the 5S process improvement methodology in the Contact Center, and developed marketing campaigns with the objective to increase product sales.

In January 2011, I was appointed as GPO's Chief of Staff by Public Printer William Boarman. Under his leadership, GPO carried out a program to reduce overhead costs, collect outstanding unpaid accounts, and expand our service offerings to Congress, Federal agencies, and the public. With this program, GPO generated positive net income for fiscal year 2011. Additionally, as Chief of Staff, I led efforts to create and implement an agency-wide strategic performance plan and oversaw the implementation of an agency-wide buyout of approximately 15% of the agency's workforce. The buyout restructured the workforce to reduce supervisory levels and resulted in the lowest staffing level at GPO in more than century.

My background and experience were instrumental in preparing me to lead the agency as Acting Public Printer. With employees and management working together, we have had many successes, and I am proud of our accomplishments.

We completed fiscal year 2012 with positive net income and reduced overhead costs to 2008 levels. We have continued our financial program of "doing more with less" into 2013 and have managed so far to absorb the effects of the sequester while continuing to carry out our services for Congress, Federal agencies, and the public.

Over the past year and a half, we have developed and introduced mobile apps for several congressional and agency publications (one of which received a Digital Government Achievement Award), expanded information offerings via our Federal Digital System (known as FDsys), initiated the Federal Depository Library Program (FDLP) Forecast Study

to ensure the digital future of the Program is based on a shared vision between GPO and depository libraries, increased our production capability for smart cards with the establishment of a second production site, and produced the work required by the 2013 Presidential Inauguration.

We attained Global Certification for Excellence in Graphic Arts, which complemented our institutional membership with the Library Binding Institute. We were also named a certified facility by the Sustainable Green Printing Partnership for commitment to smart environmental practices. And we received a joint Business Value Award with the Office of the Federal Register for the innovative use of public key infrastructure (PKI) for authenticating electronic submissions to the *Federal Register*.

We re-branded GPO as the "*Official, Digital, Secure*" provider of the Federal Government's information products and services and updated our marketing collateral. We developed a five year strategic plan and successfully emerged from a congressionally-mandated year-long study of our operations by the National Academy of Public Administration, which validated of our mission and our program of digital transition.

I believe in the value of communicating. Since I became Acting Public Printer, we have held round-the-clock employee town hall meetings every quarter to make sure GPO's employees understand our strategic vision and operational plans. In developing and carrying out plans for moving GPO forward, I am committed to communicating and consulting with this Committee, the Joint Committee on Printing, the Committee on House Administration, as well as GPO's appropriations committees; our customers throughout Congress and Federal agencies; our partners in the Federal Depository Library Program and the broader library community; GPO's employees and their representatives; representatives of the printing and technology industries; and others. Equally important is my belief in the value of planning and reporting on the results of our operation.

Most important of all is my belief in the mission of GPO—*Keeping America Informed*—and my conviction that it is the unmatched ability of the men and women of GPO to perform difficult and exacting work under pressing deadlines that is responsible for carrying out this mission every day. They are GPO's most important asset and I am so fortunate to have had the incredible experience of working with GPO's talented and committed employees. I look forward to continuing to work with them if I am confirmed as Public Printer.

Mr. Chairman and Members of the Committee on Rules and Administration, thank you again for the opportunity to appear before you today. This concludes my prepared statement and I am prepared to answer any questions you may have.

DAVITA VANCE-COOKS
Deputy Public Printer

Davita Vance-Cooks is the Deputy Public Printer of the U.S. Government Printing Office. By law, the Deputy Public Printer performs the duties of the Public Printer until a successor is appointed. As the provider of official Federal Government information in digital and printed formats, GPO produces U.S. passports, the *Congressional Record*, the *Federal Register*, and a wide variety of other publications, and provides public access to Government information products through Federal depository libraries nationwide as well as free online access via GPO's Federal Digital System, at **www.fdsys.gov**.

Biography

Vance-Cooks is a seasoned business executive with 30 years of private sector and Federal Government experience. She joined GPO in 2004 and has held a succession of senior management positions, beginning as the Deputy Managing Director of Customer Services, with the responsibility of overseeing GPO's liaison with Federal agencies for in-house print production and printing procurement services. Under her leadership, GPO annually awarded approximately $500 million dollars in printing contracts to the private industry and oversaw the award of a $50 million contract for the production of 2010 census materials, which was one of the largest procurements in the agency's history. Vance-Cooks served as the Managing Director of GPO's Publications and Information Sales business unit, where she oversaw a large print distribution/supply chain operation with customers across the United States. In that position she led GPO's effort to partner with Google to sell Federal publications in an eBook format, launched an award winning Government book blog, modernized GPO's customer contact center, and oversaw the renovation of the agency's retail bookstore in Washington, D.C.

Vance-Cooks was named GPO's Chief of Staff in January 2011. In that role, she advised the Public Printer, created and implemented an agency wide strategic performance plan, and was responsible for day-to-day operations, budgets and performance goals of the executive offices that include: Human Capital, Acquisitions, Security, Information Technology, Equal Employment Opportunity and Program, Strategy and Development offices. In December 2011, the Public Printer appointed Vance-Cooks as Deputy Public Printer.

Before coming to GPO, Vance-Cooks held several private sector management positions. She was the Senior Vice-President of Operations for NYLCare MidAtlantic Health Plan where, among other duties, she was responsible for a digital print work center for production of variable data printing products. She also served as the Director of Customer Service and Claims, Director of Membership and Billing, and Director of Market Research and Product Development for Blue Cross Blue Shield Plans. She also served as the General Manager of HTH Worldwide Insurance Services.

Vance-Cooks earned her Bachelors degree from Tufts University and her MBA from Columbia University.

June 11, 2013

The Honorable Charles E. Schumer
Chairman
Committee on Rules & Administration
United States Senate
305 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules & Administration
United States Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Schumer and Ranking Member Roberts:

We write to you today in support of President Obama's nomination of Davita Vance-Cooks for Public Printer of the United States. The Government Printing Office (GPO) is the federal government's leader in providing no-fee permanent public access to government information. The Public Printer has the important role of overseeing GPO's public access programs, including the Federal Depository Library Program and the Federal Digital System (FDsys). We believe Ms. Vance-Cooks has the understanding of GPO and the management skills to successfully lead the agency in the digital age.

Ms. Vance-Cooks has nine years of experience at GPO, serving in various leadership roles. Before coming to GPO, she held several private sector management positions, including as Senior Vice-President of Operations for NYLCare MidAtlantic Health Plan. Since becoming Acting Public Printer in January 2012, she has led a rebranding of GPO as the "*official, digital, secure* resource for producing, procuring, cataloging, indexing, authenticating, disseminating, and preserving the official information products of the Federal Government."

In her role as Acting Public Printer, Ms. Vance-Cooks has established a positive and productive relationship with the library community. In May 2012, representatives from our library organizations joined Ms. Vance-Cooks to discuss our priorities and challenges. We appreciated the opportunity to share our concerns and ideas with her.

At the 2012 Depository Library Conference, Ms. Vance-Cooks said, "I am passionate about the mission, the vision and the core values of the United States Government Printing Office. I recognize and I respect the history of the GPO over the past 151 years. And I am excited about collaborating with our stakeholders to build the future." We look forward to working with Ms. Vance-Cooks to build that future.

We believe Ms. Vance-Cooks has the understanding of GPO and the management skills to successfully undertake and lead the critical transitions necessary for the agency in the digital age. We urge you to support her nomination as the next Public Printer of the United States.

Sincerely,

American Association of Law Libraries
American Library Association
Association of Research Libraries
Medical Library Association
Special Libraries Association

The American Association of Law Libraries (AALL) is a nonprofit, educational organization founded in 1906 to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information. Today, with over 5,000 members, the Association represents law librarians and related professionals who are affiliated with a wide range of institutions: law firms; law schools; corporate legal departments; courts; and local, state and federal government agencies. www.aall.org
Contact: Emily Feltren, (202) 942-4233

ALAAmericanLibraryAssociation

The American Library Association (ALA) is the oldest and largest library association in the world with more than 58,000 members. Its mission is "to provide leadership for development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all." www.ala.org
Contact: Jessica McGilvray, (202) 628-8410

The Association of Research Libraries (ARL) is a nonprofit organization of 125 research libraries in the US and Canada. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve. ARL pursues this mission by advancing the goals of its member research libraries, providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas and expertise, facilitating the emergence of new roles for research libraries, and shaping a future environment that leverages its interests with those of allied organizations. www.arl.org
Contact: Prudence Adler, (202) 296-2296

The Medical Library Association (MLA) is a nonprofit, educational organization with more than 4,000 health sciences information professional and institutional members worldwide. Founded in 1898, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. www.mlanet.org
Contact: Carla J. Funk, (312) 419-9094, ext. 14

The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves about 9,000 members in 75 countries in the information profession, including corporate, academic, and government information specialists. SLA promotes and strengthens its members through learning, advocacy, and networking initiatives. www.sla.org
Contact: Douglas Newcomb, (703) 647-4923

GRAPHIC COMMUNICATIONS CONFERENCE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 LOUISIANA AVENUE, N.W., WASHINGTON, D.C. 20001

202/624-8991
E mail gtedeschi@gciu.org
Fax: 202/624-8145

GEORGE TEDESCHI
GCC PRESIDENT
IBT VICE PRESIDENT AT-LARGE

June 12, 2013

The Honorable Charles Schumer
Chairman, Senate Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer:

On behalf of the International Brotherhood of Teamsters and our membership of 1.4 million, I am writing to express our strong support for the nomination of Davita Vance-Cooks to the position of U.S. Public Printer. Ms. Vance-Cooks' extensive managerial and strategic planning experience, as well as her deep institutional knowledge of the U.S. Government Printing Office (GPO), makes her an excellent choice for this role. She will, if confirmed, be a strong leader for the workers employed under the Public Printer.

Ms. Vance Cooks is a seasoned business executive with 30 years of private sector and Federal Government experience. Over the course of her near decade of work with the GPO, she has held a succession of senior management positions including: Managing Director of GPO's Customer Services and Procurement business unit and Managing Director of Publication Information Sales. Most recently, she assumed the role of Acting Public Printer, following the completion of William J. Boarman's term as the 26th U.S. Public Printer. Notably, Ms. Vance-Cooks is the first woman in the history of the GPO to hold this title.

The Teamsters Union represents more than 60,000 workers in all craft and skill areas in the printing and publishing industry. Every day our members play an integral role in bringing vital information to the public. At the GPO, Teamster members are charged with keeping the American people informed about the work of the Federal Government. It is with the responsibility of this task squarely in mind that we offer our unqualified support. We hope that you will move quickly to confirm Ms. Vance-Cooks as the 27th Public Printer of the United States.

Sincerely,

George Tedeschi

George Tedeschi, President
Graphics Communications Conference/
International Brotherhood of Teamsters

cc: Senate Committee on Rules & Administration

DAVITA VANCE-COOKS
Acting Public Printer

June 3, 2013

The Honorable Charles E. Schumer
Chairman
Committee on Rules and Administration
U.S. Senate
305 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

As you have requested, enclosed are my responses to questions for the record submitted by the Committee on May 23, 2013.

If you need additional information, please do not hesitate to contact GPO's Congressional Relations Officer, Mr. Andrew Sherman, at 202-512-1991, or by email at asherman@gpo.gov.

Sincerely,

DAVITA VANCE-COOKS
Acting Public Printer

Enclosure

Cc: The Honorable Pat Roberts
Ranking Member
Committee on Rules and Administration
U.S. Senate

QUESTIONS FOR THE RECORD FOR DAVITA VANCE-COOKS
NOMINEE FOR PUBLIC PRINTER

Question: The Government Printing Office in FY2012 had operating revenues of $713.8 million and has submitted an FY2014 appropriations request of $128.5 million. Given the complexities of managing an agency of this size in an industry that is being increasingly challenged and transformed by evolving technology, how has your background prepared you to lead the GPO?

Response: GPO has been undergoing a transformation from a printing operation to a publishing operation with a specific emphasis on developing a digital information platform and leveraging our expertise to become a provider of secure credentials. GPO is operating in an industry that is dominated by evolving technology, changing stakeholder expectations, a shift to digital, and financial budget pressure.

My educational background, private sector experience, GPO management experience, and GPO executive experience have prepared me to lead the GPO. I am a seasoned business executive with 34 years of private sector and Federal Government experience, and if confirmed by the Senate, I will not need a learning curve.

My education includes a BS in Psychology from Tufts University and a MBA from Columbia University with an emphasis in Marketing and Finance. I am trained in the theory and application of marketing an organization to develop a competitive position. I have also been trained in organizational financial requirements. Both of these areas are critical in leading an agency through an organizational transformation under tight financial constraints.

I have 25 years of private sector experience with progressive leadership roles specializing in effective operations management, organizational change, marketing, and strategic planning. I was the Senior Vice-President of Operations for NYLCare MidAtlantic Health Plan where, among other duties, I was responsible for a digital print work center for production of variable data printing products. I also served as the Director of Customer Service and Claims, Director of Membership and Billing, and Director of Market Research and Product Development for Blue Cross/Blue Shield Plans. I have significant experience in business management and the process of identifying and responding to organizational challenges.

I have been with the GPO for almost nine years and I have held a succession of senior management and executive positions in GPO's printing and information dissemination operations, all of which have equipped me to lead the GPO. This background has provided me with depth, breadth, and knowledge of GPO operations, employees, and the organizational culture.

From 2004-2008, I served as the Deputy Managing Director of Customer Services and was responsible for the print procurement side of the business, overseeing the procurement of approximately $500 million annually in Federal printing requirements from the private sector. In addition, I also oversaw the development of GPO Express, a contract with FedEx Office that provides quick turnaround print jobs. I was also responsible for the establishment of GPO's

Online Paper Store. I managed corporate print procurement, 15 regional print procurement offices, the sales team, Quality Control, internal Acquisitions, and a market/product research function.

From 2008-2011, I was responsible for the sales side of GPO's information dissemination business as Managing Director for Publications and Information Sales. I managed the Online Sales Program, Content Acquisition, the Pueblo Distribution Warehouse, Laurel Distribution Warehouse, and the Contact Center. I led the renovation of the GPO Bookstore, the establishment of e-book partnerships with Google and other providers, implemented the 5S process improvement methodology in the Contact Center, and developed marketing campaigns to increase product sales.

In January 2011, I was appointed as GPO's Chief Staff. In that role I advised the Public Printer directly on all aspects of GPO operations. Under his leadership and in cooperation with senior GPO management, we crafted a program to reduce overhead costs, collect unpaid bills to GPO, and expend our service offerings to Congress, Federal agencies, and the public. With this program, GPO generated a net income of $5.6 million for FY 2011. Additionally, I led efforts to create and implement an agency-wide strategic performance plan and oversaw the conduct of an agency-wide buyout of approximately 15% of the agency's workforce.

I believe my nearly 9 years of experience at GPO have been instrumental in preparing me to lead this agency, culminating in the achievements of the past year when I carried out the responsibilities of the Public Printer to take charge and manage the GPO. During FY 2012, we completed the year in the black and restored overhead costs to 2008 levels. We introduced apps for several publications, expanded information offerings on FDsys, grew our production capability for smart cards, and produced the work required by the 2013 Presidential Inauguration. We successfully emerged from a year-long study of our operations by the National Academy of Public Administration with a validation of our mission and our program of digital transition. We have continued this program into 2013 and have managed so far to absorb the effects of the sequester while continuing to carry out our services for Congress, agencies, and the public.

I believe in the value of consulting with GPO's oversight and appropriations committees, our customers throughout Congress and in Federal agencies, the membership of the library community, GPO's employees and their representatives, representatives of the printing and technology industries, and others in developing plans for moving GPO forward. Equally important has been my belief in the value of planning and reporting on the results of our operation.

Most important of all is my belief in the mission of GPO—Keeping America Informed—and my conviction that it is the dedication and expertise of the men and women of GPO and their unmatched ability to perform difficult and exacting work under pressing deadlines that are responsible for carrying out this mission.

Question: During your service as Acting Public Printer, the federal government has faced fiscal constraints, including the implementation of sequestration. Please describe the

impact of sequestration on the workforce, stakeholders and finances of the agency. What steps must be taken to strengthen GPO financially to meet its responsibilities in the years ahead?

Response: In August 2012, we began planning for the sequester, which at that time was scheduled for January 2013. We prepared options for spending reductions and other measures to offset the impact of a sequester on GPO resources and operations, and in February 2013 conducted a series of town hall meetings with all GPO employees to discuss these measures. We also informed our oversight and appropriations committees of our sequester plans. We implemented freezes on hiring, overtime, performance awards, outside training, administrative travel, and maintenance not required for health or safety. We also reprioritized selected technology and infrastructure investments and projects.

To date, these steps appear to be working by keeping GPO in a positive financial status, although they are cutting back on our ability to make investments in the future. We also remain deeply concerned that there could be significant reductions in revenue if Federal agencies order less work from GPO as the result of the sequester's impact on their appropriations. The full extent of this reduction is not known, though data for the fiscal year to date show that revenue from printing procurements for agencies is down by approximately 5.9%. We have been reaching out to agencies to offer our print procurement program—which is based on a highly effective partnership with the printing industry—as a cost-effective solution to agency printing needs in a sequester environment.

I am very cognizant of the fiscal limits in which we all are operating today. The budget we submitted for FY 13 was flat with FY 12, and our budget for FY 14 proposed a reduction in funding conventional printing requirements to fund increased investment in digital technologies to achieve future savings.

To meet our responsibilities in the years ahead, GPO's operations must be properly equipped and staffed to maximize efficient, cost effective digital and other information product services to Congress, Federal agencies, and the public. We must be financially able to make the necessary investments in digital resources and related technologies, as well as the training and staff required to operate them. This includes investments in technologies and staff that will help us right-size and increase the efficiency of our print services as well as sustain and expand our digital innovation.

Question: What is your view of the role GPO plans in providing public access to government information, and what opportunities do you see for improvement?

Response: Keeping America Informed is GPO's primary mission, carried out largely through the Federal Depository Library Program and our Publication and Information Sales Program. Ever since the enactment of the GPO Electronic Information Access Enhancement Act of 1993, we have been fulfilling this mission via digital information dissemination, a function performed today by our Federal Digital System (FDsys). Today, FDsys use by the public has grown to more than 400 million document retrievals by the end of FY 2012. Currently, the system

provides permanent, secure, public access to approximately 800,000 individual titles from all three branches of the Government, the only system of its kind in operation today.

GPO is continually adding collections to FDsys to provide increased public access to Government information. In 2012, we made audio content available for the first time when the National Archives and Records Administration asked us to host the tape recordings of communications between the White House and Air Force One following the assassination of President John F. Kennedy. FDsys now features access to nearly 600,000 Federal court opinions through a partnership with the Administrative Office of the U.S. Courts. It provides bulk data access to certain legislative and regulatory information. Additional digitized historical content has been added for the Statutes at Large and we are collaborating with the Library of Congress on digitizing the Congressional Record back to 1873. FDsys is the basis for mobile apps we have developed for a variety of publications, and is currently being legislatively proposed to provide public access to a comprehensive database of agency reports to Congress.

Improving on these services will involve increasing the amount of content collections made available through the system, and enhancing the system and content in order to support the use and reuse of information content in line with White House's digital Government recommendations. GPO is developing new ways for users to interact with FDsys content, including providing mobile-optimized access to FDsys. The development of a responsive user interface for FDsys will further enhance access for mobile devices. In addition, we are working on usability improvements and a search engine refresh. Our goal continues to be to disseminate information to all public demographics. As we have been doing, we will continue to expand partnership opportunities with other Federal agencies to bring more content into the system, leveraging the strengths of each agency.

Question: How do you see the escalating demand for information to be compiled, published, and distributed in electronic formats affecting the mission and operational plans for the GPO during your tenure?

Response. In 2012, GPO rebranded itself as the *Official, Digital, Secure* resource for producing, procuring, cataloging, indexing, authenticating, disseminating, and preserving the official information products of the Federal Government. This brand signifies our transition from a print-centric to a content-centric focus, which will serve as the foundation for an increasing variety of digital and secure products and services to meet the information requirements of Congress, Federal agencies and the public, and to facilitate openness and transparency in Government.

The escalating demand for information is seen through requests for both quantity of information and quality of data. As previously discussed, we are making significant strides forward in adding to the quantity of information made available via FDsys. Increasing the number and size of our digital collections entails requirements for increased storage capacity, the ability to provide appropriate metadata, and related needs, which translates into the need for investment in these capabilities.

Where quality of information is concerned, the technology options involved with the dissemination of information have reached new levels of complexity, requiring new skill sets by

GPO staff and continued investment in technology. Users seek greater granularity in access to information, improved search capabilities, the provision of information in formats that facilitate the reuse and repurposing of information, improved access via mobile devices, and related improvements that broaden the availability as well as openness and transparency of Government information. At the same time, in this age of fiscal constraint, the provision of information in formats and systems that reduce cost and improve efficiency in product development, storage, and delivery remains a top priority.

Digital technologies are impacting not only GPO's digital information dissemination operations but our operations supporting the provision of information products in conventional print formats, as well as our business support systems. As long as print continues to be required of GPO, we must be positioned to provide it in the most cost-effective way possible, utilizing not only digital composition but digital press and binding technologies that are more flexible, efficient, and scaled to our customers' requirements, and employing business models—such as print on demand—that most efficiently meet our customers' needs. In our business support operations, digital technologies supporting our finance, human capital, telecommunications, security, and related operations are improving the efficiency and reducing cost, and these must be continued.

Funding requirements for GPO are changing as our transition to digital moves forward. In part these can be offset by decreases in funding for conventional products, as our appropriations request for FY 2014 proposes. However, unlike conventional print technologies which have long-term durability, digital technologies and systems are continually changing and evolving, requiring on-going investment in development, infrastructure support and security, maintenance, and testing. Associated with these requirements is the need for continuing investment in recruitment, retention, and training of staff with the requisite skills. These are having and will continue to have significant impacts on the mission and operations of GPO in the coming years.

Question: The Federal Depository Library program is intended to safeguard the public's right to know about their government. What demands or requests are the Federal Depository Libraries making on GPO as a result of greater use of electronic publishing, and how is GPO responding?

Response: The Federal Depository Library Program (FDLP) has legislative antecedents that date back 200 years, to 1813. Across those years, depository libraries and depository librarians have served as critical links between "We the People" and the information made available to the public by Federal Government. GPO provides the libraries with information products in digital and tangible formats, and the libraries in turn make these available to the public at no charge while providing additional help and assistance to depository library users.

The program today serves millions of Americans through a network of approximately 1,200 public, academic, law, and other libraries located across the Nation, averaging one per State and nearly 3 per congressional district. Once primarily involving the distribution of printed and microfiche products, the FDLP today is primarily digital, supported by FDsys and other digital resources. Digital dissemination to the library community has reduced the cost of providing

public access to Government information significantly when compared with print, while expanding public access dramatically through the Internet.

In 2012, GPO launched the FDLP Forecast Study, a collaborative research project between GPO and Federal depository libraries. Depositories completed Library and State Forecast Questionnaires and provided State Focused Action Plans (SFAPs). Submissions from these three data gathering instruments allow GPO to understand pressing issues, goals, and viewpoints of depository libraries and to document their initiatives and needs. GPO received an overwhelming response to the Questionnaires, the analysis of which will inform the strategic direction of LSCM and the development of a National Plan to shape the future of the FDLP.

As part of the analysis, we have identified several themes. It is clear that because libraries are experiencing decreased funding and reduced staff, they must rely on GPO more than ever before to allow them to fulfill their responsibilities in getting Federal Government information to the public. GPO is seen by the library community as responsible for the leadership, advocacy, and processes needed to preserve and maintain no-fee public access to Federal government information. GPO partnerships with depository libraries and Federal agencies are essential for the preservation and digitization of the historic tangible collection as well as the acquisition, web archiving, and preservation of born-digital government information. The libraries want GPO to provide increased training in digital Government information products and the use of FDsys, and they look to GPO for assistance in marketing and promotion of their services.

To meet these needs, GPO needs to increase access to online Government information, provide improved and easy to use tools/services for discovery and findability of Government information, digitize the historical collection of Government publications or coordinate a national digitization effort to do so, deliver more and enhanced cataloging (include analytics and more subject headings) records, provide more educational opportunities (including virtual classes), allow more flexibility and collaboration among depository libraries for collection management than Title 44 currently permits, and work to preserve the tangible and digital collections for future generations. If confirmed, I look forward to addressing these issues and working with the library community and other FDLP stakeholders to provide solutions.

Question: Please describe profitable growth opportunities for GPO in emerging business lines, secure documents, executive branch work and other products and services.

Response: There are several opportunities for growth in both near and long term. For GPO's passport operation, we are a key partner in the Department of State's formal program to design and select the next and newest US electronic passport scheduled for launch in 2015/16. The Department of State formed the Next Generation Passport Program working group in September 2011 and GPO plays an important role as subject-matter-experts in the process. We fully expect that passport production and associated revenues will remain steady at 10 - 15 million passports per year.

For smart cards, the opportunities for growth are significant. The number and size of card credentials used for access to Government facilities, IT systems and entitlement programs is

growing constantly in the Federal space. The use of secure card credentials to gain access to our Nation's borders and to ease "trusted and pre-approved" movement through security checkpoints at airports and sea ports is growing. It is important to many of our Federal customers that the design and production of their security documents and identification credential products be accomplished within a secure Government facility by background-cleared Government employees. As the recent report of the National Academy of Public Administration states, there may also be interest by state and local government officials in the use of GPO's card credential operations. The Academy recommends that Congress consider whether to allow GPO to respond to state and local government requests for smart cards to help grow this business line and leverage GPO's smart card expertise for public benefit.

There are also opportunities for revenue growth in other GPO operational areas. As the Academy's report recommended, GPO should offer an expanded set of services on a cost-recovery basis that contribute to the lifecycle management of Government information. These would include ingest of agency content into FDsys (including preservation, authentication, and public search and display); content organization; and metadata, granule, access file, bulk data, and API creation. Some of these services have already been used by the National Archives and Records Administration with the public release of the JFK assassination audio files. We are working on alternatives to expand the provision of these services to executive branch agencies as a way of helping to fund the operation of FDsys.

Regarding our buildings, as we move from a manufacturing facility to more digital operations, we are consolidating our space, making space available for leasing other agencies. This generates revenues to offset the cost of operating our buildings. A number of agencies have expressed interest in leasing additional space but no additional agreements have been reached.

Questions for the record submitted by Senator Thad Cochran to the Public Printer Nominee, Davita Vance-Cooks June 12, 2013

Question 1: Ms. Vance-Cooks, the GPO announced plans at the beginning of June to expand its operations located at the Stennis Space Center in Mississippi to include the production of smart cards to be used the Department of Homeland Security's Trusted Traveler Program. Do you plan to continue to diversify the work of GPO and the departments it serves if you are confirmed?

Response: Yes, without question. GPO is shifting its core position of traditional ink on paper to a digital emphasis to reflect stakeholder expectations.

The expansion of our smart card operations at Stennis (the opening ceremony for which I had the pleasure to attend at the end of May) is one part of GPO's efforts to continue diversifying the work we perform and to grow our revenue base, particularly in the security and intelligent documents area, where there is increasing demand for documents with hybrid security (both print and electronic) features. We are re-certifying our compliance with the international ISO 9001 standard at the Stennis facility, reflecting our commitment to be the best in the industry.

The passports we produce for the State Department now include electronic chip assemblies capable of holding biometric data. The State Department has recently asked us to assist in the development and production of a next generation passport, to be ready for use in 2015 and containing advanced security features.

We have leveraged our expertise in passport production into offering a growing range of secure identification cards. Various forms of these cards produced by GPO are now used by the Department of Homeland Security, the Department of Health and Human Services, the DC Government, and other agencies, including the U.S. Capitol Police for secure inaugural credentials, and a year ago by the FBI for law enforcement agencies protecting the Super Bowl. GPO today is the only certified government-to-government provider of secure identification credentials, and we see Federal agency markets for an increasing number of applications to support such measures as Federal employee identification, border security, identification security for access to Federal benefits, and related measures.

Diversifying our product mix and growing our revenue base also applies to our other digital and conventional print services for Congress, Federal agencies, and the public. For Congress, we continue to expand digital solutions for legislative information, including digitizing historical issues of the Congressional Record. We are developing a new XML-based composition system that will be used to process legislative documents for digital and print production. We are decreasing the incidence of print for the Senate and House through surveys in line with the growing use of legislative documents in digital formats. We are developing new digital utilities for legislative use and upgrading the security of digital systems for transmitting congressional information from the Capitol to GPO for production.

For our Federal agency customers, we are marketing GPO's highly cost-effective printing procurement services, which feature our longstanding partnership with the private sector printing

industry, as an economical solution to meeting their publishing needs in a sequestration environment. We offer a wide variety of services, including contractor-operated print facility management services, document digitization services, and other efficient graphic arts solutions to agencies, in addition to effective small job production through a partnership with FedExOffice known as GPO Express. We are also providing secure storage and public access capabilities for Federal agencies for their digital publications via our Federal Digital System (FDsys) on a reimbursable basis. We are pioneering new technologies such as 3D printing to determine whether it can be of assistance in providing graphic arts solutions for the Government.

For the public, we are expanding the availability of mobile web applications for Federal information such as the U.S. Budget, and offering public access to Federal agency and certain legislative information in XML bulk data download format. Mobile apps and bulk data downloads are provided on a no-fee basis in order to expand public access to Federal information through new means, increasing the openness and transparency of the Federal Government. We have surveyed our Federal depository library partners concerning recommendations for the continuing role of this longstanding program in the digital era and we are developing a Federal depository library plan for the future which will be released in October.

For those wishing to purchase Federal publications, we have a suite of new publications services featuring e-book partnerships with Google, Apple, and other providers. Our publications sales operation is backed by a print-on-demand service that has been very effective in handling small demand publications.

GPO is unmistakably growing the diversity of its operations to support Congress, Federal agencies, and the public and will continue to do so.

Question 2: Ms. Vance-Cooks, you have expressed the importance of modernizing the work and purpose of the GPO in an increasingly digital world. Can you discuss a few ways that you have worked to this end in your time at GPO? How do you plan to continue modernization efforts?

Response: Growing the diversity of our product lines to include an expanding range of digital products and services is essential to meet the changing needs of Congress, Federal agencies, and the public in how they access and use Government information. This was the conclusion of the recent study of GPO performed by the National Academy of Public Administration. Web services, mobile apps, bulk data download services, e-books, the replacement of warehousing by print-on-demand, possible applications of 3D printing, smart cards and other intelligent documents – all these products and services are paths that are leading GPO and the Government and public we serve into the future. Our modernization is centered around improvements in three systems - content management, business information, and digital production systems. We have developed a five year strategic plan to move us forward in this direction.

I have personally worked on managing and expanding the range of services provided through our printing procurement program, including GPO Express and our nationwide Online Paper Store. In our Publications and Information Sales business unit I led efforts to establish partnerships for providing e-books and print-on-demand. As Chief of Staff and Acting Public Printer I oversaw

the introduction and expansion of mobile web apps, the implementation of bulk data downloads for certain legislative data, the expansion of our smart card capability to the Stennis operation, and other business developments. As I said during the hearing before the Senate Rules and Administration Committee, GPO is increasingly finding niches to serve in the digital era, and it is doing so successfully.

The impacts of our new products and services are dictating new technology requirements, new job skill sets, and new ways of cooperating between management and employees in the GPO workplace. We are investing in digital equipment and utilizing digital workflow and processes. We are replacing conventional printing systems with new, more flexible, and smaller-scaled digital production lines, decreasing our space and staffing requirements and lowering our costs. At the same time, we are investing in digital information systems to support our Federal Digital System's capabilities to provide more rapid and effective search, expand our storage capability to increase our collections (now numbering more than 800,000 titles from all three branches of the Government), and ensure the authenticity and security of the information. We are adopting best practices in data center modernization and deploying the systems necessary to protect our data assets and operations against loss and unauthorized intrusion. The pace of our modernization will be determined significantly by the extent to which we can continue technology investment.

Technology impacts extend throughout our workforce and workplace. Recruitment and retention of employees in the digital age has to focus on new sets of digital job skills and expertise. In this environment, workplace arrangements now include measures such as telework that would not have been possible in a traditional environment. Project-focused work now commonly utilizes cross-functional teams in collaboratively developing technology solutions that meet today's needs. Openness and accountability are key to management-employee relations in this environment, and GPO—once a rigidly hierarchical organization—now relies on quarterly town halls, video and email communications, and related strategies to keep employees informed and aware. We are investing time and resources in leadership training to ensure employee buy-in and provide background for upward mobility in management through multiple programs. GPO now features the smallest workforce it has had in the past century, the result of a buyout conducted in FY 12, making communications easier to manage.

Space utilization of our building, which once housed a much larger workforce, has become an issue as we have streamlined our technologies, operations, and workforce. We have an outreach program to share space with other legislative branch agencies, and now have elements of the Capitol Police, Architect of the Capitol, Senate Sergeant at Arms, and the US Commission on International Religious Freedom housed in GPO space on a reimbursable basis.

These are examples of the range of issues we are dealing with as we continue GPO's modernization efforts in the digital era.

HEARING—NOMINATIONS OF ANN M. RAVEL AND LEE E. GOODMAN TO BE MEMBERS OF THE FEDERAL ELECTION COMMISSION

WEDNESDAY, JULY 24, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Durbin, Udall, King, Roberts, Cochran, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Ellen Zeng, Elections Counsel; Sharon Larimer, Assistant to the Staff Director; Abbie Sorrendino, Professional Staff; Nicole Tatz, Legislative Correspondent; Matthew McGowan, Professional Staff; Adam Topper, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Communications Director; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Now we will begin for two nominees to the Federal Election Commission. I ask the witnesses to please take their seats at the table, and on today's agenda is the consideration of nominations of Mr. Lee Goodman and Ms. Ann Ravel to be members of the FEC, Federal Election Commission. Before anyone suggests that I might have overlooked the common courtesy of ladies before gentlemen, we have introduced the nominees in alphabetical order for simplicity's sake. So, Mr. Goodman and Ms. Ravel, I would very much like to welcome you here today, congratulate you on your nomination.

Mr. Goodman, I understand you are accompanied by your family members, your wife, Paige Pippin, your daughter, Piper, and your son, Kemper. Maybe they can stand so we can say hello. It is such a nice family.

[Applause.]

Chairman SCHUMER. Thank you. And I know the three of you are proud of your husband and dad, so thanks for coming.

Ms. Ravel, I understand you, too, have brought family and friends your husband, Steve Ravel, your son and daughter-in-law, Gabriel Ravel and Katie Marcellus Ravel, your daughter, Shana Ravel, and your good friend, Elaine Mielke, and they are a very nice family and friends, too, so will you please stand so we can recognize you and thank you for coming.

[Applause.]

Chairman SCHUMER. Thank you.

I also want to welcome FEC Chair Ellen Weintraub and Commissioner Caroline Hunter, along with FEC Director Alec Palmer. Thank you all for coming, and since you do not have your adorable families with you, we are not going to ask you to stand, although I know they are adorable.

[Laughter.]

Chairman SCHUMER. The nomination of new Federal Election Commission members comes at a critical juncture. Originally envisioned as an independent Federal watchdog agency, the FEC of today seems to be stuck in its own version of partisan gridlock. As we know, by law, no more than three Commissioners can be members of the same political party and at least four votes are required for any Commission action. This structure was encouraged to create nonpartisan decisions. We also recognize that three-three deadlock votes are not always unexpected.

The problem, however, is in recent years, deadlock votes are occurring with increasing frequency, and as a result, enforcement of existing campaign finance laws is down significantly. Violators may go unpunished. Others may be emboldened to cross the line on our campaign finance laws and rules, and that is unacceptable. So, at a time when the amount of money in politics, as Senator Udall ably noted, is reaching new highs, we must have a functioning FEC.

The Commission is designed to play a critical role in our campaign finance system. Almost 40 years ago, Congress created the FEC to administer and enforce the Federal Election Campaign Act, and that is the law that governs the financing of Federal elections. The agency is tasked with investigating and stopping financial campaign abuses. It also ensures disclosure of legally mandated campaign finance information, and it audits campaigns and organizations to ensure compliance with our nation's laws as enacted by Congress and interpreted by the courts. The search for compromise on each of these functions, we know, is difficult, but it is worth the effort.

I am encouraged by the nomination of two well-qualified candidates testifying before the committee. Your experience with campaign finance issues suggests that both of you have the ability to find workable compromises. I hope to hear from both of you that you also have the will and desire to do so.

I strongly urge both nominees to work diligently to restore the role of the Federal Election Commission as a fully functioning independent Federal watchdog for the nation's campaign finance laws. It is my hope you will work together with your FEC colleagues to find common ground and that the FEC will move past the current partisan gridlock. With that, let me turn to Senator Roberts for an opening statement, if he wishes to make one.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Thank you, Mr. Chairman, and thank you for calling this hearing.

We do have with us today two very well qualified nominees before us. I have to apologize to both. I know we were to have a personal visit, a courtesy call, and unfortunately, things did not work that way with votes. We had the Bob Dole 90th birthday celebration last night, which took a lot of preparation, but at any rate, I

apologize for that. But you have both answered the questions that I submitted to you and I really appreciate that.

Each brings an impressive legal background, Mr. Chairman, as you have said, in the field of election law. And in their prepared remarks, they each have expressed a commitment to follow exactly your admonition, Mr. Chairman, to follow the law, administer the campaign laws in a nonpartisan way. No party can have a majority on the FEC. This does require each party to work with the other for the Commission to act. It prevents either party from using the Commission to target and harass any political opponent. It compels collaboration and allows the public and the regulated community to have confidence that regulations will be developed and complaints considered by a panel that neither party controls. Critics of the FEC frequently claim it has been designed to fail. I understand that, but I think the critics are wrong. The FEC is not designed to fail. It is designed to prevent abuse. That can only be assured when each party has an equal voice in its decisions. I hope the nominees before us today will recognize that for the Commission to function, they must work together to achieve consensus, a tough job.

Should they be confirmed, they will be joining a Commission that is now grappling with many important issues. Their decisions will impact our citizens' ability to exercise fundamental constitutional rights, the rights to speak and to participate in our democratic process. I hope they will approach that task with the seriousness it deserves. I am sure they will. I look forward to hearing their remarks.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Roberts.

Senator Udall.

OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you very much, Chairman Schumer. Mr. Chairman, we really appreciate you holding this hearing today. As you know, I am a strong supporter of reforming our campaign finance system. I believe one important step is to have a functioning FEC where all six seats are filled with Commissioners in terms that have not expired. Regrettably, that has not been the case for quite a while. I hope we can begin to change that with today's hearings.

Comprehensive campaign finance reform is crucial to our democracy, but at the very least, we need to make sure that the FEC is enforcing the laws that are on the books. Unfortunately, recent Supreme Court decisions have gutted many of those laws and we have seen the devastating impact on our elections. In the Republican Presidential primaries alone last year, super PACs spent over $100 million. More than half of that was for negative TV ads, further poisoning our political process, by groups that did not even have to say who was paying for all that venom. By billionaires hiding in dark corners with checkbooks open.

The Supreme Court laid the groundwork for this broken system in 1976 with Buckley v. Valeo. Ruling that a restriction on independent campaign spending violated the First Amendment right to free speech. In effect, it said money and free speech were the same

thing. I do not think we can truly fix this broken system until we undo that false premise.

That is why I have again introduced a constitutional amendment. We need to overturn Buckley and the subsequent decisions that relied on it. We have also tried to pass more modest reforms, such as Senator Whitehouse's Disclose Act. That bill had 40 cosponsors but could not overcome a filibuster last year.

Campaign finance reform historically has been a bipartisan issue. I hope it will be again. In the meantime, the FEC has a vital role to play by diligently enforcing existing laws, and I welcome our nominees and look forward to hearing their testimony today.

Thank you very much, Chairman Schumer.

Chairman SCHUMER. Thank you, Senator Udall.

Senator Cochran.

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. Mr. Chairman, I am pleased to join you and the other members of the committee in welcoming the witnesses and am looking forward to our discussion at the hearing.

Thank you.

Chairman SCHUMER. Thank you, Senator Cochran.

Senator King.

Senator KING. No statement, Mr. Chairman.

Chairman SCHUMER. Senator Blunt.

OPENING STATEMENT OF SENATOR BLUNT

Senator BLUNT. Mr. Chairman, for eight years, I was the Secretary of State in Missouri, which is the chief election official in our State. We dealt with the FEC often and with good results during that period of time. I am glad to see these two individuals with strong backgrounds. An FEC that can meet the hopes of the organization when it was formed is something I think we have not accomplished yet. I'm hopeful with the addition of these two new people, we will get a step closer to making the FEC the functioning and refereeing group we hoped it would be when it was created.

I am glad to be here. Thank you for having this hearing today.

Chairman SCHUMER. Thank you, Senator Blunt.

And now, since we have more than two members here, we can swear the witnesses in, so will the witnesses please rise and raise their right hand.

Do you swear that the testimony you are to provide is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GOODMAN. I do.

Ms. RAVEL. I do.

Chairman SCHUMER. Please be seated.

We will now hear from our nominees in alphabetical order. First, Mr. Goodman, and then Ms. Ravel. Your entire statements will be read into the record, so if you can limit your statements to five minutes, we would appreciate it.

Before Mr. Goodman begins, I want to thank a member of this committee, Senator Feinstein, who could not be here this morning but submitted a statement in support of Ms. Ravel.

[The prepared statement of Senator Feinstein inserted for the record:]

Chairman SCHUMER. I also want to express my appreciation for the letters of support for Mr. Goodman and Ms. Ravel sent in by colleagues and friends, so without objection, I will ask Senator Feinstein's statement and letters of support be included in the record.

Chairman SCHUMER. Mr. Goodman, you may proceed.

TESTIMONY OF LEE E. GOODMAN, OF VIRGINIA, NOMINATED TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION FOR A TERM ENDING APRIL 30, 2015

Mr. GOODMAN. Thank you, Chairman Schumer, Ranking Member Roberts, and distinguished members of the committee. It is an honor to be President Obama's nominee for the Federal Election Commission. I appreciate Senator McConnell's recommendation of me to the President and the decision of the President to nominate me.

If you will indulge me, Senator Schumer, thank you for recognizing my family. I would like to introduce them myself with a little bit more detail. My wife, Paige, has been a public schoolteacher. She teaches civics in Albemarle County, Virginia, for over 20 years and she is a high school volleyball coach.

My daughter, Piper, is a soccer and a volleyball player and she gets all As in Latin, which she started taking in the fifth grade.

And my son, Kemper—we often call him Kemp after my favorite politician of the 20th century—he is a Little League all-star catcher. He is a goalie in soccer, and he loves Charles Dickens novels, especially Oliver Twist and Pip and Great Expectations.

My wife and I met at the University of Virginia in the 1980s. We both were government majors. We both took classes from Larry Sabato, a rather renowned political scientist who, above all things, taught me a refrain, and it is on a bumper sticker on our car now and it says, "Politics is a good thing."

I got involved in politics about 25 years ago upon graduation, and since that time, I have worked in politics at virtually all levels of politics. I have been a policy and legal advisor to a Governor and a State Attorney General. I have been a campaign staffer. My first job out of college was working for Vice President Bush's Political Action Committee, the Fund for America's Future. And I have been a lawyer for political party committees and for campaigns, from school board members all the way to Presidential campaigns.

And probably the most influential role I have played in politics is being a legal counsel to State and local political parties, where I have seen citizens from all walks of life come together to participate in our democratic process. And I know that you know these people. They are the people who knock on doors for you. They are the people who call. They are the people who put signs in their yards. They are the people who give you contributions.

And what I can tell you from my experience and over 25 years of involvement in politics is that I have a deep and abiding respect for our American democratic process and respect in the virtue of the people who engage in civic participation. And so I have come to know what Larry Sabato taught me over 25 years ago, that politics is indeed a good thing.

Now, to keep it a good thing, Congress created the Federal Election Commission. Senator Schumer, you summarized the history of the Federal Election Commission quite appropriately. But the difficulty that has arisen and permeated this field over the years has been the delicate balancing between the regulation of politics to prevent corruption of it on the one hand and the protection of the First Amendment rights of the citizens who participate in our political process on the other. And this has proved a complicated enterprise, not just at the Commission, but for this Congress and for the courts who have dealt with these issues.

If the Senate confirms my nomination, I commit to you that I will undertake this balancing role, of balancing First Amendment protections against protection of the political system against corruption, with several guiding principles in mind.

First, the Commission must address legal and factual questions without partisan bias. I have represented both Democratic interests and Republican interests in my professional career.

Second, the Commission's procedures must be fair.

Third, the Commission's regulations must be clear. Many grassroots organizations cannot afford to hire lawyers to guide them through a complex set of regulations.

Fourth, the Commission must fulfill its role to help people comply.

And, fifth, I will endeavor to serve with integrity, ethically, and with civility toward my colleagues on the Commission.

In conclusion, it would be an honor to serve as a Commissioner on the Federal Election Commission. I hope it is the pleasure of this committee and the Senate to confirm my nomination, and I look forward to answering any questions.

[The prepared statement of Mr. Goodman submitted for the record:]

Chairman SCHUMER. You are a very precise man. You ended at exactly five minutes to the second.

[Laughter.]

Chairman SCHUMER. Ms. Ravel.

TESTIMONY OF ANN MILLER RAVEL, OF CALIFORNIA, NOMINATED TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION FOR A TERM EXPIRING APRIL 30, 2017

Ms. RAVEL. Chairman Schumer, Ranking Member Roberts, and distinguished members of the Senate Committee on Rules and Administration, I am very grateful to you for scheduling this hearing to consider my nomination to serve on the Federal Election Commission, and I also want to express my deep appreciation to Senator Feinstein for her letter of support and to President Obama for his confidence.

I know you introduced my family that is here today, but I do have some family and friends watching in California very early in the morning and I would like to mention them, as well. My older son, Aaron, and his wife, Simone, and my gorgeous granddaughter, two-and-a-half years old, Sofia, are at home, as well as my brother, Paul Miller, his wife, Beth, and also my great staff at the California Fair Political Practices Commission, who got up at seven to go to the office to watch this.

It is truly an honor and a privilege for me to be here today. I know, having lived in Latin America most of my life, how important it is to live in a country in which the government is truly a representative one and in which every citizen has the opportunity to take part in the governing process.

I am the child of two orphans, both of whom grew up in poverty. They would have been so proud to see their daughter here today sitting in this beautiful chambers as a Presidential nominee to the FEC. My parents forever instilled in me a devotion to democratic values and public service.

Through hard work and the opportunities that were afforded to him, my father was able to obtain a Ph.D. and ultimately become a professor. My mother was an immigrant from Latin America when they married and when she became a naturalized citizen, her proudest moment and the proudest thing in her life was that she could vote in this country and participate in the public political process.

My parents always stressed to me the importance of engaged participation in our representative democracy. Throughout my career, I have endeavored to fulfill that charge. I have worked at every level of government, as County Counsel, and I was there—I hate to admit this—32 years, and after that at the—as a Deputy Assistant Attorney General in the Department of Justice, then the California Fair Political Practices Commission. I have devoted decades to independently analyzing, adhering to the language and intent of statutory and case law, and writing and interpreting regulations consistent with law.

As Chair of the FPPC, to your point, Senator Roberts, I have undertaken an overhaul of complex and sometimes contradictory regulatory scheme to ensure that the regulations support the law which was enacted by the public, to make sure that everything is consistent with the original intent of the law.

While at the Department of Justice, I helped to develop a regulatory structure to ensure that legislation that provided compensation to the first responders of 9/11 was properly implemented. I met with interested parties, listened to their concerns, analyzed the law, and worked to build consensus among stakeholders, particularly consensus that was consistent with Congress' intent that was enshrined in the legislation.

Throughout my career, I have worked very hard to build consensus and interpret and apply the law in a neutral and even-handed manner. As County Counsel, I served a politically diverse board, and yet my advice was always, above all, clear, unbiased, and honest, and the same at the FPPC. I have worked with a very politically diverse board and have always achieved consensus.

If concern—well, thank you very much. Thank you for the invitation to appear, and I am happy to answer any questions.

[The prepared statement of Ms. Ravel was submitted for the record.]

Chairman SCHUMER. Mr. Goodman has set the model of preciseness——

Ms. RAVEL. Yes, he did. He did.

[Laughter.]

Chairman SCHUMER [continuing]. Which you ably followed. Okay.

Well, let me ask the first round of questions here, and we are going to try to limit the questioning to five minutes per member. So these questions are for both nominees.

As I mentioned in my statement, I am extremely concerned about the FEC's failure in recent years to enforce existing campaign finance laws and rules. What actions would you take as an FEC Commissioner to ensure effective enforcement of campaign finance laws? So, first, Mr. Goodman, then Ms. Ravel.

Mr. GOODMAN. Well, Senator, as I mentioned in my opening remarks, I am committed to enforcement of the Act as written by Congress and I am committed to nonpartisan enforcement of the Act. I do not intend to call balls and strikes one way for one party and another way for a different party.

As far as the experience that the FEC has undergone in recent years on an increasing number of three-three splits, I do not know what the number of those is. I have read some studies that indicate that approximately—in approximately 15 percent of the cases, the Commission appears to be splitting three-three. Now, we need to look at that as somewhat glass half full. That means in 85 percent of the time, the Commission is in agreement and there is consensus. One of the reasons why the Commission was built to be three-three was so that there would be some consensus requirement between the parties in enforcement decisions.

I think one reason we have been seeing an increase in three-three splits in recent years is not necessarily because of obstruction but because the law has been changing at a rapid pace. Just in the last ten years, from the passage of the bipartisan Campaign Finance Act and the McConnell, the FEC decision, we then saw changes in the law as applied challenges in Wisconsin Right to Life. We then saw Citizens United and we have seen several important decisions that have altered the First Amendment jurisprudence in this area out of the U.S. Court of Appeals in the District of Columbia, particularly in the case of Emily's List and then a case following up on Citizens United called Speech Now.

And the changing First Amendment landscape, I think, has given rise to, in some cases, honest disagreements, and the Commission is trying to find its way in the wake of those decisions.

Now, I am committed to making the FEC functional, working for compromise, working in a nonpartisan way, but I believe we do have to understand the three-three splits in that broader context.

Chairman SCHUMER. Ms. Ravel.

Ms. RAVEL. Thank you, Mr. Chairman. The purpose of the FEC is clearly to instill confidence in the public in the political system, and one of the mechanisms for doing that is enforcement of our campaign finance laws. And I think that the public perception now is that because of some of the stalemate and the difficulty of reaching agreement at the Commission, that those campaign finance laws have not been enforced sufficiently.

I would commit, and I think this is a very important thing to the public, they expect the law to be followed as was promulgated by Congress and their intent, so I will commit, understanding, of course, that there are constitutional First Amendment issues that need to be observed and concerned about, but I will commit to work very closely with my fellow nominee if we are, in fact, confirmed

together, and the rest of the Commission, to work very assiduously at enforcing those laws.

Chairman SCHUMER. My time has expired, so Senator Roberts.

Senator ROBERTS. Well, thank you, Mr. Chairman, and Piper, I am very impressed with your five year commitment to Latin. I had to take Latin.

[Laughter.]

Senator ROBERTS. I think my comments indicate that was not my desire. My dad told me that if I took Latin, I would fully understand—better understand the English language. I said, it is a dead language, and if I had put the amount of time that I had to study in Latin on English, I would get As in English.

[Laughter.]

Senator ROBERTS. I had to take Latin.

[Laughter.]

Senator ROBERTS. Dale Kildee, a former member of the House of Representatives, was a Latin teacher, and every time I would walk down the aisle to see Dale again in the House, he would say, "Mica, mica, parva stella. Miror quaenam sis tam bella," which you know is "Twinkle, twinkle, little star."

[Laughter.]

Senator ROBERTS. It is the only thing I remember, so I wanted to commend you for that.

All right. One of the questions I sent to the witnesses prior to the hearings, and Ms. Ravel addressed some of the statements that reflect my concern, I really appreciate the commitment that you have expressed to not prejudge matters that may come before the FEC. Here is my problem, or my real issue of concern.

The mere filing of a complaint, even a specious one, will generate news coverage. That is just what happens. A political opponent can then point to the complaint as if it is somehow evidence of wrongdoing. Senator so-and-so has been accused of, and you know the rest of it, as if the accusation itself somehow reflects poorly on the subject of the complaint. It is very important, it seems to me, that FEC Commissioners withhold judgment on complaints and not publicly comment on them, even though all the pressure from the Fourth Estate, until the parties have had a chance to respond and all the facts are in. I am assuming you would both agree. Just nod your heads.

Mr. GOODMAN. I do.

Ms. RAVEL. Yes.

Senator ROBERTS. I will, something like that.

Ms. RAVEL. Yes.

Senator ROBERTS. All right. So, I have your commitment that you will withhold judgment and comment while complaints are being investigated, and I also want to ask how we treat Internet communications. I understand that in California, and by the way, Ms. Ravel, thank you for giving the Chairman, myself, all members of the committee more California exposure than we have ever had——

[Laughter.]

Senator ROBERTS. But at any rate, I understand in California, where everything happens first, there is some consideration of a regulation that would cover bloggers, requiring them to disclose if they have received payments from campaigns. Now, we debated

this in Congress a couple years ago. Our Majority Leader, Senator Reid, actually introduced a bill to exempt Internet communications from regulation. The FEC ultimately adopted a regulation that covered only Internet communications that are placed on another person's site for a fee.

My question to you, ma'am, is how far are we going to take this full disclosure idea? Do we really need to start regulating bloggers, or for that matter, texters or tweeters or any other form of communication that is so popular today? Are new Internet regulations needed?

Ms. RAVEL. Thank you very much for the question, Senator Roberts. The California rule that is being proposed, and it has not yet been adopted by the Commission, does not regulate bloggers. It regulates the committees that are already regulated under our laws, and that regulation that is being proposed, and it is actually going to be heard in our August meeting of the Commission, requires committees to explain with specificity all payments that are being made to organizations and other groups for their political purposes, which is consistent with what is already being done in California. It is merely explaining more specificity with respect to Internet communications, and it does not apply to tweeting or other such events that are done on the Internet.

Senator ROBERTS. I am an old newspaper man. I should have said, I am a newspaper man.

[Laughter.]

Chairman SCHUMER. Former.

Senator ROBERTS. Former newspaper man. Former. Former. Thank you, Mr. Chairman.

The First Amendment covers journalists.

Ms. RAVEL. Correct.

Senator ROBERTS. Is a blogger a journalist?

Ms. RAVEL. Well, there is some question about that, but most journalists—most newspapers do not get paid for political opinions that are placed in them, say, in their editorials——

Senator ROBERTS. Well, you have to have an awful lot of online connection to the newspapers, who are getting smaller and smaller and they are having a very difficult time to monetize the product. I just wonder if, in fact—I went to journalism school. We paid attention to the canons of journalism that were issued by the University of Missouri some time ago. I doubt if any blogger does that, any common blogger, whatever that means.

And that really gets to my question. How do you define a journalist today? Is it a blogger? Is it a tweeter, a texter, and so forth? And some of the blogs are extremely popular, as you know. And some, I think, would like to be considered as journalists. That is an open question.

Ms. RAVEL. Right.

Senator ROBERTS. I do not know what the answer is.

Ms. RAVEL. I agree with you. I do not think that it is a simple question, and I have relied on counsel for their analysis in this matter. But, as I said, we have received public comment. We will receive more public comment at the meeting that we are having to discuss this issue——

Senator ROBERTS. Right.

Ms. RAVEL. and so there is no decision that has been made.

Senator ROBERTS. I appreciate that. Mr. Chairman, I am over a minute-twelve, so we will have to call on Mr. Goodman to give me more time back.

Chairman SCHUMER. No, no, he used exactly the right amount.

Senator ROBERTS. That is my point.

[Laughter.]

Chairman SCHUMER. Senator Udall, would you like to ask some questions?

Senator UDALL. Thank you, Mr. Chairman.

Mr. Goodman, there was an editorial recently in the Washington Post, on July 14, that said, and I quote, "Fundamentally, the Republican Commissioners seem not to believe in the campaign finance laws that Congress has passed and that they are bound to enforce," and that is the end of the quote. I would ask, Mr. Chairman, that that editorial be put into the record.

[The information of Senator Udall submitted for the record:]

Chairman SCHUMER. Without objection.

Senator UDALL. Can we receive your commitment that, if confirmed, you will fully enforce all existing campaign finance laws and FEC regulations, even if you have personal opposition to a law or FEC regulation?

Mr. GOODMAN. Yes, Senator, you can. I undertake this post with the solemnity of knowing that it is a law enforcement post. I would not undertake it with any intent to subterfuge the law that I am agreeing to enforce.

Senator UDALL. And are there any existing campaign finance laws that you think should be repealed or not enforced, and if so, which ones and why?

Mr. GOODMAN. Well, Senator Roberts addressed some questions to Chairman Ravel and to me that gave some examples of some that should be repealed, and those were the ones that were squarely and unequivocally held to be unconstitutional by the Supreme Court in the Citizens United decision. So, for example, if you look in the U.S. Code, and you can look in the Code of Federal Regulations today, three years after the Supreme Court ruled in Citizens United, and you can see in 11 CFR Section 114.2(b) an express prohibition against labor unions and corporations from spending money to make independent expenditures. There is a law that says they cannot spend their treasury funds to expressly advocate to the public the election or defeat of any candidate. That regulation, that rule of law, was held unconstitutional in Citizens United.

It has historically been the practice of the Commission to eliminate regulations that have been held unconstitutional, even by courts lower than the Supreme Court. So, for example, when the U.S. Court of Appeals for the District of Columbia ruled three regulations to be unconstitutional and to exceed the Act in a case brought by Emily's List, the Commission thereafter repealed those three regulations.

So that would be a case where I would feel prohibited by the ruling of the Supreme Court from enforcing a law that is still on the books.

Senator UDALL. The unfortunate thing about the Citizens United ruling, in my opinion, is that we have now, and the following

Speech Now ruling, is that we have now reached the point with that ruling that corporate treasuries are now in play in terms of campaign finance. And so, just to pick one corporation, ExxonMobil has $81 billion in its corporate treasury that now can go into the campaign system. As you know, in the last election, both the President and all the other Federal officials spent about $6 billion. So this is a huge amount of money flooding into the system, and I think it corrupts the system. So we are going to have to deal with that ruling. I have a constitutional amendment to deal with that, but you are also going to have to deal with that as an FEC Commissioner.

The New York Times recently published an editorial titled, "Sabotage at the Election Commission." I would ask that that editorial, Mr. Chairman, also be included in the record.

[The information of Senator Udall submitted for the record:]

Chairman SCHUMER. Without objection.

Senator UDALL. The editorial opposed efforts to take advantage of a temporary three-to-two Republican majority on the FEC to change the agency's enforcement rules, including how DOJ and the FEC can communicate. What is your opinion of the proposed changes to the FEC Enforcement Manual to change how DOJ and FEC can communicate? Do you think the Commission should attempt to make substantial changes when there are only five Commissioners with nominees pending Senate confirmation? And I would ask you both to answer that.

Mr. GOODMAN. Senator, I will have to defer judgment on the substance of the manual because there is a long history, there is a longstanding Memorandum of Understanding between the FEC and the Department of Justice that I have not been privy to. I have not read the extant manual and my knowledge of it is essentially what I have read in the New York Times and other publications.

What I would want to be apprised of is the substance of the historical MOU, historical practice within the Commission, and I would also want to be apprised of some things I have read in the newspaper about whether or not the General Counsel's Office in the Federal Election Commission has been keeping the Commission, its client, apprised of communications with the Department of Justice, before I came to a definitive substantive position on how that Enforcement Manual should be changed, if at all.

Senator UDALL. Thank you.

Ms. RAVEL. Thank you, Senator Udall. I have some of the same concerns and views that Mr. Goodman has with respect to this issue. While I have read the articles in the newspaper, I do not know sufficient information relating to the Enforcement Manual and the rules of the FEC with regard to voting and what is appropriate in this particular matter. So I would hesitate to make a commitment or a judgment at this moment.

I would say that at the FPPC, we worked on the case involving a theft of a lot of money from 300 committees in California by the treasurer and we worked closely with DOJ and with the FBI on that matter because a couple Federal candidates were subjects of that fraud and that theft. So it would be important to me to see what the issues are in this case because I have had some experience in this and think that it worked out very well for California.

Senator UDALL. Thank you both very much, and we look forward to you sorting out this dysfunctional FEC.

Chairman SCHUMER. Thank you, Senator Udall.

Senator Cochran.

Senator COCHRAN. Thank you very much, Mr. Chairman.

Let me ask the witnesses about a filing requirement of the Campaign Disclosure Parity Act. I am a sponsor of an amendment that we were considering offering to this bill that would be equivalent to the Campaign Disclosure Parity Act, S. 375. I was a cosponsor with other Senators of this bill and it deals with the filing of the finance reports directly with the FEC. Currently, Senators file their reports with the Secretary of the Senate, and the procedure, as I understand it, is printing of the report and distributing it to the members of the FEC and others, and I am told that eliminating this extra step would save up to $500,000 a year and provide greater transparency in the campaign finance disclosure process.

I am curious to know whether you think that is a good idea, to support that change, or not. Ms. Ravel.

Ms. RAVEL. Thank you very much, Senator Cochran. I am a very strong advocate of e-filing and working very hard to do that in California, and I do understand that it saves time, it saves a lot of money for the agency, and also gives greater transparency to the public, which is one of the core reasons for the existence of the FEC.

However, of course, whatever it is that Congress determines is what, if I were confirmed, I would implement.

Senator COCHRAN. Mr. Goodman.

Mr. GOODMAN. Senator, I certainly defer to the Senate's judgment on how the Senate wants to regulate itself. But in the 21st century, I see local campaigns for House of Delegates and other campaigns using electronic filing quite effectively. It does eliminate steps. It does aid transparency. It is less expensive to deal with on the agency side. And Chairman Ravel and I have already discussed one area of agreement, which is to improve the transparency and reporting on the FEC's Web site of campaign data. The Web site is a bit dated and a bit clunky.

So I would, in concept, certainly support the—if it is the Senate's desire to report electronically, I think it is a good idea.

Senator COCHRAN. Yes. Thank you.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Cochran.

Senator Blunt.

Senator BLUNT. Thank you, Mr. Chairman.

Mr. Goodman, I thought actually citing your favorite politician of the 20th century was very shrewd because we are all competitive and it gives us all a chance to be your favorite politician of the 21st century.

[Laughter.]

Mr. GOODMAN. For my third child.

Senator BLUNT. Exactly.

[Laughter.]

Senator BLUNT. I had a number of people reach out to me about your reliable work over the years and your willingness to work for both Democrats and Republicans. One of them is, Harvey

Tettlebaum, a Republican lawyer in Missouri who has been the State Party Counsel among other things. I think you both are also involved in some of the same groups, as well. I am pleased you are here today.

Ms. Ravel, the same with you. Your background is an excellent one to bring to the Commission.

You mentioned there were examples of insufficient enforcement of campaign finance laws. Do you have some specific examples of that?

Ms. RAVEL. I merely was saying, Senator Blunt, that I had heard, because, you know, clearly, I am in California and I do not know the specifics of what has transpired at the FEC. But I read news reports and that is what I am basing it on. I did not indicate that there were specific examples. What my view is, that the public perception is, as has been transmitted in some news reports, is that there has been insufficient enforcement. So I do not have any specific examples.

Senator BLUNT. The FEC is equally divided, is that right?

Ms. RAVEL. Yes, it is, sir.

Senator BLUNT. So it is possible at the FEC to have a tie vote. In most agencies, not, but it is possible at the FEC.

Ms. RAVEL. No question. It is possible.

Senator BLUNT. And we all understand the reason for that, and I am not advocating.

Ms. RAVEL. Right.

Senator BLUNT. It is one of the few agencies where actually you can wind up with a disagreement with everybody participating, whether it is the current moment when there happens to be one more person from the other party. It is not usual, and one of the few agencies like that. We need the FEC to work, and those of us who run for office need it to work in a way that is fair and defends us from people doing things outside the law, but at the same time allows the discourse of the campaign to occur.

Ms. RAVEL. Right.

Senator BLUNT. Have you had any examples in your job in California that you think would be particularly applicable to what you will be doing here?

Ms. RAVEL. Well, I think the best example is that I absolutely agree with you that an important aspect of this job is to ensure that people participate in politics, and that is not just voters but that people can run and run in a way that is not encumbered by terribly cumbersome, difficult to understand regulations, and that enforcement should be only with respect to those matters that are serious and matters that evidence corruption, and not matters that are inadvertent mistakes.

And in California, when I began as the chair, they were clearly enforcing against candidates, and, of course, California, these are candidates all the way from Water District and School Board to the Legislature and the Governor that we oversee. And many of those candidates do not have lawyers. They have treasurers who are their mother-in-law or, you know, somebody like that, most of them.

And so when I began, I said, we need to make sure that enforcement is fair and that we are not trying to trap people in inad-

vertent mistakes, that we are actually regulating and enforcing only the most serious violations of people who are purposely trying to flaunt the law. So I believe that my views are consistent with yours, Senator, in this instance.

Senator BLUNT. Well, they certainly are on that issue. One of the things we have done in the country in the last 20 years, and many of us here have participated in it one way or another, is pass laws that essentially criminalize politics and criminalize mistakes that people can make. I think that is such an important principle.

Mr. Goodman, would you like to comment on that? This will be my last question here.

Mr. GOODMAN. Yes, Senator. As I mentioned, in 85 percent of the cases, the Commission is in agreement and they are enforcing the law. And the area of disagreement is largely permeated by changing First Amendment jurisprudence. The three-three split not only protects one side against partisan bias in enforcement, but the three-three constitution and sometimes three-three splits also respects philosophical disagreements on how to regulate the process. And I think we have to acknowledge that.

To use a sports analogy, if one team has a great passing offense and also gets to set the rules, well, then the linemen are going to be able to hold. There will be no bumping by cornerbacks at all of the wide receiver, and you can never hit the quarterback.

Senator BLUNT. Jack Kemp would be proud.

Mr. GOODMAN. That is right.

[Laughter.]

Senator BLUNT. Mr. Chairman, I am done. Thank you.

Chairman SCHUMER. And so would the Buffalo Bills.

[Laughter.]

Chairman SCHUMER. Are there any—does anyone wish a second round of questioning?

Senator ROBERTS. I just want to ask unanimous consent that the five letters of support from very esteemed friends of Mr. Goodman be inserted in the record at this point.

[Letters submitted for the record:]

Chairman SCHUMER. Without objection.

Senator ROBERTS. And just to follow up on Senator Blunt's comments, I think there is a comparability or a commensurate example between the FEC and the esteemed Senate Ethics Committee. I have been appointed to the Ethics Committee for all of my public service in the Senate. I do not know what I have done wrong.

[Laughter.]

Senator ROBERTS. I have resigned twice. The resignation has not been accepted by the leadership.

And I worry about these "gotcha" opportunities that every campaign, unfortunately, seems to use as a tool in their campaigning, and I mentioned this before in my statement. I do not even know if we need to ask you for a comment, because I think I know exactly what you are going to say in terms of how you are going to hope that the FEC will comport themselves in a way that this does not happen, i.e., publicly stating something about somebody's complaint. Many times, they are specious.

I will tell you that the Ethics Committee receives complaints every day. Most of them are about minutiae. But when that hap-

pens, anybody can file an ethics complaint, and as a result, it gets press coverage immediately, and the Senate Ethics Committee then sees it in the public domain, whether it be a blog or whether it be in print or whether it be anything, and we will investigate it. And then that takes about three months, and during that time, why, the person who lodged the complaint just pounds the living you-know-what out of his or her opponent.

We cannot comment on anything. I mean, there are no leaks in the Senate Ethics Committee. That has been the way for, what, 14, 15 years that I have been on it—16. I just do not think that is right, and I have always been trying on the Ethics Committee to say, let us be very selective about what really is an ethics violation as opposed to just open season.

If people who are looking to run for office, and we are looking for good people to run for office, both parties, Independents, whomever, whatever level, my Lord, if they really realized and went through the entire Ethics Manual, which I defy anybody to explain—we used to try to do that at the beginning of every Congress. Harry Reid and I tried to do that. Harry Reid and I tried to simplify it, the regs on the Ethics Committee. That was a bad mistake. We went to the Republican Conference and Harry went to the Democratic Caucus and it grew bigger. You open it up and you have people putting more stuff in there.

And now, you have a situation that I think if candidates would really take the time for a couple of days to look at all the stuff that they have to do and what could happen to them and how much they have to reveal, I am not sure they would run. I think there is a hindrance there, and I think that factor, there again, of what people do with the FEC and with House Ethics Committee—the House has two Ethics Committees. What is that all about? We have an Ethics Committee first to determine whether or not it should go to the Ethics Committee. It is that bad.

And so I think there is a lot of common sense here that we could apply and I hope you both—I know you will, because you have a very rich background and you have already declared that. I just wanted to express my concern on the record for that, Mr. Chairman, and I thank you for that.

Chairman SCHUMER. Well, I thank you, and knowing your record on the Ethics Committee, I think you would make an outstanding nominee to the FEC.

[Laughter.]

Chairman SCHUMER. And I think I might urge Senator McConnell to consider you.

[Laughter.]

Chairman SCHUMER. Anyway, all kidding aside, I thank the witnesses for their outstanding testimony. We are going to look forward to working with you for our goal of swift confirmation by the full Senate.

The record is going to remain open for five business days for additional statements and post-hearing questions submitted in writing for the nominees to answer.

Being there no further business before the committee, the committee is adjourned.

[Whereupon, at 10:57 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Prepared Testimony of Lee E. Goodman
United States Senate
Committee on Rules and Administration
July 24, 2013

Mr. Chairman, Ranking Member Roberts, and distinguished Members of the Committee, it is an honor to appear before you as President Obama's nominee to serve as a Commissioner on the Federal Election Commission. I appreciate Senator McConnell's recommendation of me and the President's decision to nominate me.

First, I would like to introduce my family. My wife, Paige, has taught civics in Virginia public schools for over 20 years and she can advise you that the next generation tunes into Jon Stewart for their world news, not CNN. My daughter, Piper, is a whiz in Latin, and my son, Kemper, is a little league all-star catcher.

When I was a college student in the 1980s, my professor Larry Sabato lectured one refrain above all others, that "Politics is a good thing." In the 25 years since that time, I have been involved in politics at every level. I have worked as a campaign staffer, policy advisor to a governor and state attorney general, and lawyer for political parties and candidates from school board to president. I have represented primarily Republicans, and I have represented Democrats too. I have represented diverse ideological organizations—conservative, progressive, libertarian, non-partisan, and the media. I have worked with the many people who comprise state and local political parties—retired citizens, school teachers, business people, homemakers, farmers, college students—people from all walks of life. I recently observed over 8,000 citizens from across a state come together for a convention—remarkably one of the largest deliberative parliamentary bodies ever convened anywhere—and stay until 11 o'clock at night, through four rounds of ballots, to vote for a candidate of their choice.

As elected officials, you know these people too, and because democracy is your life's work, I know how much you appreciate their devotion to civic engagement and the democratic life of our country.

My experience with citizens from all walks of life, and organizations and candidates of varied political stripes, has instilled in me a deep and abiding respect for the American democratic process and the virtue of the people who engage in it. I have come to the fundamental belief that American politics is indeed a good thing.

In the early 1970s, Congress passed the Federal Election Campaign Act and established the Federal Election Commission and vested the Commission with jurisdiction over civil enforcement of the Act. Congress also empowered the Commission to formulate policy implementing the Act, principally through regulations and advisory opinions. And Congress tasked the Commission to act as a clearinghouse for campaign finance reports and to promote compliance with the law.

Since its establishment, the Commission's enforcement and policymaking roles have been clear. But balancing regulation of politics to prevent corruption, on the one hand, with First Amendment protection for citizen speech and civic engagement, on the other, often has proved a complicated enterprise—for Congress, courts, and the Commission. The tension between these values is what makes the Commission's work both challenging and profound.

If the Senate confirms my nomination, I will undertake the profound responsibility of balancing these democratic values with several guiding principles in mind.

First, the Commission must address legal and factual questions without partisan bias.

Second, the Commission's procedures must be fair to the people it regulates.

Third, the Commission's regulations must be clear. Citizens who exercise First Amendment rights need and deserve clear rules.

Fourth, the Commission must help people comply. Many people involved in grassroots politics simply cannot afford to employ lawyers to guide them through complex regulations.

And fifth, I will endeavor to serve ethically, with integrity, and with civility toward my colleagues.

In conclusion, it would be an honor to serve as a Commissioner on the Federal Election Commission. I hope it is the judgment of this Committee and the Senate to confirm my nomination. Thank you and I am happy to answer any questions.

-end-

Lee E. Goodman

Professional Experience

LeClairRyan, a Professional Corporation, Washington, DC, Partner	2005-Present
Wiley, Rein & Fielding LLP, Washington, DC, Of Counsel	2002-2005
Office of the Governor of Virginia, Richmond, VA, Deputy Counselor to the Governor & Deputy Policy Director	1998-2002
Office of the Governor-elect of Virginia, Richmond, VA, Deputy Director	1997-1998
Jim Gilmore for Governor Committee, Richmond, VA, Policy Director	1997
Office of the Attorney General of Virginia, Richmond, VA, Counsel to the Attorney General	1997
Office of the General Counsel of the University of Virginia, Charlottesville, VA, Special Assistant Attorney General & Associate General Counsel	1995-1996
Wiley, Rein & Fielding LLP, Washington, DC, Associate Attorney	1990-1995
Fund for America's Future, Washington, DC, Research Analyst	1986-1987

Publications

"The Internet: The Promise of Democratization of American Politics," Chapter 3 in M. Streb, *Law and Election Politics, The Rules of the Game* (2nd ed.) (Routledge 2013)

"The Internet: Democracy Goes Online," Chapter 7 in M. Streb, *Law and Election Politics, The Rules of the Game* (Lynne Reinner Publishers 2004)

"Citizens United at Age One," *University of Virginia Journal of Law and Politics*, Vol. XXVI, No. 4 (Summer 2011)

"On Coretta Scott King," *Richmond Times-Dispatch* (Jan. 15, 2005)

"Swift Boat Democracy & The New American Campaign Finance Regime," *Engage* (Federalist Society, October 2004)

"Does Your State Tax Access to the Internet? *Did You Vote for That*?" *ALEC Policy Forum* (American Legislative Exchange Council, Winter 2004)

"Campaigns and Elections: Corporate Political Involvement," *ACC Docket* (Association of Corporate Counsel, November/December 2003)

"National Sales Tax Reform Raises New Customer Privacy Issues," *The Metropolitan Corporate Counsel* (July 10, 2002)

Education

Juris Doctor, University of Virginia School of Law	1990
Bachelor of Arts with highest distinction, University of Virginia	1986

Statement of Ann Ravel
Nominee to be Commissioner of the Federal Election Commission

Nomination Hearing before the Senate Rules Committee
July 24, 2013

Chairman Schumer, Ranking Member Roberts, and Distinguished Members of the Senate Committee on Rules and Administration:

I am very grateful to you for scheduling this hearing to consider my nomination to serve on the Federal Election Commission (FEC). I also wish to express my deep appreciation to President Obama for his confidence.

I would like to introduce my very supportive family and friends.

It is an honor and a privilege to be here. I know how important it is to live in a country in which the government is truly a representative one, and in which each citizen has the opportunity to take part in the governing process.

I am the child of two orphans, who both grew up in poverty. They would have been very proud to see their daughter sitting in these chambers as a Presidential nominee to the FEC.

My parents forever instilled in me a devotion to democratic values and public service. Through hard work and the opportunities afforded to him by living in America, my father obtained a PhD and became a professor. My mother was an immigrant from Latin America who, after becoming a naturalized citizen, had enormous pride in being able to vote and take part in the political process.

My parents stressed the importance of being an engaged participant in our representative democracy. Throughout my career, I have endeavored to fulfill their charge.

I have worked at every level of government. As the County Counsel for Santa Clara, a Deputy Assistant Attorney General in the Department of Justice and the Chair of the Fair Political Practices Commission (FPPC), I devoted decades to independently analyzing, adhering to the language

and intent of statutory and case law, and writing and interpreting regulations consistent with the law.

As Chair of the FPPC, I have undertaken an overhaul of a complex and sometimes contradictory regulatory scheme to ensure that the regulations supporting the Political Reform Act, which was enacted directly by the voters of California, are consistent with the statute's original intent.

While at the Department of Justice, I helped to develop a regulatory structure to ensure that legislation providing compensation for the 9/11 first responders was properly implemented. I met with interested parties, listened to their concerns, analyzed the law and worked to build consensus among stakeholders in a manner consistent with Congress's intent as enshrined in legislation.

Throughout my career, I have worked hard to build consensus, and interpret and apply the law in a neutral and evenhanded manner, regardless of party affiliation. While serving as County Counsel for a politically diverse Board, my advice and analysis was always, above all else, clear, unbiased, and honest.

The FPPC is a non-partisan agency, which is in many ways California's equivalent of the FEC. I work closely with members of both political parties to uphold the rule of law and to enforce and clarify an intricate regulatory regime.

The FEC is as important now as it was when Congress created it more than three decades ago. The transparency required by the FEC can empower each and every citizen to participate in the political process.

If confirmed, I will use my experience, devotion to public service and the rule of law, and commitment to work on a bipartisan basis, to ensure that the Commission serves the important mission it was created to accomplish.

Thank you again for the invitation to appear. I am happy to answer questions you may have.

ANN M. RAVEL
25 Central Avenue
Los Gatos, California 95030
(408) 458-0719 cell
aravel@fppc.ca.gov

EDUCATION

Law – Hastings College of the Law, JD 1974
Undergraduate: University of California, Berkeley, Philosophy B.A. 1970

Graduate Programs:
Straus Institute for Dispute resolution, Pepperdine School of Law
University of Chicago Graduate School of Business, Negotiations program
Harvard University, Kennedy School of Government, Program for Government Officials

EMPLOYMENT

March 2011 – Present

Chair, California Fair Political Practices Commission
Appointed by Governor Edmund G. Brown, Jr.

The FPPC is an independent regulatory and quasi-judicial state agency which oversees government ethics (including conflict of interests and revolving door), political campaign matters, and lobbying. As the only full-time member of the Commission, I have authority over management of the Agency, policy, and the determination of priorities, with the approval of the Commission. The FPPC provides education and advice on our rules to the public and the regulated community, while also playing a major role in the disclosure of important public information. The FPPC issues regulations in furtherance of the purposes of the Political Reform Act, and enforces the law. The Commission sits in a quasi-judicial capacity on matters of enforcement or appeals from enforcement decisions. This has provided me with recent "quasi-judicial" experience in decisions about the enactment of regulations, which often raise legal and constitutional questions, as well as in decisions about violations of the Act.

2009 – 2011

Deputy Assistant Attorney General, Civil Division, Torts and Consumer Litigation Divisions, United States Department of Justice, Washington, D.C.
Appointed by President Barack Obama

Oversaw several hundred attorneys on sensitive and significant matters, developed policy, strategy and worked on consumer finance issues, white collar criminal cases, Constitutional cases, the Gulf Oil spill case, torts the Katrina Flooding litigation, the Federal Tobacco RICO case, among others. I was also selected by the Attorney General to Committee on Selection of Immigration Judges.

1998 – 2009

County Counsel, Santa Clara County, San Jose, CA

~ Attorney for the Board of Supervisors, and all departments and agencies of the County of Santa Clara, a county with 15,000 employees and a budget of almost $4 Billion.
~ Provided public and private advice and strategy in matters ranging from tax, health

and hospital issues, labor and personnel, finance, budgeting and bonding, constitutional law, litigation, federal and state regulatory issues, environmental quality matters, contracts, legislation, election law, government transparency and redevelopment law, and compliance matters.
~ Negotiated and mediated significant political and high exposure matters.
~ Worked with community and elected officials, interacted with the press on behalf of the County
~ Provided training to elected officials on financial issues, compliance and ethics
~ Established Ethics Commission; wrote regulations and decisions
~ Initiated groundbreaking Elder Financial Abuse Task Force; Educational Rights Program, and Impact Litigation group. Brought consumer and other affirmative cases on behalf of the public
~ Worked with other agencies and brought Prop. 8 challenge to the Supreme Court
~ Oversaw a staff of 125, including 70 lawyers, administrative and support staff
~ Used legal strategies to help recoup and bring funds into the County
~ Litigated cases of note: *DiQuisto v. County of Santa Clara*; County of Santa Clara – re use of public funds for information, and *Santa Clara v. Atlantic Richfield Company* – re lead paint remediation, and use of private counsel in public law offices (California Supreme Court decisions)

1977-1998 Chief Assistant County Counsel; Chief Deputy County Counsel; Acting County Counsel; Lead Deputy County Counsel and Deputy County Counsel, Santa Clara County, San Jose, CA

~ Supervised sensitive and high exposure litigation; litigated 15 jury trials in State and Federal court, and hundreds of court trials, motions and arguments – both in United States and California Supreme Courts, and Federal and State Courts of Appeal
~ Member, Local government Steering Committee, Nation tobacco cases
~ Brought consumer and other affirmative cases
~ Litigated case of note: *Johnson v. Santa Clara County Transportation Agency* (U.S. Supreme Court)

1975-1976 Litigation Associate, Morgan Beauzay, Hammer, Ezgar et al, San Jose, CA

~ Litigated plaintiff's personal injury, labor, Title VII, criminal and contract cases.
~ Litigated case of note: *Robins v. Pruneyard* (U.S. Supreme Court decision re First Amendment rights at shopping center)

1974-1978 Law Clerk, Santa Clara County Superior Court

AWARDS

~ Honorary Doctor of Laws, Lincoln Law School of San Jose, May 2013
~ Society of Professional Journalists, James Madison Freedom of Information Award, March 2013
~ Law and Politics, Recognition, 2009 - 2011
~ State Bar of California, Public Attorney of the Year, 2007 - 2008
~ Status of Women Commission, Santa Clara County, Award for Contribution to Women's Rights, 2009
~ Recognition as Super Lawyer in Northern California, 2006 - 2009
~ California State Assn. of Counties, Circle of Service Award, 2008

~ San Jose Business Journal, Woman of Influence, Silicon Valley, 2008
~ American Bar Association, Jefferson Fordham Award for Litigation, 2007
~ Santa Clara County Bar Assn., Professional Attorney of the Year, 2006
~ Unsung Hero Award, Diversity Committee of the Santa Clara Bar Assn, 2006
~ National Merit Scholar out of high school, 1996
~ Rotary International Scholarship, 1996
~ San Jose Mercury News, Elizabeth Ent Award for Contributions to Law and Justice, 1985
~ San Jose Mercury News and Status of Women Commission, Award for Professional Woman of the Year, 1984
~ Dean's List, UC Berkeley, 1967 - 1970

PROFESSIONAL

~ Lecturer in Law at Santa Clara University School of Law and Stanford Law School
~ Led Clinical and pro Bono Program between Harvard Law School and Santa Clara County Counsel's Office
~ Served as Attorney for the Board of the California State Association of Counties
~ Served as Judge Pro-Tempore, and Arbitrator for Superior Court
~ Numerous articles/publications in the ABA The Public Lawyer, CA State Bar Public Law Journal, Op Eds, San Jose Mercury News, including: November 13, 2008 – "Santa Clara County fights for equal right to marry," regarding County challenge to Proposition 8.

ACTIVITIES

~ Lawyer Representative, U.S. District Court, Northern District of California
~ Board of Governors, State Bar of California, Vice-President and member
~ Chair, commission on Judicial Nominees Evaluation, and member for 4 years; also member, Task Force for the Reform of JNE Rules and Procedures
~ Attorney member of Judicial Council of California
~ Board of Governors of California women Lawyers Association
~ President, American Inns of Court, Ingram chapter, member
~ Latina Coalition of Silicon Valley
~ Hispanic National Bar Association
~ Santa Clara Bar, President's blue ribbon Commission on Diversity in the Legal Profession in Silicon Valley
~ State Bar of California Committee on Professional Responsibility and Conduct member
~ President, County Counsel's Association of California
~ Chair, U.S. District court of Northern California Standing Committee on Professional Conduct
~ U.S. Court of Appeals for the Ninth Circuit Task Force on Self-Represented Litigants

PERSONAL

Latin American (Brazilian); grew up in Chile; speak Spanish and Portuguese

Washington Post Editorial
July 14, 2013
The FEC's wrong-headed proposal to change rules

The FEC's lame-duck overreach

IMMOBILIZED BY political gridlock, the Federal Election Commission (FEC) has allowed its enforcement actions to nosedive in recent years. Now outgoing commission Vice Chairman Donald F. McGahn II, a former general counsel to the National Republican Congressional Committee, could be seeking to take advantage of a temporary 3-to-2 Republican majority on the FEC to write Republican stall tactics into agency rules.

Mr. McGahn and other Republican commissioners have proposed a version of the FEC enforcement manual that would prevent the agency's general counsel from consulting, without commission approval, publicly available information when considering an enforcement matter. It would also severely restrict information-sharing between the FEC and the Justice Department.

Commissioner Cynthia L. Bauerly, a Democrat, departed the FEC in February, leaving Democrats on the commission outnumbered. It's not as if it had been operating smoothly prior to Ms. Bauerly's departure. With the FEC at full strength, its debates have tended to be unproductive: Repeatedly, when agency staff have recommended enforcement in a case, the three Democratic commissioners have voted in favor of action and the three Republicans against, citing First Amendment rights. Without a majority, nothing happens, regardless of the party of the candidate under scrutiny. Fundamentally, the Republican commissioners seem not to believe in the campaign finance laws that Congress has passed and that they are bound to enforce.

The beleaguered FEC needs a fresh start. President Obama nominated Ann Ravel, head of California's campaign finance agency, and Lee Goodman, a Republican election lawyer, in June (Mr. Goodman's nomination was to replace Mr. McGahn), and the Senate should speedily confirm them. Then the president and the Senate should see to the replacement of the other four commissioners, all of whom are lame ducks.

Meanwhile, the commission should not be changing its rules. The proposed manual is wrong in substance — it would further stifle the agency's efforts to enforce the law and seek out violators. And the effort is hypocritical. Mr. McGahn and his allies have defended the FEC's 3-to-3 voting structure, saying it is intended to force consensus between the major parties on inherently political questions. The commissioners ought to be embarrassed to exploit a temporary imbalance to promote their ideological opposition to campaign finance enforcement.

The New York Times

July 5, 2013

Sabotage at the Election Commission

By THE EDITORIAL BOARD

The Federal Election Commission is already in a state of wretched dysfunction, but it will only get worse if Republican members succeed in crippling the agency further when the commission meets on Thursday. The three Republicans on the commission appear ready to take advantage of a temporary vacancy on the three-member Democratic side to push through 3-to-2 votes for a wholesale retreat from existing regulations.

Under their proposals, agency workers would no longer be allowed to routinely forward information about potential criminal violations by campaigners to the Justice Department, and the commission's staff investigators would be severely hobbled in conducting preliminary inquiries. This would provide further aid and comfort to politicians and operatives who run roughshod over campaign laws.

The proposed changes amount to naked subversion from within. The F.E.C.'s own general counsel, Anthony Herman, felt compelled to warn last month against ending regular information sharing with Justice Department officials, a procedure he stressed has "greatly benefited" enforcement of the law and is standard procedure for all regulatory agencies. The proposals are being pushed by Donald McGahn, the Republican vice chairman of the commission who has engineered repeated 3-to-3 standoff votes to stymie approval of staff recommendations for penalties against campaigners found in violation of the law.

Mr. McGahn, a former ethics adviser to Tom Delay, the former House majority leader who left office under an ethical cloud, is a fierce proponent of weakening F.E.C. enforcement powers. He will soon be leaving his position, but not before attempting a final blow to its effectiveness. President Obama has proposed two new commission members to put it back to six members, which means it would take a 4-to-2 vote to undo the damage proposed by Mr. McGahn. The F.E.C.'s responsibilities should have been shifted long ago to a new body of politically independent regulators, but this has been a nonstarter in a Washington environment of tooth-and-claw partisanship epitomized by Mr. McGahn.

California Political Attorneys Association
c/o Betty Ann Downing, President
California Political Law, Inc.
3605 Long Beach Blvd., Ste. 426
Long Beach, CA 90807
Telephone: (562) 427-2100
E-Mail: BADowning@CaPoliticalLaw.com

July 23, 2013

Via Email Only: lynden_armstrong@rules.senate.gov

Senator Charles Schumer, Committee Chairman
Senator Pat Roberts
U.S. Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Re: **FEC Nominee Ann Ravel**

Dear Senators:

We write this letter on behalf of the California Political Attorneys Association ("CPAA") and its members to support the confirmation of Ann Ravel as a member of the Federal Election Commission ("FEC").

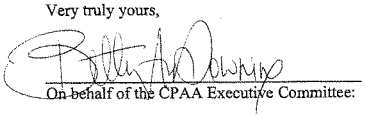
The CPAA was formed in 1988 in order to provide a voice for the regulated community in the political and election law arena. It is a nonpartisan organization comprised of private and public sector California attorneys who practice political and election law.

The CPAA provides comment and expertise in connection with proposed legislation and regulations, as well as policy matters before agencies such as the California Fair Political Practices Commission, California State Legislature, California Secretary of State's Office, California Franchise Tax Board and Federal Election Commission.

The CPAA regularly worked with Ann Ravel in her capacity as the Chair of the California Fair Political Practices Commission. During her tenure as FPPC Chair, Ann Ravel proactively solicited the views of wide spectrum of groups, including the CPAA, on matters before the FPPC. She fostered a transparent and interactive regulatory process in an effort to streamline and simplify the Commission's rules. She takes others' viewpoints into thoughtful consideration, even if she disagrees with their perspective, and treats all with professional courtesy and respect. As Commissioner, she would be an exceptional asset to the FEC and the public.

Should additional information or comment from the California Political Attorneys Association be useful to your deliberations, please do not hesitate to contact me.

Very truly yours,



On behalf of the CPAA Executive Committee:

Betty Ann Downing, Esq. President
CALIFORNIA POLITICAL LAW, INC.

Jason D. Kaune, Esq.
NIELSEN, MERKSAMER, PARRINELLO, GROSS & LEONI LLP

Kevin Heneghan, Esq.
HANSON BRIDGETT LLP

Richard Rios, Esq.
OLSON, HAGEL & FISHBURN, LLP

Brian Hildreth, Esq.
BELL, MC ANDREWS & HILTACHK, LLP

Steven G. Churchwell, Esq.
CHURCHWELL WHITE, LLP

cc: Ann Ravel

CATHERINE C. SPRINKLES
2410 Deerpath Road
Saratoga, California 95070
408.867-0732
Member California Bar

July 23, 2013

The Hon. Charles E. Schumer, Chairman,
Senate Rules and Administration Committee
Via email Lynden Armstrong@rules.senate.gov

Hon. Pat Roberts, Ranking Member
Senate Rules and Administration Committee
Via email Lynden Armstrong@rules.senate. gov

Re: Nomination of Ann M. Ravel to Federal Elections Commission

Dear Senator Schumer and Senator Roberts,

I am writing in support of the nomination of Ann M. Ravel to the Federal Elections Commission. I have known Ms. Ravel for more than twenty years, and have observed her career during that time. Ann is a near- perfect candidate for the position to which she has been nominated. Her reputation as an attorney is outstanding. She has first-hand experience with elected officials and a deep appreciation for the challenges inherent in public life. She understands the legislative and administrative processes, having served as counsel to the Santa Clara County Board of Supervisors, and having taught administrative law in local law schools.

Ann was elected to the State Bar Board of Governors by local attorneys in three counties, which attests to the esteem in which she is held by her colleagues. Her dedication to professional ethics is clear from her service on committees and commissions whose goal is the furtherance of professionalism. In fact, the local bar association recognized her dedication by selecting her as a "Professional Lawyer of the Year." Her current service on California's Fair Political Practices Commission has shown her ability to manage issue and challenges that will exist on the Federal Elections Commission. She has tirelessly dedicated herself to highlighting the role of the FPPC and raising public awareness of its important work. She has tried to provide an administrative framework within the FPPC that will benefit California's office seekers, through rules clarity and even-handed enforcement.

As a member of the legal community, I have appreciated Ann's ability to analyze and strategize on legal matters. Her work ethic is legendary—when she was county counsel she was known to the be the first to arrive at the office and always one of the last to leave. Ann has the intelligence

and insight to learn new law quickly; she has a nimble legal mind. She listens carefully to positions that are presented, but has no difficulty in making decisions based on relevant facts.

With her skills, demeanor and contacts, Ann could have left public service for more lucrative private practice. But, her commitment always has been to public service and the betterment of our society and its important institutions. As the recent dismal election turn- out has demonstrated, at all levels of government, public belief in the integrity and importance of elections continues to diminish. The importance of fair, knowledgeable, capable and dedicated citizens on the FEC cannot be overstated. As a life-long Republican, and one who has discussed many of these difficult election related issues with Ann, I can think of no important qualification for this democracy-protecting position that Ann does not possess in abundance. She is fair, courageous, smart, hard-working, dedicated, unbiased and fearless. The public is fortunate that Ann has chosen public service as her passion.

Please feel free to contact me if I can be of any help in your process.

Kind regards,

Catherine C. Sprinkles

Catherine C. Sprinkles

MICHAEL M. HONDA
17TH DISTRICT, CALIFORNIA
WASHINGTON OFFICE:
1713 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE: (202) 225-2631
FAX: (202) 225-2699
http://www.honda.house.gov
DISTRICT OFFICE:
2001 GATEWAY PLACE
SUITE 670W
SAN JOSE, CA 95110
PHONE: (408) 436-2720
(855) 680-3769
FAX: (408) 436-2721

Congress of the United States
House of Representatives

COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEES:
COMMERCE, JUSTICE, SCIENCE
LABOR, HEALTH AND HUMAN SERVICES, EDUCATION

SENIOR WHIP

CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS, *CHAIR EMERITUS*

SUSTAINABLE ENERGY AND ENVIRONMENT COALITION, *VICE CHAIR*

LGBT EQUALITY CAUCUS, *VICE CHAIR*

July 16, 2013

The Honorable Pat Roberts
Ranking Member, Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Senator Roberts,

I write to support the nomination of Ann Ravel to Commissioner of the Federal Election Committee. Ann, the current Chair of the California Fair Political Practices Commission (FPPC), has been a tireless advocate for political reform, a defender of the public's right to know who contributes to political campaigns, and a staunch proponent for readily accessible campaign finance information.

She has been a friend of mine for many years, allowing me to attest to her professionalism, expertise and experience. I first met Ann while she was working for the Office of the County Counsel, while I was a County Supervisor in Santa Clara County, California. She was deliberative, fair and respectful of the rule of law—adhering to the intent of the Board when they enacted legislation.

As Chair of the FPPC, Ann has demonstrated outstanding judgment, management and the acumen to prioritize the public's interests. As you know, she led the investigation into California's largest money laundering scheme, an 11-million-dollar contribution from an out-of-state group. In a post-*Citizens United* society, the country would benefit from Ann's leadership at the FEC.

I believe Ann has both the leadership skills and breadth of experience to be an asset to the Federal Election Commission, and I am pleased to recommend her. Thank you for your consideration.

Sincerely,

Michael M. Honda
Member of Congress

PRINTED ON RECYCLED PAPER

ROBERT HURT
5TH DISTRICT, VIRGINIA

125 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE: (202) 225-4711
FAX: (202) 225-5681

www.hurt.house.gov

Congress of the United States
House of Representatives
Washington, DC 20515–4605

COMMITTEE
FINANCIAL SERVICES
VICE CHAIRMAN,
SUBCOMMITTEE ON CAPITAL MARKETS
AND GOVERNMENT SPONSORED ENTERPRISES

SUBCOMMITTEE ON
HOUSING AND INSURANCE

July 23, 2013

The Honorable Pat Roberts, Ranking Member
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Ranking Member Roberts:

I write to express my support for the nomination of Lee Goodman to Commissioner of the Federal Election Commission and ask that you show him every consideration. I believe that the combination of Mr. Goodman's experience, expertise, and leadership make him uniquely qualified to provide outstanding service to our nation at the FEC.

I have known Mr. Goodman for a number of years, and I now have the privilege of representing him in Congress, as he resides in Albemarle County, Virginia. A graduate of the University of Virginia, Mr. Goodman is widely respected professionally for his knowledge of federal and state election law and his years of experience in both the public and private sectors providing sound counsel on electoral matters.

An expert on the regulation of political activity, Mr. Goodman has authored a number of articles and often lectures on issues relating to election law. He strongly believes in adherence to the rule of law to maintain free and fair elections and understands how fundamentally important these principles are to a well-functioning democracy.

I hope you will show every consideration to Lee Goodman, who I believe would make for an outstanding Commissioner of the Federal Election Commission.

Sincerely,

Robert Hurt

RH/wp

686 BERKMAR CIRCLE
CHARLOTTESVILLE, VA 22901
PHONE: (434) 973-9631
FAX: (434) 973-9635

308 CRAGHEAD STREET, SUITE 102-D
DANVILLE, VA 24541
PHONE: (434) 791-2596
FAX: (434) 791-4619

515 SOUTH MAIN STREET, P.O. BOX O
FARMVILLE, VA 23901
PHONE: (434) 395-0120
FAX: (434) 395-1248

Committee on the Judiciary
- Ranking Member — Subcommittee on Immigration, Policy and Enforcement
- Subcommittee on Intellectual Property, Competition, and The Internet

Committee on House Administration
- Ranking Member — Subcommittee on Oversight

Committee on Science, Space, and Technology
- Subcommittee on Energy and Environment
- Subcommittee on Investigations and Oversight

Congress of the United States
House of Representatives
Washington, DC 20515

ZOE LOFGREN
16th District, California

635 North First Street
Suite B
San Jose, CA 95112
(408) 271-8700

1401 Longworth House Office Building
Washington, DC 20515
(202) 225-3072

www.house.gov/lofgren

Chair, California Democratic Congressional Delegation

Co-Chair, Congressional Caucus on Vietnam

Co-Chair, Diversity & Innovation Caucus

Co-Chair, Congressional Hazards Caucus

July 11, 2013

The Honorable Charles E. Schumer
The Honorable Pat Roberts
U.S. Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts:

I am writing to support the nomination of Ann Ravel to the Federal Election Commission (FEC).

I have known Ms. Ravel for over 30 years. During my tenure as a County Supervisor in Santa Clara County, Ms. Ravel served as an attorney in the Santa Clara County Counsel's Office, where she worked for 32 years, and was ultimately appointed as County Counsel from 1998 until 2009. Ms. Ravel is well-respected by her peers, having been named Public Attorney of the Year in 2007 by the State Bar of California, named a "Woman of Influence" in the Silicon Valley, and recently being appointed as Chair of the California Fair Political Practices Commission (FPPC).

As the current chair of the California FPPC, which regulates campaign financing and spending, lobbyist registration and reporting, and conflicts of interest, Ms. Ravel has a thorough understanding of the issues relevant to campaign finance. Ms. Ravel understands the importance of adherence to the rule of law and to Congressional intent, and has consistently demonstrated her commitment to integrity in the electoral process. I have always found Ms. Ravel to be open-minded and fair, and I have no doubt that she would make an exceptional commissioner.

I appreciate your consideration, and I urge Ms. Ravel's swift confirmation.

Sincerely,

Zoe Lofgren
Member of Congress

July 23, 2013

Senator Charles Schumer
Chairman
Committee on Rules and Administration
United States Senate
Washington, DC

Senator Pat Roberts
Ranking Member
Committee on Rules and Administration
United States Senate
Washington, DC

Re: Nomination of Lee E. Goodman

Dear Senator Schumer and Senator Roberts:

It is with pleasure that I write to recommend my friend and colleague Lee Goodman to the Senate Rules Committee. I have worked with Lee Goodman beginning in 1995 when I was the Chief Deputy Attorney General for the Commonwealth of Virginia, and we hired Lee to serve as a Special Assistant Attorney General in our education section. In the almost 20 years since that time, Lee has demonstrated a high level of professionalism, integrity, and legal expertise in varied areas of law, including political law, education law, non-profit law, and other areas.

I have no hesitation whatsoever in giving Lee my highest recommendation. He is a fine lawyer. Lee adheres to the highest standards of professional and personal integrity. He does not play favorites. At the Federal Election Commission, Lee will treat all who come before him fairly and listen to their arguments with an open mind.

Please accept this recommendation from a personal friend and colleague who has worked with Lee in government and in private practice, and who has known Lee for almost 20 years. I am confident he will serve our country honorably on the Federal Election Commission.

Sincerely,

David E. Anderson

E-mail: david.anderson@leclairryan.com
Direct Phone: 202.659.6709
Direct Fax: 202.659.4130

1101 Connecticut Avenue, NW, Suite 600
Washington, D.C. 20036
Phone: 202.659.4140 \ Fax: 202.659.4130

July 16, 2013

Honorable Charles E. Schumer, Chairman
Senate Committee on Rules and Administration
United States Senate
Washington, DC. 20510

Dear Chairman Schumer:

I am writing in support of the confirmation of Ann Ravel as a Commissioner on the Federal Election Commission (FEC).

I had the opportunity to serve on the State of California's Fair Political Practices Commission (FPPC) while Ann was Chair. We worked closely together to rule on numerous enforcement actions, rewrite many of the Commission's outdated regulations and draft new language to increase transparency of campaign finance in an age of electronic communications and developing technology.

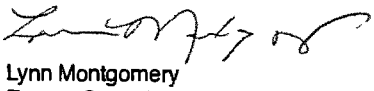
Ann earned my respect as she tackled a myriad of issues in an intelligent, open-minded and fair manner. She actively sought input from all affected parties and created a respectful and inviting atmosphere for individuals who spoke at public hearings - a noticeable change from previous Chairs.

Because she was able to negotiate consensus on many contentious and long-standing issues, Ann achieved a new-found respect for the FPPC from the public, interest groups and elected officials.

I highly recommend Ann Ravel's confirmation and know that the FEC would be well served by her inclusion and participation.

If you need any further information or have any questions, please do not hesitate to contact me at lynndmontgomery@gmail.com.

Sincerely,



Lynn Montgomery
Former Commissioner
California Fair Political Practices Commission

cc: Honorable Pat Roberts
Ranking Member

City of Gilroy
Mayor's Office
City Hall
7351 Rosanna Street
Gilroy, California
95020-6197

Don Gage, Mayor
don.gage@ci.gilroy.ca.us
City Hall Office (408) 846-0227
www.cityofgilroy.org

Honorable Charles E. Schumer, Chairman
Senate Committee on Rules and Administration
United States Senate
Washington, DC 20510
cc: the Honorable Pat Roberts

July 17, 2013

Dear Mr. Schumer,

I served on the Santa Clara County Board of Supervisors from 1997 through 2010. Being the only Republican on the five member Board for those thirteen years, it was really a challenge. During that time, I worked with Ann Ravel. When we needed to select a new County Counsel, Ann was everyone's first choice. She was very bright, had a great deal of experience, and always followed the law, which was not always what the Board wanted to hear. She understood that her role was to carry out the dictates of the makers of the law. She was impartial and most importantly to me, she was always fair and treated me the same as the other members of the Board. When I needed her advice Ann made time for me, and gave me straight answers.

I am saddened to know that she is leaving her state government role, but it seems the Federal government needs her more. I have a great deal of respect for Ann and the work that she does. You will not be disappointed with her in any way. She will always have my support.

Sincerely,

Donald F. Gage

Donald Gage, Mayor
City of Gilroy

Michael C. Genest
Lincoln, Ca 95648
mike.genest@gmail.com

July 14, 2013

The Senate Rules and Administration Committee
Charles E. Schumer, Chairperson,
Honorable Pat Roberts, Ranking Member
attn: Lynden Armstrong

Dear Senator Schumer and Senator Roberts:

I write in support of the nomination of Ann Ravel to the Federal Elections Commission. I have known Ms. Ravel since we both attended high school together in the 1960's, so I can assure you from decades of personal experience that she is of the highest character.

I am a Republican while Ann is a Democrat. That has not prevented us from being the best of friends, although it has led to a few interesting discussions. I am now retired after 30 years of public service. My last position was as Governor Schwarzenegger's Director of Finance, but I am most proud of my years as the Director of the Senate Republican Fiscal Office. In that role, I served two Senate Republican Leaders, Ross Johnson and James L Brulte. I remain close to both of these exceptional men.

California politics are perhaps as partisan as D.C. politics. Nevertheless, many of us maintain close ties to folks on the other side. For example, I recommended Ms. Ravel to Governor Brown's top staff person, Jim Humes, days before the Governor's election, even though I was employed at that time as a consultant to his opponent, Meg Whitman. (Regrettably, it was clear by that time that there would be no Whitman Administration.)

As you know, Ann worked in the Santa Clara County Counsel's Office for more than two decades, finishing up there as County Counsel. In that capacity I had several occasions to deal with her on issues involving state and county government.

Earlier in my career, I was deeply involved in efforts to detect, prevent and punish welfare fraud. In fact, an analysis that I wrote for the (non-partisan) Legislative Analyst's Office related to an innovative fraud detection approach in use in the County of Orange in the mid-1980's was read into the Congressional Record. That program was ultimately adopted into federal law. In California, it is the counties, however who administer these programs. Having a high ranking county executive as a personal friend helped me immeasurably in understanding the subtleties of that relationship.

Later, I was the bureaucratic point person for Governor Wilson's welfare reform proposals. My direct boss in that capacity was Eloise Anderson (a leader well-known to welfare reformers in Washington at that time and currently a department head in Scott Walker's Administration).

Again, Ms. Ravel's insights into county government helped me formulate policies sensitive to the subtleties of the state/county relationship.

When I later became Chief Deputy and then Director of Finance, Ms. Ravel was active in the California Association of County Counsels, ultimately serving as its chairperson. In that capacity, she lobbied me vigorously and extensively on behalf of the county perspective. I always found her presentations to be logical, forceful and grounded in the legal basis for the state/county relationship in California and certainly never partisan.

When Ms. Ravel took over as the Chair of California's Fair Political Practices Committee, I became one of her informal, outside advisors. To help her develop a strong non-partisan reputation in a government town with which she was at that time unfamiliar, I introduced her to her predecessor in that position, a good friend of mine and a Republican, Dan Schnur. Early on, Mr. Schnur had been openly critical of Ms. Ravel, implying publicly that she would perhaps be soft on democrats who violated our disclosure rules. I knew that Ms. Ravel would never even imagine giving her own party preference in her official role as Chair. So, I intervened, even to the point of writing an op-ed piece on her behalf to try to dampen this criticism, which was baseless to begin with. I think that ultimately, Mr. Schnur came to respect Ms. Ravel's dedication to even handed enforcement of our laws.

When Senator Brulte was named Chairman of the California Republican Party, I arranged a meeting between him and Ms. Ravel, i.e., between the regulated and the regulator. While they both invited me to attend, I declined because I have no official role in California politics now and because I thought it best to give them the privacy needed for a frank conversation. After-action reports from both parties on that meeting make me somewhat regret my decision not to attend since it was apparently quite animated, good-natured and even jocular. I can only imagine the gibing and testing that went on, but I know that they parted company liking each other and agreeing to stay in touch.

In its enforcement of federal election laws, the FEC must avoid any appearance of partisanship. Democrat and Republican Senators share a desire that its commissioners perform their duties in an unbiased way and in accordance with the law. As someone who has known Ms. Ravel for many years, I can assure that she will do exactly that.

Sincerely yours,

Michael Genest

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
MCLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

July 23, 2013

Richard E. Wiley
202.719.7010
rwiley@wileyrein.com

Honorable Charles E. Schumer, Chair
Honorable Pat Roberts
Senate Committee on Rules and Administration
United States Senate
Washington, DC 20510

Dear Senator Schumer and Senator Roberts:

I write in support of Lee Goodman's nomination to the Federal Election Commission. I have known Mr. Goodman for many years, both when he worked at my law firm but also in connection with numerous campaign seminars and other activities.

In my judgment, Lee is not only a very talented lawyer, and an expert in election law, but also an individual of high personal integrity. I am convinced that he would serve the Commission well, would administer the FEC's statute and regulations fairly, and would work with his fellow members and staff with equanimity and collegiality.

Lee Goodman is highly respected by his colleagues in the election law practice and also those with whom he has interacted in countless campaigns. He is a consummate professional and a principled gentleman who, I believe, would perform his government responsibilities with both competence and honor.

Accordingly, I am pleased to recommend Lee Goodman to you and to the Committee. Thank you for your consideration and best regards.

Sincerely,

Richard E. Wiley

CHAPMAN UNIVERSITY | SCHOOL OF LAW

ONE UNIVERSITY DRIVE
ORANGE, CALIFORNIA 92866
WWW.CHAPMAN.EDU

Ronald D. Rotunda
The Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence
Email: rrotunda@chapman.edu
(714) 628-2698 • Fax (714) 628-2576

15 July 2013

Honorable Charles E. Schumer
Chair & the Honorable Pat Roberts
Senate Committee on Rules and Administration
United States Senate
Washington, DC 20510

VIA EMAIL TO: Lynden_armstrong@rules.senate.gov
RE: The Honorable ANN RAVEL

Dear Senators Schumer and Roberts:

I am pleased to learn that President Obama has nominated ANN RAVEL to be a Commissioner on the Federal Election Commission. I first met Ann in March of 2011, shortly after Governor Brown appointed her to the California Fair Political Practices Commission (FPPC) as Chair (the state analogue to the FEC, established directly by the people of California by proposition). I was a Commissioner from June of 2009 until my term ended in January of 2013. She was the third Chair during my term of office. She followed two impressive predecessors with her own impressive contributions.

Each chair brings his or her personal style to the job. She helped push the FPPC into the 21st Century (better late than never), by updating its use of the internet. She encouraged civic engagement and helped bring the FPPC to the people, when we held more of our monthly Commission hearings throughout the state, instead of just Sacramento.

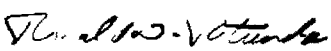
She brought (in addition to her intellect, enthusiasm, and charm), her considerable experience in both the federal and state governments. As you may know, she was a lawyer in the Santa Clara County Counsel's Office, rising to County Counsel from 1998 until 2009. She also served in the federal government, as Deputy Assistant Attorney General for Torts and Consumer Litigation in United States Department of Justice (Civil Division). In 2007, the State Bar of California named her as the Public Attorney of the Year, because of her contributions to public service.

Ann and I have not always agreed with each other. (Of course, if the Commissioners were all to agree, we would not need five of them; only one would do). However, we disagreed without being disagreeable, and that alone is important.

I have read criticisms that the FEC staff sometimes exceeds its powers under the law when they initiate investigations without the FEC approval. If that criticism is true, I am confident that Ann will treat the staff with utmost respect while not supporting unsanctioned investigations.

If you have any questions, please do not hesitate to write or call. I am most pleased to recommend Ann Ravel as a Commissioner of the Federal Election Commission.

Sincerely,



Ronald D. Rotunda
Doy & Dee Henley and Distinguished Professor of Jurisprudence

MUNGER, TOLLES & OLSON LLP

355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

RONALD L. OLSON*
ROBERT E. DENHAM
JEFFREY I. WEINBERGER
CARY B. LERMAN
CHARLES D. SIEGAL
GREGORY P. STONE
BRAD D. BRIAN
BRADLEY S. PHILLIPS
GEORGE M. GARVEY
WILLIAM D. TEMKO
ROBERT B. KNAUSS
STEPHEN M. KRISTOVICH
JOHN W. SPIEGEL
TERRY E. SANCHEZ
STEVEN M. PERRY
MARK B. HELM
JOSEPH D. LEE
MICHAEL R. DOYEN
MICHAEL E. SOLOFF
GREGORY D. PHILLIPS
LAWRENCE C. BARTH
KATHLEEN M. MCDOWELL
GLENN D. POMERANTZ
THOMAS B. WALKER
RONALD C. HAUSMANN
PATRICK J. CAFFERTY, JR.
JAY M. FUJITANI
O'MALLEY M. MILLER
SANDRA A. SEVILLE-JONES
MARK H. EPSTEIN
HENRY WEISSMANN
KEVIN S. ALLRED
BART H. WILLIAMS
JEFFREY A. HEINTZ
JUDITH T. KITANO
KRISTIN LINSLEY MYLES
MARC T.G. DWORSKY
JEROME C. ROTH
STEPHEN D. ROSE
GARTH T. VINCENT
TED DANE
STUART N. SENATOR
MARTIN D. BERN
DANIEL P. COLLINS
ROBERT L. DELL ANGELO
BRUCE A. ABBOTT
JONATHAN E. ALTMAN
MARY ANN TODD
MICHAEL J. O'SULLIVAN
KELLY M. KLAUS
DAVID B. GOLDMAN
KEVIN S. MASUDA
HOJOON HWANG
DAVID C. DINIELLI
PETER A. DETRE
CARL H. MOOR
DAVID H. FRY
LISA J. DEMSKY
MALCOLM A. HEINICKE
GREGORY J. WEINGART
TAMERLIN J. GODLEY
JAMES C. RUTTEN
RICHARD ST. JOHN
ROHIT K. SINGLA
LUIS LI
CAROLYN HOECKER LUEDTKE
C. DAVID LEE
MARK H. KIM
BRETT J. RODDA
SEAN ESKOVITZ
FRED A. ROWLEY, JR.
KATHERINE M. FORSTER
BLANCA FROMM YOUNG
RANDALL G. SOMMER
MARIA SEFERIAN
MANUEL F. CACHAN
ROSEMARIE T. RING
JOSEPH J. YBARRA
KATHERINE K. HUANG
MICHELLE T. FRIEDLAND
TODD J. ROSEN
TRUC T. DO
MELINDA CADES LEMOINE
SETH GOLDMAN
GRANT A. DAVIS-DENNY
JONATHAN H. BLAVIN
JOHN B. OWENS
SUSAN R. SZABO
LISA C. MIYAKE
HAILYN J. CHEN
BRAD SCHNEIDER
MIRIAM KIM
MISTY M. SANFORD
KATHERINE HU
KIMBERLY A. CHI
DEREK J. KAUFMAN
BETHANY W. KRISTOVICH
BENJAMIN W. HOWELL
JACOB S. KREILKAMP
ERIC P. TUTTLE
HEATHER E. TAKAHASHI
KEITH R.D. HAMILTON, II
SORAYA C. KELLY
PATRICK ANDERSON
JEFFREY Y. WU
H. LANCE JASPER
ALISSA BRANNAN
ADAM R. LAWTON
AVI BRAZ
PUNEET K. SANDHU
DAVID C. LACHMAN
JENNY H. HONG
AARON SEUJI LOWENSTEIN
LAURA D. SMOLOWE
LEO GOODMAN
MATTHEW A. MACDONALD
MARGARET G. ZIEGLER
ESTHER H. SUNG
BENJAMIN J. HARD
RENEE DELPHIN-RODRIGUEZ
MICHAEL J. MORGAN
KATHRYN A. EGNMAN
JOEL M. PURLES
KYLE A. CASAZZA
AARON GREENE LEIDERMAN
ERIN J. COX
CLAIRE YAN
DAVID H. PENNINGTON
BRIAN ALDEN
MARK R. SAYSON
JOHN M. RAPPAPORT
DAVID C. THOMPSON
ANNE HENRY LEE
MATTHEW N. STEINBERG
CHRISTIAN K. WREDE
PETER E. GRATZINGER
ANJAN CHOUDHURY
JEREMY A. LAWRENCE
BENJAMIN E. FRIEDMAN
CHRISTOPHER M. LYNCH
RAY S. SELLE
NICHOLAS C. SOLTMAN
ADAM I. KAPLAN
AMELIA L.B. SARGENT
KENNETH M. JAMISON
BRYAN H. HECKENLIVELY
LAURA WINTH
JASMINE H. ROBENS
JENNIFER A. JONES
LAURA A. SULLIVAN
KYLE W. MACH
JEFFREY M. OSOFSKY
ENRIQUE R. SCHAERER
GREGORY H. SERGI
ACHYUT J. PHADKE

OF COUNSEL
RICHARD O. EISENSHADT
ROBERT K. JOHNSON*
ALAN V. FRIEDMAN*
RICHARD S. VOLPERT
RONALD K. MEYER
RICHARD E. GROSYAN
ALLISON B. STEIN
ALLEN M. KATZ
WILLIANA CHANG
DANIEL B. LEVIN

E. LEROY TOLLES
(1922-2008)

*A PROFESSIONAL CORPORATION

July 18, 2013

WRITER'S DIRECT LINE
(213) 683-9178
(213) 683-5178 FAX
sean.eskovitz@mto.com

The Honorable Charles E. Schumer
Chairman
Senate Committee on Rules and
Administration
United States Senate
Washington, D.C. 20510
Lynden_Armstrong@rules.senate.gov

Re: **Nomination of Ann Ravel to the Federal Election Commission**

Dear Senator Schumer:

I am writing to lend my strong support to the President's nomination of Ann Ravel to serve on the Federal Election Commission. For more than two years now, I have had the pleasure of serving with Chair Ravel on the California Fair Political Practices Commission ("FPPC"). During her tenure as Chair of the FPPC, Chair Ravel has consistently demonstrated that she is a strong and fair leader. From day one, Chair Ravel has effectively refocused the FPPC on pursuing enforcement, regulatory, and legislative matters of the greatest importance to the integrity of the California political process.

As a Republican, I have always found Chair Ravel to be open-minded and capable of working effectively with a wide range of constituents. She has handled difficult and controversial issues with professionalism and grace. I am confident that the Federal Election Commission would benefit greatly from Chair Ravel's intelligence and commitment.

Please feel free to contact me if you would like any additional information.

Sincerely,

Sean Eskovitz

SE:mlp
cc: The Honorable Pat Roberts

July 23, 2013

VIA E-MAIL:
lynden_armstrong@rules.senate.gov
paul_vinovich@rules.senate.gov
adam_topper@rules.senate.gov

The Honorable Charles Schumer
Chairman
Senate Committee on Rules and Administration
United States Senate
Washington, DC

The Honorable Pat Roberts
Ranking Member
Senate Committee on Rules and Administration
United States Senate
Washington, DC

RE: Nomination of Lee E. Goodman

Dear Senators Schumer and Roberts:

I have been a colleague of Lee Goodman since he joined our law firm in 2005. We have worked closely together on several significant litigation cases and client matters. When you work with someone as often and closely as I have with Lee, you come to know them quite well. I know Lee as a colleague of the utmost professionalism and commitment to clients and legal causes.

Together we have defended government action and we have challenged government action. We have represented the Commonwealth of Virginia in its efforts to stop fraudulent private child support enforcement practices. And we have represented an individual wrongly accused by government of improper conduct. From my work with Lee, I know he will understand the purposes and necessity of government regulation as well as governmental abuses that require correction, and he would have great capacity for measured approaches to regulation and enforcement of the law.

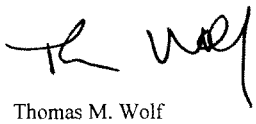
E-mail: thomas.wolf@leclairryan.com
Direct Phone: 804.916.7143
Direct Fax: 804.916.7243

951 East Byrd Street, Eighth Floor
Richmond, Virginia 23219
Phone: 804.783.2003 \ Fax: 804.783.2294

Finally, I am an active Democrat in Virginia. I have enjoyed discussing political issues with Lee, even though he is a longtime Republican. Lee is a fair and open minded individual who meets the merits of political and philosophical questions. He is not knee jerk or dismissive of a competing point of view. Likewise, Lee has crossed the partisan line to represent Democrats, too, and has demonstrated the same level of professionalism and loyalty to Democratic clients that he devotes to all clients.

For these reasons, I am confident that Lee will be a fair Commissioner on the Federal Election Commission who adheres to the law and not to partisan bias.

Sincerely yours,



Thomas M. Wolf

TMW

Answers of Lee E. Goodman to

Questions for the record submitted by Senator Pat Roberts for Lee Goodman, Federal Election Commission nominee

Question 1:

Should you be confirmed, what would be your goals and priorities at the Federal Election Commission (FEC)? How would you seek to accomplish them?

ANSWER:

I have outlined several philosophical goals in the testimony I have submitted to the Committee. First, the Commission must be fair to all sides, and address legal and factual questions without partisan bias. Second, the Commission's procedures must be fair to those it regulates. Third, the Commission's regulations must be clear. Citizens who exercise First Amendment rights need and deserve clear rules. Fourth, the Commission should always look for ways to enhance its assistance programs for the regulated community. Many people involved in politics at the grassroots level simply cannot afford lawyers and professional reporting services. Compliance should not be a game of "gotcha" at the Commission. Fifth, it will be my goal to serve ethically, with integrity, and with civility toward my colleagues and Commission staff.

As for programmatic goals and priorities, I would like to improve the Commission's website and thereby enhance public accessibility and transparency of campaign finance data. For comparison, an excellent website is a state-based campaign finance website in Virginia maintained by the Virginia Public Access Project (www.vpap.org) which makes political contributions and expenditures fully transparent and searchable from multiple vantage points and cross-reference points. The Commission's website is not nearly as nimble or accessible and can be improved to enhance public transparency of political money. Second, I would like to enhance the Commission's compliance assistance programs to help people and organizations comply with the law. The FEC has made great strides in providing new training programs, which are very helpful and popular. I would like to increase the number and quality of training programs. In addition to training programs, the FEC assistance line is an excellent resource for political committee treasurers and legal counsels. And I would like to see reports analysts become more proactive in facilitating reporting compliance and in building trust with the political committees under their review, where the goal is to help committees comply rather than threatening them with punitive enforcement as a matter of first resort. Third, I would like to find common ground among Commissioners on regulatory changes dictated by the Supreme Court's decision in Citizens United.

Question 2:

The Federal Election Commission, when fully constituted, has six Members, no more than three of whom can be from the same political party. Do you regard this

structure as a strength or weakness of the agency? How would you operate within this structure to achieve consensus and accomplish your goals?

ANSWER:

Congress very carefully designed the Commission's composition, including the requirement of four votes to take action. Through this design, the Congress sought to avoid the kind of partisan enforcement, partisan bias, or unfair partisan advantage in the regulation of campaigns and elections.

At minimum, the current structure prevents one party from taking advantage of the other. But there are more salutary benefits than simply protecting against one party's biased enforcement against the other. The bi-partisan design moderates decision-making and requires a degree of bi-partisan consensus to take regulatory action.

If confirmed, I would seek to work within the bi-partisan structure Congress designed by focusing principally on moderate consensus-worthy regulatory concepts and policy initiatives.

Question 3:

The *Citizens United* decision was issued in January 2010, yet FEC regulations that were deemed unconstitutional by the decision remain on the books. What should be done about this?

ANSWER:

Where the Supreme Court has ruled a regulation to be unconstitutional, the Commission should comply with the Supreme Court's ruling promptly by eliminating the unconstitutional regulation. The Commission has done this in the past by consensus action. The Commission has a rulemaking pending to eliminate the regulations ruled unconstitutional by the Supreme Court in the Citizens United decision, and the Commission should forthwith eliminate the regulations. This should not be a controversial undertaking.

July 21, 2013

BUSINESS MEETING—TO CONSIDER THE NOMINATION OF DAVITA VANCE-COOKS TO BE PUBLIC PRINTER AND S. 375

WEDNESDAY, JULY 24, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 9:59 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Udall, King, Roberts, Cochran, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Ellen Zeng, Elections Counsel; Sharon Larimer, Assistant to the Staff Director; Abbie Sorrendino, Professional Staff; Nicole Tatz, Legislative Correspondent; Matthew McGowan, Professional Staff; Adam Topper, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Communications Director; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The hearing will come to order. The committee needs a quorum, ten members. We ask the members to maybe stay around. We are going to try to round up four more—we have six now—so we can actually move forward on these nominees. Then we will go to the hearing but come back into the session from the hearing session if we can get ten.

But, in the meantime, does any Senator wish to make a statement on either the nomination of Davita Vance-Cooks to be Public Printer or I know we have some cosponsors of S. 375, the electronic filing bill, to require Senate candidates to file designations, statements, and reports in electronic form. I do not have a statement, but if you do, go right ahead.

Senator COCHRAN. Mr. Chairman, I have a statement on the Campaign Disclosure Parity Act. Is that something that we are going to consider this morning, as well?

Chairman SCHUMER. Yes, it is, indeed.

Senator ROBERTS. Why do you not go ahead and then I will——

Chairman SCHUMER. Go ahead, Thad. The Senator from Mississippi and then any of the Senators on our side will be recognized, too.

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. Mr. Chairman, I am pleased to be one of the sponsors of this bill, the Campaign Disclosure Parity Act, and we thank you for holding this markup today to consider it.

Not only does the bill have the support of a group of 34 cosponsors from both parties, including several members of this committee, but it also has the support of the Secretary of the Senate and the Federal Elections Commission.

In a time of sequestration and fiscal restraint, this bill affords an opportunity for us to save over $500,000 per year for the Senate and the Federal Elections Commission. It would reduce duplicative work and would align the filing process for Senate candidates with those of political committees and candidates for Federal office, including Presidential candidates and candidates for the U.S. House of Representatives.

I am pleased to join Senator Tester as a cosponsor of this bill and I am hopeful the committee will favorably report it to the full Senate. Thank you.

Chairman SCHUMER. Thank you, Senator Cochran.

Senator Udall, do you want to make a statement?

Senator UDALL. My statement is on the FEC nominees.

Chairman SCHUMER. Thank you. Senator Roberts, and then Senator King.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. I only say that it always is of some concern to me that when we go down the road to reform and we wave the banner of reform, we want to see what is underneath it, and I think there is something called the First Amendment there and I want to make sure that we appreciate that fact.

Thank you for your leadership, and I hope we can get a quorum of ten to finish our business.

Chairman SCHUMER. Thank you, Senator Roberts.

I will also ask, Senator King, do you wish to make an opening statement?

Senator KING. No, Mr. Chairman.

Chairman SCHUMER. Senator Blunt.

Senator BLUNT. No, Mr. Chairman.

Chairman SCHUMER. Okay. It is long past time for Senate candidates to file campaign reports in the same way as every other Federal candidate has for years. The Senate's current system is stuck in the past and wastes over half-a-million tax dollars a year to perpetuate a redundant, slow, and completely unnecessary process that prevents the public from seeing Senate candidates' expenditures for more than a month after the reports are already online. At a time when Federal budgets have been slashed and savings are being sought, there is no reason to continue.

And I want to thank Senator Tester for his strong leadership on this issue.

Chairman SCHUMER. Okay. We do not have a quorum, so I think we will go on to the hearing.

Okay. So, we have to go into recess. I would now recess our markup subject to the call of the chair. What we will try to do is assemble a quorum of ten, since I do not think we will get it this morning, off the floor when we have one of the votes, and I would urge the members here and all other members whose staff is here to please cooperate. As you know, we are trying to move nomina-

tions. These are non-controversial nominations, and so if we could move them quickly, that would be of great help.

With that, we are recessed.

[Whereupon, at 10:06 a.m., the committee recessed, subject to the call of the chair.]

The committee reconvened, at 4:05 p.m., July 24, 2013, in Room S–217, United States Capitol Building, Hon. Charles E. Schumer, chairman of the committee, presiding.

Present: Senators Schumer, Roberts, Durbin, Murray, Chambliss, Pryor, Tom Udall, Warner, Leahy, Klobuchar, and King

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Abbie Sorrendino, Legislative Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Rachel Creviston, Republican Professional Staff, and Adam Topper, Staff Assistant.

Chairman SCHUMER. We now have a quorum of 10 Members to continue our markup.

Is there any further debate on the nomination of Davita Vance-Cooks to be the public printer?

The question is on reporting the nomination favorably to the Senate. Unless there is a request for a roll call vote, this will be a voice vote.

Chairman SCHUMER. All in favor, say aye.

[A chorus of ayes.]

All opposed, say nay.

Chairman SCHUMER. The ayes have it. The nomination is ordered favorably reported to the Senate with the recommendation that the nominee be confirmed.

The second item is S. 375. Unless there is a request for a roll call vote, this will be a voice vote. Is there any further debate on S.375, a bill to require Senate candidates to file their campaign reports directly with the Federal Election Commission in electronic format, rather than on paper with the Secretary of the Senate?

The question is on reporting S. 375 favorably to the Senate.

Chairman SCHUMER. All in favor, say aye.

[A chorus of ayes.]

All opposed, say nay.

The Ayes have it. S. 375 is ordered reported to the Senate.

I want to thank everyone for coming. The meeting is adjourned.

[Whereupon, at 4:14 p.m., the committee adjourned.]

BUSINESS MEETING—TO CONSIDER THE NOMINATIONS OF ANN M. RAVEL AND LEE E. GOODMAN TO BE MEMBERS OF THE FEDERAL ELECTION COMMISSION AND S. RES. 229

WEDNESDAY, SEPTEMBER 17, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met pursuant to notice, at 11:01 a.m., in room S–219, United States Capitol, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Murray, Klobuchar, King, Roberts, Cochran, Chambliss, Alexander, Shelby, Blunt.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Abbie Sorrendino, Legislative Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Republican Communications Director; Rachel Creviston, Republican Professional Staff, and Adam Topper, Staff Assistant.

Chairman SCHUMER. We now have a quorum of 10 Members to continue our markup. We will consider the two FEC nominations individually, followed by consideration of two resolutions related to committee funding.

Unless anyone objects, my statement regarding the markup of the two FEC nominees will be included in the Committee record. [So ordered.]

Is there any further debate on the nominations of Lee Goodman or Ann Ravel to be Members of the Federal Election Commission?

The question is on reporting the nominations favorably to the Senate. Unless there is a request for a roll call vote, this will be a voice vote.

First up for consideration is Mr. Lee Goodman.

All in favor, say aye.

[A chorus of ayes.]

All opposed, say nay.

The ayes have it. The nomination of Mr. Lee Goodman is ordered favorably reported to the Senate with the recommendation that the nominee be confirmed.

Next up for consideration is Ms. Ann Ravel.

All in favor, say aye.

[A chorus of ayes.]

All opposed, say nay.

The Ayes have it. The resolution is ordered reported to the Senate.

The final item for consideration is an original resolution authorizing expenditures by the Committee on Rules and Administration for the remainder of the 113th Congress.

For Fiscal Year 2014, the amount is not to exceed $2,334,743, and the same amount is pro-rated for the first five months of Fiscal Year 2015.This is the same level as the current expenditure guidance.

Is there any further debate on the resolution authorizing expenditures by the Committee on Rules and Administration for the remainder of the 113th Congress?

The question is on reporting the resolution favorably to the Senate. Unless there is a request for a roll call vote, this will be a voice vote.

All in favor, say aye.

[A chorus of ayes.]

All opposed, say nay.

The Ayes have it. The resolution is ordered reported to the Senate.

I want to thank everyone for coming. Before I adjourn, I am going to ask our Ranking Member, Senator Roberts, whether he wishes to make any remarks.

Thank you. The meeting is adjourned.

[Whereupon, at 11:09 a.m., the committee adjourned.]

BUSINESS MEETING—TO CONSIDER S. RES. 253, AN ORIGINAL RESOLUTION AUTHORIZING THE EXPENDITURES OF SENATE COMMITTEES

TUESDAY, SEPTEMBER 24, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senator Schumer.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Abbie Sorrendino, Professional Staff; Lynden Armstrong, Chief Clerk; Adam Topper, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Communications Director; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. All right, the Committee will come to order.

We do not have a quorum of ten members present. We cannot proceed to vote on the item, the Omnibus Committee Funding Resolution, on the announced agenda for this business meeting.

Since a quorum is not present, the Committee will recess, subject to the call of the Chair, take up this matter when we can obtain a quorum.

I intend to convene another meeting, most likely immediately after the 11:45 judge vote on the Senate floor.

The Committee stands in recess, subject to the call of the Chair.

[Whereupon, at 10:05 a.m., the Committee was recessed.]

The committee reconvened, at 11:55 a.m., September 24, 2013, in Room S–219, United States Capitol Building, Hon. Charles E. Schumer, chairman of the committee, presiding.

Present: Senators Schumer, Feinstein, Durbin, Murray, Pryor, Leahy, Klobuchar, King, Roberts, Cochran, and Alexander.

Chairman SCHUMER. We have a quorum of ten members. Is there any further debate on the resolution authorizing the reporting of committee funding resolutions for the period October 1, 2013, through February 28, 2015?

Chairman SCHUMER. The question is on reporting the resolution favorably to the Senate. Unless there is a request for a roll call vote, this will be a voice vote. Is there a second?

Senator ROBERTS. Second.

Chairman SCHUMER. All in favor say "aye."

[A chorus of "ayes".]

Chairman SCHUMER. All opposed?

[No response.]

Chairman SCHUMER. The ayes have it. The resolution is ordered reported to the Senate.

[Whereupon, at 12:05 p.m., the Committee was adjourned.]

HEARING—NOMINATIONS OF THOMAS HICKS AND MYRNA PÉREZ TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION

WEDNESDAY, DECEMBER 11, 2013

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:00 a.m., in Room SR–301, Russell Senate Office Building, Hon. Angus King, presiding.

Present: Senators King and Roberts.

Staff Present: Jean Bordewich, Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Abbie Sorrendino, Professional Staff; Phillip Rumsey, Staff Assistant; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF ACTING CHAIRMAN KING

Senator KING. The Rules Committee will please come to order. Good morning.

I would like to ask the witnesses to be at the table, which I see that they are, and on today's agenda is the consideration of the nominations of Mr. Thomas Hicks and Ms. Myrna Pérez, to be members of the Election Assistance Commission.

As we now have at least two members present, I will proceed to swear in the nominees. I know that members have other places to go, and I want to swear in our witnesses promptly. After the swearing in, we will move to opening remarks from the committee members.

So, if our witnesses could stand and raise your right hand. Do you swear that the testimony you are to provide is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HICKS. I do.

Ms. PÉREZ. I do.

Senator KING. Thank you. Please be seated.

Mr. Hicks and Ms. Pérez, I would like to welcome you both here today and congratulate you on your nomination to be members of the Election Assistance Commission.

I would also like to welcome both of your families who have joined you here today. Mr. Hicks, I understand that you are accompanied by your parents, Annie and Bennie Hicks, along with your daughters, Lizzie and Meg, and your son, Eddie Hicks, and if you would like, could your family please rise and be acknowledged. Thank you. Glad to have you here with us today. We appreciate your coming, especially Lizzie and Meg. Glad to have you here.

And, Ms. Pérez, I understand you are accompanied by your husband, Mark Muntzel, and your son, Diego, and if you could stand, please. Welcome to both of you.

Ms. PÉREZ. They are actually still parking right now.

Senator KING. Oh, they are parking. Well, they will be ready here to join us.

Elections are at the heart of our democratic system. Citizens need to be confident that elections are being conducted in a free and fair manner.

This Commission was established by the Help America Vote Act of 2002. The EAC was created to be an independent, bipartisan commission charged with a number of responsibilities, including developing guidelines to meet HAVA requirements, adopting voluntary voting system guidelines, and serving, importantly, as a national clearinghouse of information on election administration.

The EAC has four Commissioner positions, two allocated to the Democrats and two for Republicans, with candidates recommended by Congress—to Congress to the President. The EAC has not had a quorum since late 2010 and has had no Commissioners since December of 2011. Without a quorum, the EAC has not been able to fill the positions of Executive Director and General Counsel. The Standards Board and the Board of Advisors to the EAC, composed of State and local election officials and members of the broader elections community, have been unable to convene and do their work.

While election administration in the United States is decentralized, the primary responsibility for conducting elections falls on State and local election officials. But we also must ensure that the Federal Government is able to fulfill its election-related responsibilities. While most of the original funds designated by HAVA to upgrade elections systems in the States have been distributed, many of the important functions of the EAC remain.

The Election Administration and Voting Survey, which is compiled from data supplied from every election jurisdiction, provides the only comprehensive picture of election administration across the country and has won widespread acclaim from election officials, scholars, and other experts as a valuable source of information.

Additionally, all States have access to the state-of-the-art EAC testing and certification program. The law in some States requires the use of Federally certified voting systems. Elsewhere, State and local officials may not have the resources to detect voting system problems on their own, and the EAC can examine whether they are getting fair prices, quality equipment, and good service from the vendors they hire. This program will become increasingly important as existing voting systems become obsolete and States must buy new ones in the near future.

The EAC's work to broaden access for voters with disabilities and language minorities has saved money for local jurisdictions that may otherwise be required to pay for this work themselves.

And, finally, and, I believe, importantly, the clearinghouse function of the agency can help highlight innovation at the State and local levels. As a former Governor, I often observed the lack of information that flows between the States. I used to say that Jeffer-

son characterized the States as the laboratories of democracy, but nobody reads the lab reports.

[Laughter.]

Senator KING. There is very little communication, and I think one important function this Commission can provide is as a clearinghouse of best practices from across the country.

As local budgets are increasingly strained, the importance of identifying best practices and sharing information becomes even more important because it helps local and State election officials do their jobs as cost effectively as possible.

I am pleased that we have two well-qualified candidates that have been nominated and are testifying before the committee today. I understand that there are questions about the continued efficacy of the Commission itself and I suspect that we will have statements raising those questions, but today, we want to focus on these two nominees. But I welcome the comments of my colleague, Senator Roberts, and would call upon him for opening remarks.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. I want to thank the Acting Chairman.

I want to make it very clear that none of my comments is a reflection of the nominees' experience and commitment and ability and desire to serve. Nevertheless, it seems like we have been here before. It sounds like a song.

[Laughter.]

Senator ROBERTS. But, at any rate, this is the second time that our witnesses have been before the committee as nominees for this Commission. We previously had a confirmation hearing for the nominees in June of 2011. Welcome back. I do not know what to call this. I think maybe "nomination purgatory" might be appropriate.

One significant difference today is the absence of a Republican nominee. As the Acting Chairman has pointed out, the Election Assistance Commission was established as a bipartisan commission, intended to be evenly divided with two Republicans and two Democrats acting as Commissioners.

As my colleague, Senator Alexander, ably demonstrated at the hearing over two years ago, the Election Assistance Commission has fulfilled its purpose and should be eliminated. As I say again, no reflection on the nominees. At that hearing, while Republicans on this committee called for hearings to examine the need for this Commission, something that you might think would be pretty basic, those hearings have never happened, Mr. Chairman. Instead, we are back here over two years later with the very same nominees. I think we owe you an apology.

This committee has never had an oversight hearing on the EAC, never. Despite its now expired authorization, we have never examined the real continuing need for this Commission or considered whether any remaining responsibilities could be taken on by other agencies, or as the Chairman has ably pointed out, the State laboratories, with regard to elections. We cannot apparently be bothered to perform these basic oversight obligations.

Nominations to commissions like this have normally been paired with a Republican nominee joined to a Democrat. Because Repub-

licans have called for the elimination of the agency, we simply have not put forward any new nominees. Now, in light of our new rules, 51–50, the majority can, if they choose, do whatever they would like to do and move these nominations with no minority support and no Republican pair, something I hope does not happen. That presents a problem for us in that it puts us in the position of having to make appointments to a commission that we do not think is necessary or otherwise simply allow the majority to make its own appointments and thereby control the Commission. While I do not think we need this Commission, I do believe that if it is going to exist, it must be balanced.

And the curious thing about the nominations before us today is that Republicans do not seem to be the only ones who have questioned the need for this Commission. Democrats do not seem to have much regard for the EAC, either, though that lack of regard has been expressed in deed rather than word. These nominations had been made by the President of the United States, yet when the President wanted an examination of the problems in the 2012 election, did he turn to the EAC? No, he did not. In fact, in March of this year, he created a new commission by Executive Order, the Presidential Commission on Election Administration.

Compare the two missions. The Acting Chairman correctly stated the mission of the EAC, but according to the President's Commission on Election Administration, the Commission , "shall identify best practices and otherwise make recommendations to promote the efficient administration of elections in order to ensure that all eligible voters have the opportunity to cast their ballots without undue delay and to improve the experience of voters facing other obstacles in casting their ballots, such as members of the military, overseas voters, voters with disabilities, and voters with limited English proficiency." Wait a minute. Is that not what the EAC is for? Do we need two commissions for this? If President Obama does not think the EAC can do its job, why is he making new nominations to it?

Even my majority colleagues here on this committee do not seem to have much regard for the EAC, and fortunately, last week, I received a letter from the Government Accountability Office advising me that they were conducting a study into the impact of voter ID requirements, alleged voter suppression in Kansas and Tennessee. The study was initiated at the request of some majority members of this committee, including its Chairman.

So, think about that for a minute. We are here today because the majority says we need to preserve the EAC, but when majority members of this committee want a study done on a voting issue, they do not think the EAC apparently is up to the task. If they think the GAO is better able to do these studies, why do we need the EAC? Or, if the EAC can do the job, why are we writing the letter to the GAO?

This is a sad state of affairs. It is embarrassing to this member. I think it is embarrassing to the Acting Chairman, hopefully, maybe, or at least of interest. And the same for the nominees.

If the majority sees the light, maybe we can finally both eliminate this Commission and save the taxpayers some money, or if the majority persists in pursuing these nominees through, we may be

back here for another confirmation hearing to ensure the Commission maintains some measure of balance. Only time will tell. I urge the Acting Chairman to talk with his leadership. I have already talked with ours, and only time will tell, Mr. Chairman.

Again, I apologize to the nominees.

Senator KING. Thank you, Senator Roberts. I understand the concerns that you raise and I think that is a—I think the issues of the efficacy and continued necessity of the Commission are ones that the committee should discuss, and I certainly will use my best efforts to see that occur. But, as you point out, we have the nominees before us today, and perhaps part of their testimony can be helpful to us in understanding the role of this Commission and how it can be effective and important in improving election administration.

Chairman Schumer is unable to attend today's hearing. He asked that I convey his congratulations and best wishes to both of you, and without objection, I ask that his statement be submitted for the record. Hearing none, Chairman Schumer's statement will appear in the record.

[The prepared statement of Chairman Schumer was submitted for the record:]

Senator KING. We will now hear from our nominees, first, Mr. Hicks, and then Ms. Pérez. Your entire statements will be entered into the record, so please limit your remarks to five minutes and then we will have a chance to have some discussion.

Mr. Hicks, please proceed.

TESTIMONY OF THOMAS HICKS, OF VIRGINIA, NOMINATED TO BE A MEMBER OF THE ELECTION ASSISTANCE COMMISSION FOR A TERM EXPIRING DECEMBER 12, 2017

Mr. HICKS. Good morning, Chairman King, Ranking Member Roberts. Thank you for holding this hearing on my nomination to serve on the United States Election Assistance Commission. I am truly honored to be a nominee to serve on the Commission. I look forward to the opportunity to testify on my qualifications and interest in becoming an EAC Commissioner.

I thank House Democratic Leader Nancy Pelosi for resubmitting my name to the President and for the President for submitting my nomination to the Senate. I thank members of the Committee on House Administration for supporting my nomination, including Ranking Member Bob Brady and past Ranking Members Steny Hoyer and John Larson. I thank other members from both sides of the aisle and chambers, a list that is too long to enumerate, who have not only supported and encouraged my nomination, but helped me throughout my career in Washington.

My interest in elections started as a child, when my mother brought my brother and me into a voting booth and pulled the lever. She gently reminded us that when she was growing up in Southern Georgia, it was a lot harder for minorities to vote than on that day when she voted for President Jimmy Carter. I was able to share the story with President Carter a few years ago. The ability to help facilitate access to our voting systems, the cornerstone of our participatory system of government, for all eligible Americans continues to be a strong motivating factor in my career.

Over the last ten-plus years, I have worked at the Committee on House Administration, the equivalent committee in the House to Senate Rules and Administration. I interviewed for the job the day after my oldest daughter was born. My primary responsibility is advising and providing guidance to the committee and members and caucus on election issues. Prior to that, I worked at Common Cause, a nonpartisan, nonprofit advocacy organization that empowers citizens to make their voices heard in the political process and to hold the elected leaders accountable to the public interest. I enjoy working with State and local election officials, civil rights organizations, and other stakeholders to improve the voting process.

I believe in the Election Assistance Commission. I believe in the primary mission of the agency, ensuring all eligible Americans have the information needed to register to vote, cast a ballot, and have that ballot counted. Whether those Americans are voting in New Hampshire, Maine, California, Georgia, or Afghanistan, they should have the same confidence that their ballots are being counted. I believe our elections must be administered in a manner that ensures accuracy while allowing for openness and transparency. I also believe the process should ensure malicious actions are prevented from influencing the final outcome of our elections. This is a challenge that must be accomplished with small budgets and without the option of failure. Elections do not allow for do-overs. Above all else, we must always uphold the public's trust and ensure confidence in the process.

Through my present job of Senior Elections Counsel, I have communicated with Americans in every State about voting experiences. I have worked with State and local election officials across America to address critical election concerns. I have had a unique opportunity to work and speak with Americans overseas concerning the obstacles they face in registering to vote and casting their ballots. Should I be confirmed, I will use this knowledge and experience in my role as an EAC Commissioner.

I believe that, regardless of partisan ideology and political affiliation, we all want the same thing, fair, accurate elections where we are confident of the outcome and all eligible Americans, domestic and overseas, are able to participate in our process, the best in the world. Should I be confirmed, I hope to use the lessons learned in life and my experience to continue working to achieve this goal.

Lastly, I would like to thank my mother and father, both now retired and enjoying the love and admiration of their grandchildren, and I would also like to acknowledge, again, my three children, Elizabeth, 10, Megan, 7, and Eddie, 5. I am most gratified that their experiences with voting and participating in our electoral system will be far different from that of their grandmother.

Thank you, and I will be happy to answer any and all questions.

[The prepared statement of Mr. Hicks submitted for the record:]

Senator KING. Thank you, Mr. Hicks.

Ms. Pérez, your statement, please.

TESTIMONY OF MYRNA PÉREZ, OF TEXAS, NOMINATED TO BE A MEMBER OF THE ELECTION ASSISTANCE COMMISSION FOR A TERM EXPIRING DECEMBER 12, 2015

Ms. PÉREZ. Thank you, Senator King. Thank you, Senator Roberts. Thank you for holding this hearing and giving me the opportunity to discuss with you my qualifications to serve on the U.S. Election Assistance Commission. I care deeply about the fair, impartial, and accurate administration of elections and I would be honored at the chance to serve, should the Senate choose to confirm my nomination.

I have been extremely fortunate in my life and career. I am a native Texan, a resident of New Jersey, and a lawyer working in New York City. My parents were born in Mexico and moved to the United States as children and grew up with limited means. They raised me and my brother to be proud Americans in an environment which respected public service. My father served in the U.S. Air Force and worked many years for county government. My mother works for the U.S. Postal Service. And they made possible my ability to attend Yale College, Harvard University's School of Government, my ability to attend law school at Columbia, and for my brother to pursue a career in law enforcement.

I have been given a great many gifts and I believe that responsible stewardship of those gifts means I must explore opportunities to use my good fortune in service of others, whether it be by correcting Bible study lessons for people in prison, or serving breakfasts to those in my neighborhood who are food insecure, or in a variety of many other ways through my professional experiences in the private, nonprofit, and government sector.

It is with great gratitude that I experience your consideration for the opportunity to serve my country and the democratic principles for which it stands.

Elections are the cornerstone of our democracy and all Americans have an interest in their efficient and secure administration. Administering elections, however, is a difficult task. State and Federal election laws governing election administration are complicated. Resources for election administration are scarce. The technology is always changing. And it can be challenging to inoculate the administration of elections from the politics of elections.

The EAC's mission, in my view, is to provide resources and reliable information to election administrators and voters on issues of election administration. I believe I can further that mission because I understand election administration from a variety of perspectives.

My interest in voting and election administration started the summer in college that I worked for my county's election administration office, processing registration forms and identifying potential polling locations. Professionally, as a Deputy Director of the Democracy Program and the Director of the Voting Rights and Election Project at the nonpartisan Brennan Center for Justice at NYU's School of Law, I represent voters, talk frequently with election administrators, study Federal and State election laws, and research election practices.

Congress gave the EAC the duties of conducting research, collecting and disseminating information, certifying voting systems,

and maintaining the Federal form. I have certain skills which I think will be very useful to the EAC in performing these duties, if I am confirmed.

First, I have substantial experience in researching and collecting and disseminating information. I was a Policy Analyst for the GAO and I had to perform qualitative and quantitative research on issues requested by Congress. At the Brennan Center, I conduct research on election administration and I have to pay close attention to methodologies and make information accessible to a variety of audiences.

I also have a deep subject matter knowledge on issues related to election administration. I have spent the better part of the past seven years working on issues related to election administration, from list maintenance efforts to statewide voter registration databases. And while my focus has been on the experiences of voters, one cannot effectively serve voters without understanding the realities faced by election administrators.

Finally, I have strong strategic and public management skills. In my personal and professional life, I have worked for organizations where resources are limited, the organizational purpose has been defined, and the operational environment has been key to mission achievement, very much like the EAC.

It would be premature for me to commit to any particular course of action without being more familiar with the internal workings of the EAC and talking with State and local election administrators who are the end users of the EAC services, but I can tell you that, if confirmed, my approach to my role and duties would reflect the following.

A clear understanding of the role of the EAC. State and Federal laws govern election administration, not the EAC. It is my view that the EAC will function best if it focuses on the nuts and bolts of election administration and is not distracted by questions that are best suited for the legislatures and the courts.

A desire to work closely with election administrators. I have a great deal of respect for the work that they do, and part of my job involves learning from them on almost a daily basis.

A responsible attitude toward public funds. These are tough fiscal times and I will expect the EAC to use its resources effectively and thoughtfully. I will work with others to make sure that its administration is top notch.

And, finally, a respect for data. My work on election administration is guided by research about what works and what does not. I would ensure that any advice and assistance provided to election administrators be thoughtful and well researched.

A significant part of my career has been dedicated to protecting and preserving the right to vote and improving our election system. As a voter, as a person who has represented voters, I know that election administration is critically important to our democracy. The EAC, if operating well, is a valuable resource to election administrators because of its nationwide scope, targeted focus, and expressly delineated responsibilities.

If confirmed, I would look forward to working collaboratively with the members of this committee to achieve the goal of an efficient and effective EAC.

Thank you for this opportunity to appear before you today, and I am very pleased to respond to questions.

[The prepared statement of Ms. Pérez was submitted for the record:]

Senator KING. Each of us will have a round of questions.

This is an unusual situation in that—I cannot speak for my colleague, but for myself, each of you is superbly qualified by a variety of different backgrounds and, I think, complement one another. The issue, really, is the effectiveness and the necessity for the Commission. So, that is what I want to address my questions to.

I would like to ask both of you, let us change the focus of this hearing from you to the Commission, and the basic question before us that I think is going to be discussed on an ongoing basis is why we need this Commission and what role do you think that it plays in our democratic system. Mr. Hicks, do you want to tackle that.

Mr. HICKS. Thank you, Chairman King. The Commission is still needed. We have elections every two years, and every two years, there are similar problems that occur. Ranking Member Roberts talked a little bit about the President having a Commission on Elections, as well, but the truth of that is that the commission only exists for six months. They are tasked with a very narrow scope of issues that they have to face, mostly long lines.

The EAC delves into all sorts of aspects in the administration of elections. They are the only place in the Federal Government that certifies voting equipment. They are the only place that is the clearinghouse for a lot of the information that State and local election officials depend upon in their smaller budgets to get out to their constituents and make their elections run more effectively.

The agency itself, like all Federal agencies, has certain problems that I think need to be addressed, and if I am confirmed, I hope to address those problems. One of the added features that I have had the opportunity to work on in my role as Senior Elections Counsel and observed from afar, because I have had to recuse myself from a lot of these things, is the fact that our committee, the Democrats on the committee offered a bill to reform the EAC to address a lot of the problems that Senator Roberts addressed and a lot of the other members have talked about. So, I think that looking at reforming the agency in the way that makes it more effective to address the needs that the American people have, because we are not running elections as we were ten years ago and those problems that were occurring in Florida.

There are people who still support the agency, a lot of State and local election officials, a lot of Democrats, and some Republicans, as well, and I hope to be confirmed so that we can move the agency forward.

Senator KING. Ms. Pérez, would you like to make a statement on—not on your own qualifications, which are impressive, but on the importance of the agency as you have studied and reviewed it.

Ms. PÉREZ. Certainly, Senator King. Our elections are a source of national pride and international inspiration, and we have our election administrators, thousands of them at the State and local level across the country to thank. And, currently, they are underresourced. In these tight fiscal times, their budgets are increasingly being cut and yet elections are dynamic. It is constantly changing.

The technology is changing. The laws that they operate under are changing. They have staff turnover. And they simply do not have the resources to be able to perform all of their incredibly important functions.

A national organization is incredibly useful, if it is operating well, to the achievement of that task. Its national scope allows it to have a birdseye view and connect far flung offices such that best practices can be shared, ideas for innovation can be shared, people can learn what it is that they do not know and the way some of their partners in other States are handling some of the important matters of the day.

Beyond that, there are economies of scale and economies of scope that accrue when you have one national organization doing incredibly resource-intensive activities, and I am thinking primarily of voting system certification. It should not be the case that we need to reinvent the wheel 50 times and have each State come up with its own system of testing and certification, just for something as foundational as making sure that our voting systems are secure and reliable.

The EAC has the opportunity to be able to provide important resources for State and local election officials at a time where they need those resources and when the American public is demanding good customer service in the realm of election administration.

Senator KING. As I understand both of your answers, the agency is not regulatory in the sense of issuing regulations that are binding on States or localities. It is more information providing and then the function that you just mentioned, of being the kind of Underwriter Laboratories of voting machines. Is that accurate, that it is not a regulatory agency?

Ms. PÉREZ. Certainly, the enabling legislation sets forth a number of responsibilities, including conducting studies, serving as a clearinghouse, maintaining the Federal form, and certifying voting systems. The EAC does not set policy, but it does provide resources to election administrators who have a very difficult task that is constantly changing in a dynamic environment.

Senator KING. Mr. Hicks.

Mr. HICKS. The only piece I would add is that the EAC does have a small piece of regulatory authority with the National Voter Registration Act, and that is it. All the other pieces are just basically providing guidance and resources to the States.

Senator KING. Senator Roberts.

Senator ROBERTS. Well, thank you both for your statements and for coming.

Mr. Chairman, the EAC has been in operation since 2002, I think. The primary purpose, as I recall, was to distribute grants to States so they can better serve their people with regard to voter participation and to eliminate voter fraud and the sanctity of the ballot. But those funds are not forthcoming anymore and those grants have been distributed.

Again, I remember taking part in the Motor Voter legislation. Al Swift, a Democrat friend of mine from Washington, and myself, as the Ranking Member then in the House, we had considerable debate.

I just mention this to—I wish we could have a real hearing with regard to the need for the EAC. I am not trying to denigrate it, I am just saying we have never done that.

Let me just ask the question of both of you: Do you agree the EAC must operate in a bipartisan fashion? Obviously, the answer to that is yes. We can get past that pretty quickly, probably. But, how would you work toward that goal if the leadership on both sides can come to some kind of an agreement as to whether we go forward or whether we have a hearing and get you in a position—I know you have been at work, but in terms of being truly effective with the mission of the EAC as envisioned. Again, I have to apologize to you, but how would you do that? How would you work toward that goal?

Mr. Hicks, do you want to try that one on?

Mr. HICKS. Thank you, sir. One of the unique opportunities that I have had in my life is when I worked at Common Cause and working on the Help America Vote Act. That piece of legislation was passed—it was the quickest civil rights piece of legislation ever passed in history, to my knowledge. And the way that it passed, it did not pass with just Republican support. It did not pass with just Democratic support. It passed with House support. It passed with Senate support. It passed 98 to 2 in the Senate. And we brought everyone into the room, where we had civil rights organizations, we had State and local election officials, we had voter integrity groups come in, and we had good government groups come in. The only way that it was able to pass was because everyone was in the room and everyone was able to talk and get their information out and get those issues on the board.

And I think that in order for this to truly work, we have to have bipartisan support and we have to have Democrats, we have to have Republicans, we have to have Independents. And I think that is why I have not given up my nomination. I have been in a holding pattern for three-and-a-half years, and I believe in the agency. I believe that it can work effectively. And I believe that for me just to give up would be me just turning over and saying, I quit, which I cannot do. I believe that the agency can work, but it has to work in a bipartisan manner.

Senator ROBERTS. I appreciate that very much. Ms. Pérez.

Ms. PÉREZ. I think there is no dispute among any American that we need elections to be fair, impartial, accurate, and secure, and I believe that there is significant common ground that can be achieved by focusing on the core mission of the EAC, which is to provide resources and information to the local election administrators who are trying to do an incredibly important task and are under-resourced in doing so.

I think the best way for the EAC to function is, again, to focus on the nuts and bolts of election administration, to look for best practices on how you find polling locations, how do you train poll workers, how do you send out election notices, how do you certify election results. And I do not think there is significant disagreement among people of any political background that these tasks are vitally important.

The way that I would proceed is the way that I proceed in my practice, which is with a collaborative spirit, an open mind, and ap-

proaching information with respect to data and evidence, talking to all of the stakeholders, and trying to achieve and celebrate the common ground when it is found.

Senator ROBERTS. I appreciate that, and thank you for your comments.

Let me just point out the EAC has been forced to make payments to victims of hiring discrimination in the past, in one case, the discrimination against a candidate on the basis of party affiliation, and another due to military service status. If confirmed, how would you handle this kind of situation so we would not see a reoccurrence of these kind of episodes? We will do it in reverse. Ms. Pérez.

Ms. PÉREZ. I think one important way is to be very clear about State and Federal laws and best practices with respect to hiring. I think it is incredibly important to focus on the qualifications and to focus on the mission. Personal attributes and backgrounds, those kinds of things, are not relevant to the tasks that the EAC needs to perform.

I was not there when that happened and I do not know all of the details, but I can assure you that I have a strong interest in making sure that the open positions are filled by the highest-caliber people and to ensure that the management of the EAC is top notch and that the public feels very confident that its taxpayer dollars are being well spent and in an appropriate and fair manner.

Senator ROBERTS. Mr. Hicks.

Mr. HICKS. I believe that it is going to be a challenge to ensure that we have the best-qualified candidates for any position at the EAC. The agency has taken so many hits over the years in terms of financial and other problems that they have faced. I think that with any sort of candidate that comes before the Commission, they should be evaluated under the law and the best way that HR's provisions establish.

Senator ROBERTS. I appreciate that.

Let me just say that both of you, I think, have indicated that the EAC should have an advisory mission as opposed to more of a regulatory agency. Am I correct in assuming that is the case? Ms. Pérez.

Ms. PÉREZ. Congress has set forth the EAC's duties, and its primary duties are to provide resources and information. "Advisory" is even a different word than I would use. It serves as a clearinghouse function. It brings people together. It allows election administrators to hear how other people are handling similar problems in their States. It performs studies that are designed to assist election administrators with the jobs that they do.

It does have a couple of functions with respect to certifying voting systems and the maintenance of the Federal form, but the primary responsibility, in my mind, of the EAC is to provide accurate, cutting edge, and needed data and information that election administrators want in order to be able to provide good customer service to their voters.

Senator ROBERTS. And with that information, they would make their own decisions, hopefully. Mr. Hicks.

Mr. HICKS. I believe that the agency's functions are spelled out in HAVA correctly, and I think that unless Congress expands

those, that we should follow the only roles that the Commission has set out in the law.

Senator ROBERTS. I appreciate that. Mr. Chairman, just on a personal note, since the GAO apparently will be making some advisory comments, hopefully, with the State of Tennessee and Kansas, and I think perhaps Indiana, maybe Arizona, this issue is extremely important to me. My great-grandfathers came to Kansas before it was a State. One established the second-oldest newspaper and the other about the fourth. They did not particularly care for each other, and they wrote editorials that would make both of us blush with the adjectives and adverbs used back in the day. We think it is tough today. You should see those.

But the one thing that they were committed to is that they came as abolitionists and they fought through bleeding Kansas. Both newspapers were threatened by Quantrell when he rode in from Missouri.

I mention this personal history only that we have a commitment in Kansas with regard to ballot sanctity and with regard to voter access that, I think, represents a very fine effort to try to follow through with that historical precedence. So, for me personally, I think I want to indicate how strongly I feel about this.

Thank you for appearing. Again, I wish we had better direction for you. Both of us will work on that, so I truly appreciate it. Thank you so much.

Senator KING. I want to also thank you, and I think you have presented yourself very well today and been helpful to us, and now it is our job to find a way to move forward.

It is my understanding that a quorum requires more than just two members, is that correct? So, you cannot act—if the two of you are confirmed, you could still not act as the Commission, lacking a Republican—actually, two Republican members, is that correct?

Ms. PÉREZ. Yes.

Mr. HICKS. [Shaking head.]

Senator KING. Okay. Well, we have some work to do ourselves, but I want to sincerely express my appreciation on behalf of myself and Senator Roberts to your commitment and willingness to step forward in these somewhat difficult circumstances.

I also notice your very young man has joined us and I want to welcome him to probably his first hearing in the United States Senate.

Again, I want to thank both of you and we are going to be meeting as a committee to talk about some of these issues to see if we cannot resolve the differences between the two parties and get this Commission into a place where it can perform the function that the Congress has assigned it and protect this basic important right of all Americans to vote.

Before we close, I have one other matter. The Chairman and the Ranking Member have received a report from committee staff regarding a petition contesting the special election that took place in New Jersey on October 16, 2013. This petition was referred to the committee on October 28, 2013. Committee staff for both the majority and the minority reviewed the petition, found it to be without merit, and concluded that further consideration by the committee

is not warranted. Without objection, the committee adopts the staff recommendation and will take no further action on the petition.

Thank you, again, to both of you. Thank you for your families.

The record will remain open for five business days for additional statements and comments and post-hearing questions submitted in writing for the nominees to answer.

Again, thank you very much for joining us here this morning, and since there is no further business to come before the committee, the committee meeting this morning is adjourned.

[Whereupon, at 10:44 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Committee on Rules and Administration
Statement by Mr. Thomas Hicks, Nominee for Commissioner
Election Assistance Commission
Wednesday December 11, 2013

Good Morning Chairman Schumer, Ranking Member Roberts and Members of the committee. Thank you for holding this hearing on my nomination to serve on the United States Election Assistance Commission. I am truly honored to be a nominee to serve on the commission.

I look forward to the opportunity to testify on my qualifications and interest in becoming an EAC Commissioner. I thank House Democratic Leader Nancy Pelosi for resubmitting my name to the President and for the President for submitting my nomination to the Senate. I thank members of the Committee on House Administration for supporting my nomination, including current ranking member Bob Brady and past ranking members Steny Hoyer and John Larson. I also thank other members from both sides of the aisle and both chambers, a list that is too long to enumerate, who have not only supported and encouraged my nomination, but helped me throughout my career in Washington.

My interest in elections started as a child when my mother brought my brother and me into the voting booth and pulled the lever. She gently reminded us that when she was growing up in southern Georgia, it was a lot harder for minorities to vote than on that day when she voted for President Jimmy Carter. I was able to share this story with President Carter a few years ago. The ability to help facilitate access to our voting system – the cornerstone of our participatory system of government – for all eligible Americans continues to be a strong motivating factor in my career.

Over the last 10 plus years, I have worked at the Committee on House Administration, the equivalent committee in the House to Senate Rules and Administration. I interviewed for the job the day after my oldest daughter was born. My primary responsibility is advising and providing guidance to the committee members and caucus, on elections issues. Prior to that, I worked at Common Cause, a nonpartisan, nonprofit advocacy organization that empowers citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. I enjoyed working with state and local election officials, civil rights organizations and all other stakeholders to improve the voting process.

I believe in the Election Assistance Commission. I believe in the primary mission of the agency - ensuring all eligible Americans have the information needed to register to vote, cast a ballot and have that balloted counted. Whether those Americans are voting in New Hampshire, California, Georgia or Afghanistan, they should have the same confidence that their ballots are

being counted.

I believe our elections must be administered in a manner that ensures accuracy while allowing for openness and transparency. I also believe the process should ensure malicious actions are prevented from influencing the final outcome of our elections.

This is a challenge that must be accomplished with smaller budgets and without the option of failure. Elections don't allow for do overs. Above all else, we must always uphold the public's trust and ensure confidence in the process.

Through my present job as senior elections counsel, I have communicated with Americans in every state about their voting experiences. I have worked with state and local election officials across America to address critical election concerns, I have had unique opportunities to work and speak with Americans overseas concerning the obstacles they face in registering to vote and casting their ballots. Should I be confirmed, I will use this knowledge and experience in my role as an EAC Commissioner.

I believe that, regardless of partisan ideology or political affiliation, we all want the same thing—fair, accurate elections, where we are confident of the outcome and all eligible Americans (domestic and overseas) are able to participate in our process, the best in the world. Should I be confirmed, I hope to use the lessons learned in life and my experiences to continue working to achieve this goal.

Lastly, I would like to thank my mother and father, both now retired and enjoying the love and admiration of their grandchildren. I would also like to acknowledge my three children, Elizabeth 10, Megan 7 and Edward 5. I am most gratified that their experiences with voting and participating in our election system will be far different from that of their grandmother.

Thank you and I will be happy to answer any questions.

BIOGRAPHY OF THOMAS HICKS

Thomas Hicks serves as the Democratic Senior Elections Counsel for the Committee on House Administration. In this role, he is responsible for issues relating to campaign finance, election reform, contested elections and oversight of both the Election Assistance Commission and Federal Election Commission. Mr. Hicks came to the committee from the government watchdog group Common Cause, where he served as a Senior Lobbyist and Policy Analyst.

Mr. Hicks currently is a nominee to the Election Assistance Commission. Prior to joining Common Cause, Mr. Hicks worked for nearly 8 years in the Clinton Administration as a Special Assistant and Legislative Assistant in the Office of Congressional Relations for the Office of Personnel Management.

Mr. Hicks, a native of Boston, Massachusetts, earned his Bachelor's Degree in Political Science from Clark University in Worcester, MA. He earned his law degree from the Catholic University of America - Columbus School of Law.

Written Statement of Myrna Pérez

Nominee for Member,

Election Assistance Commission

Before the

Committee on Rules and Administration

United States Senate

December 11, 2013

Chairman Schumer, Ranking Member Roberts, and distinguished members of the Committee:

Thank you for holding this hearing and giving me the opportunity to discuss with you my qualifications to serve on the Election Assistance Commission ("EAC"). I care deeply about the fair, impartial and accurate administration of elections, and I would be honored by the chance to serve, should the Senate choose to confirm my nomination.

I have been extremely fortunate in my life and career. I am a native Texan, a resident of New Jersey, and a lawyer working in New York City. My parents were born in Mexico, moved to the United States as children, and grew up with limited means. They raised me and my brother in an environment which respected public service — my father served in the Air Force and worked for county government, my mother works for the US Postal Service; and they made possible my ability to attend Yale College, Harvard's Kennedy School of Government, law school at Columbia, and for my brother to pursue a career in law enforcement. I have been given a great many gifts, and I believe responsible stewardship of those gifts means I must explore opportunities to use my good fortune in service of others, whether it be by correcting bible study lessons for persons in prison, or serving breakfast to those in my neighborhood who are food insecure, or in a variety of other ways through my professional experiences in the private, nonprofit, and government sector. It is with great gratitude that I experience your consideration for the opportunity to serve my country and the democratic principles for which it stands.

Experience

Elections are the cornerstone of our democracy, and all Americans have an interest in their efficient and secure administration. Administering elections, however, is a difficult task. State and federal election laws governing election administration are complicated, resources for election administration are scarce, the technology is always changing, and it can be challenging to inoculate the administration of elections from the politics of elections.

The EAC's mission, in my view, is to provide resources and reliable information to election administrators and voters on issues of election administration. I believe I can further that mission because I understand election administration from a variety of perspectives. My interest in voting and election administration started the summer in college that I worked for my county's election administrator processing registration forms and identifying potential polling locations. Professionally, as a Deputy Director of the Democracy Program, and the Director of the Voting Rights and Elections Project, at the non-partisan Brennan Center for Justice at NYU School of Law, I represent voters, talk frequently with election administrators, study federal and state election laws, and research election practices.

Congress gave the EAC the duties of conducting research, collecting and disseminating information, certifying voting systems, and maintaining the federal form. I have certain skills which I think, if confirmed, will be useful to the EAC in performing those duties.

Substantial Research Experience

First, I have substantial experience in researching and collecting and disseminating information. As a policy analyst for the Government Accountability Office, I had to perform qualitative and quantitative research on issues requested by Congress. At the Brennan Center, I conduct research about election administration. In both jobs, I have had to pay close attention to appropriate methodologies, talk to people on the frontlines, and make information accessible to a variety of audiences.

Deep Subject Matter Knowledge

Second, I have deep subject matter knowledge on issues related to election administration. I have spent the better part of the past seven years working on issues related to election administration — from list maintenance efforts to statewide voter registration databases. While my focus has been on the experiences of voters, one cannot effectively serve voters without understanding the realities faced by election administrators.

Strong Strategic and Public Management Skills

Finally, I have strong strategic and public management skills. In my personal and professional life, I have worked for organizations where resources are limited, the organizational purpose has been defined, and the operational environment has been key to mission achievement — very much like the EAC.

Approach

While it would be premature to commit to any particular course of action without being more familiar with the internal workings of the EAC, and talking with state and local election administrators, I can tell you that if confirmed, my approach to my role and duties would reflect the following:

A Clear Understanding of the Role of the EAC – State and federal laws govern election administration, not the EAC. Congress has set forth the EAC's responsibilities of assisting states and localities with their administration of elections by providing data and technical assistance, and those responsibilities are

static unless and until Congress decides to change them. The EAC will function best if it focuses on the nuts and bolts of election administration and is not distracted by those questions best suited for legislatures and the courts.

A Desire to Work Closely with Election Administrators – I have a great deal of respect for election administrators and the work that they do, and do not believe the EAC can function effectively without their input and perspectives. I am fortunate that my current job requires me to interact frequently with election administrators and I am glad that if confirmed, I can continue to have those conversations. I am interested in learning more about their research and information needs; and their ideas about what shared practices would be helpful.

Responsible Stewardship of Public Funds – These are tough fiscal times, which make it ever more critical that the EAC operates efficiently. I bring a personal frugalness to my own decision-making, and, if confirmed, I will expect the EAC to use its resources effectively and thoughtfully. If confirmed, I will work with others to ensure that the management of the Commission is top-notch, and that the concerns of the public and election officials are addressed. I want all stakeholders to be confident that the taxpayer dollars supporting the EAC is money well-spent.

A Respect for Data – My work on election administration is guided by research and evidence about what works and what does not. If confirmed as an EAC Commissioner, I would work to ensure that any advice and assistance provided to election administrators be thoughtful and well-researched.

Conclusion

A significant part of my career has been dedicated to protecting and preserving the right to vote and improving our election systems. As a voter, and as a person who has represented voters, I know that election administration is critically important to our democracy. The EAC, if operating well, is a valuable resource available to election administrators because of its nationwide scope, targeted focus, and expressly delineated responsibilities. I believe that my experience, skills, and approach make me well-equipped to help the EAC efficiently and effectively fulfill its congressional mandate. If confirmed, I would look forward to working collaboratively with the members of this Committee to achieve that goal. Thank you for this opportunity to be before you today and I would be pleased to respond to any questions you may have.

Biography of Myrna Pérez

Myrna Pérez is currently Director of the Voting Rights and Elections Project, and Deputy Director of the Democracy Program at the Brennan Center for Justice at NYU School of Law, where she has worked and published on a variety of voting rights issues. Ms. Pérez is also an adjunct professor of clinical law at NYU School of Law. Previously, Ms. Pérez was the Civil Rights Fellow at Relman, Dane, and Colfax, a civil rights law firm in Washington, DC, and served as a policy analyst at the United States Government Accountability Office while she was a Presidential Management Fellow. She is a past Chair of the Election Law Committee of the New York City Bar Association. Ms. Pérez is involved in numerous community service activities and is the recipient of several awards, including the Puerto Rican Bar Association Award for Excellence in Academia and the Robert F. Kennedy Award for Excellence in Public Service. She clerked for Judge Anita B. Brody of the United States District Court for the Eastern District of Pennsylvania and for Judge Julio M. Fuentes of the United States Court of Appeals for the Third Circuit. Ms. Pérez holds a B.A. from Yale College, an M.P.P. from Harvard University's Kennedy School of Government, and a J.D. from Columbia Law School.

AMERICA'S
CONGRESSIONAL BLACK CAUCUS
ESTABLISHED 1971

OFFICERS
Marcia L. Fudge
Chair

G.K. Butterfield
First Vice Chair

Yvette D. Clarke
Second Vice Chair

André Carson
Secretary

Karen Bass
Whip

MEMBERS

John Conyers, Jr., MI - '65
Charles B. Rangel, NY - '71
John Lewis, GA - '87
Eleanor Holmes Norton, DC - '91
Maxine Waters, CA - '91
Sanford D. Bishop, Jr., GA - '93
Corrine Brown, FL - '93
James E. Clyburn, SC - '93
Alcee L. Hastings, FL - '93
Eddie Bernice Johnson, TX - '93
Bobby L. Rush, IL - '93
Robert C. "Bobby" Scott, VA - '93
Melvin L. Watt, NC - '93
Bennie G. Thompson, MS - '93
Chaka Fattah, PA - '95
Sheila Jackson-Lee, TX - '95
Elijah E. Cummings, MD - '96
Donna M. Christensen, VI - '97
Danny K. Davis, IL - '97
Gregory W. Meeks, NY - '98
Barbara Lee, CA - '98
William Lacy Clay, Jr., MO - '01
David Scott, GA - '03
G.K. Butterfield, Jr., NC - '04
Emanuel Cleaver II, MO - '05
Al Green, TX - '05
Gwendolynne Moore, WI - '05
Yvette D. Clarke, NY - '07
Keith Ellison, MN - '07
Hank Johnson, GA - '07
Andre Carson, IN - '08
Donna F. Edwards, MD - '08
Marcia L. Fudge, OH - '08
Karen Bass, CA - '11
Cedric Richmond, LA - '11
Terri Sewell, AL - '11
Frederica Wilson, FL - '11
Donald M. Payne, NJ - '12
Joyce Beatty, OH - '13
Steven Horsford, NV - '13
Hakeem Jeffries, NY - '13
Marc Veasey, TX - '13
Robin Kelly, IL - '13

Members are listed in order of seniority

December 6, 2013

The Honorable Charles E. Schumer
The Honorable Pat Roberts
U.S. Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Chairman Schumer and Ranking Member Roberts:

The Congressional Black Caucus (CBC) respectfully requests your support for the confirmation of Thomas Hicks to serve on the Federal Elections Assistance Commission.

Mr. Hicks has the background experience and knowledge to successfully oversee our federal voting operations. For the last ten years he has worked on voting modernization and facilitation issues as a Counsel for the House Committee on House Administration. In this role, he has been responsible for issues relating to campaign finance, election reform, contested elections and oversight of both the Election Assistance Commission and Federal Election Commission. Before coming to work for Congress, Mr. Hicks was instrumental in the development and passage of the Help America Vote Act, the landmark legislation written to address the well-noted voting problems of the 2000 presidential elections.

While we have worked hard to address voting discrepancies, much more is needed. During the last election, voters routinely experienced exceptionally long lines, confusing rules and voting-machine problems. The Elections Assistance Commission needs members who understand the state and local issues and the federal resources and guidance that can solve these problems. The CBC believes that Thomas Hicks is the perfect person to address these challenges.

Thomas Hicks is an exemplary nominee and is deserving of this honor to serve the American people.

Sincerely,

Marcia L. Fudge

Rep. Marcia L. Fudge
Chair, Congressional Black Caucus

2344 Rayburn House Office Building · Washington, DC 20515
WWW.THECONGRESSIONALBLACKCAUCUS.COM

Democrats Abroad
PO Box 15130
Washington DC 20003
phone: (202) 621-2085
email: secretary@democratsabroad.org

December 17, 2013

The Honorable Charles E. Schumer
Chairman, Committee on Rules & Administration
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing on behalf of Democrats Abroad, with regards to the **Election Assistance Commission Nomination Hearing** of **December 11, 2013.**

Democrats Abroad respectfully requests that this letter and the attached statement be included in the hearing record.

Sincerely yours,

Kathryn Solon

Chair, Democrats Abroad

Statement by Democrats Abroad

Prepared for the Election Assistance Commission Nomination Hearing United States Senate Committee on Rules & Administration

December 2013

Chairman Schuman, Ranking Member Roberts, and members of the Committee,

Thank you for the opportunity to submit comments on the nomination of Thomas Hicks and Myrna Pérez to be members of the Election Assistance Commission (EAC).

Democrats Abroad is the official arm of the Democratic Party for United States citizens living outside the United States and its territories. Founded in 1964, Democrats Abroad now has members in over 190 countries and has active committees in 53 countries around the world.

Each election year, Democrats Abroad is primarily devoted to assisting American citizens living abroad to vote. Our VoteFromAbroad.org resource does not discriminate by party affiliation or any other political test: any eligible voter living outside the US can use VoteFromAbroad.org to obtain a properly completed Federal Post Card Application (FPCA) to register to vote and request an absentee ballot. Our volunteers assist thousands of new and repeat overseas voters to register to vote and to request absentee ballots, without distinguishing among Republicans, Democrats, or independents.

Our volunteers are driven by the lack of voting information available to American citizens living abroad and their extraordinarily low voter turnout rates under even the most optimistic estimates. Our first task, every year, is simply to inform fellow Americans that they can vote while living abroad.

In this context, the EAC can provide valuable support for American citizens living abroad. The standards set forth in the Help America Vote Act of 2002 (HAVA) lowered some of the needless barriers to overseas Americans who seek to fulfill their civic duty to vote.

For the first time ever, it provided statistics from each of the thousands of election districts that distinguished overseas absentee votes from those cast within the territory of the United States. The EAC was created to provide guidance and information to election officials, elected leaders and voters. That is an on-going and invaluable service to American voters abroad.

Just one of the benefits of a strong EAC with dedicated and talented Commissioners would be that its reports, recommendations and grants to state election officials, as mandated by HAVA, would make voting more accessible for American citizens living in

the United States and abroad. This fact is the prime motivation for our testimony to this Committee.

Much of the practice of voter registration and absentee voting by eligible voters living outside the United States is currently shrouded in uncertainty, due in part to non-compliance by states with the requirements of HAVA and the great variability from election district to district in interpretation of election law. We sympathize with local election officials faced with increased expectations and dwindling financial resources. Many local election officials are heroically devoted to helping overseas Americans vote, whatever the obstacles. We believe that they should have a strong EAC to inform and support their efforts.

In our own planning and practice, we acutely feel the disadvantages of a de-centralized system of voting. The EAC publishes the only national statistics on overseas absentee voting on a district-by-district basis, collected from state election authorities as part of the Election Administration and Voting Survey. To date, however, many states do not yet fully comply with the requirements of HAVA in the reporting of overseas absentee voters and the data remains incomplete. Consequently, there is still no completely reliable, overall picture of voting by American citizens living abroad. Such a picture is essential to know what steps need to be taken to enfranchise all overseas Americans who wish to participate in our democratic governance.

The research conducted by the EAC provides a great benefit to Americans living overseas, especially through recommendations regarding overseas voting. This responsibility of the EAC is too costly or simply impossible to accomplish on less than a national scale, and would be repetitive and wasteful, at best, to devolve to each jurisdiction.

The EAC's role as a clearinghouse of voting information and as a help for states in meeting the requirements of HAVA is far from fulfilled. There continues to be a shortage of reliable information on how Americans vote, particularly regarding eligible American voters living abroad.

For this reason, Democrats Abroad supports a strong, well-funded EAC that can help make voting more fair, more accurate, and more accessible for all American voters, whether they live in the United States or abroad. Our goal is to help make participation in our democratic process as accessible for our citizens abroad as for our compatriots at home. The revolution in communications has largely removed the barrier of distance. The remaining barriers are in our election practices. The EAC can help us chart the changes needed to remove them.

The first step to re-invigorating the EAC is to fill all four vacancies on the commission. We urge the Senate committee move forward and vote in favor of the confirmation of the President's appointments of Mr. Hicks and Ms. Perez.

Washington, D.C. Regional Office
1016 16th Street, NW
Suite 100
Washington, DC
20036
Tel: 202.293.2828
Fax: 202.293.2849

National Headquarters Los Angeles Regional Office
634 S. Spring Street
Los Angeles, CA 90014
Tel: 213.629.2512
Fax: 213.629.0266

Chicago Regional Office
11 East Adams
Suite 700
Chicago, IL 60603
Tel: 312.427.0701
Fax: 312.427.0691

San Antonio Regional Office
110 Broadway
Suite 300
San Antonio, TX
78205
Tel: 210.224.5476
Fax: 210.224.5382

Sacramento Policy Office
1512 14th Street
Sacramento, CA 95814
Tel: 916.444.3031
Fax: 916.444.7207

Submitted by email

December 11, 2013

The Honorable Senator Charles E. Schumer, Chairman
The Honorable Senator Pat Roberts, Ranking Member
Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Re: Support for Myrna Pérez, Nominee to the Election Assistance Commission

Dear Chairman Schumer and Ranking Member Roberts,

The Mexican American Legal Defense and Educational Fund ("MALDEF") writes to express its strong support for the nomination of Myrna Pérez as a Commissioner on the Election Assistance Commission (EAC). Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Often described as the "law firm of the Latino community," MALDEF promotes social change through legislative and regulatory advocacy, community education, and litigation in the areas of education, employment, immigrant rights, and voting rights.

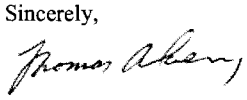
Ms. Pérez is well suited for this post. Her wealth of experience in public service, civil rights, voting rights, and election law makes her uniquely qualified to serve on the EAC. We urge the Senate to support her nomination.

The EAC develops guidance to meet the requirements of the Help America Vote Act of 2002, adopts voluntary voting system guidelines, oversees the testing and certification of voting machines, maintains the national mail voter registration form, and serves as a national clearinghouse of information on election administration. However, the EAC has not had a quorum since 2010, and no sitting commissioners since late 2011. As a result, it has been unable to adopt new standards to meet the current changes to election administration and voting technology. In order to properly function the EAC requires effective, competent, accountable, and honest leadership, all skills that Ms. Pérez has exhibited throughout her career as an attorney, voting rights expert, and civil rights advocate.

Ms. Pérez earned three advanced degrees, including her Juris Doctorate from Columbia Law School. As Deputy Director of the Democracy Program at the Brennan Center for Justice, Ms. Pérez works to protect access to civic participation and to ensure that the EAC is fulfilling its mandate to protect our franchise across the nation. Ms. Pérez's knowledge of election administration and voting is expansive, having worked issues such as redistricting, voter registration maintenance, and ballot access. As former Chair of the Election Law Committee of the City of New York Bar Association, she gained broad knowledge of election law and an appreciation for collaboration between stakeholders. Her steadfast commitment to civil rights for all will make her a truly exceptional leader on the EAC.

MALDEF urges the Committee on Rules and Administration and the full Senate to vote to confirm Ms. Pérez as Commissioner of the EAC.

Sincerely,



Thomas A. Saenz
President and General Counsel
MALDEF

TAS:AS

NHLA MEMBER ORGANIZATIONS

American G.I. Forum
ASPIRA Association
Avance Inc.
Casa de Esperanza
Cuban American National Council
Farmworker Justice
Hispanic Association of Colleges & Universities
Hispanic Federation
Hispanic National Bar Association
Labor Council for Latin American Advancement
Latino Justice PLDEF
League of United Latin American Citizens
MANA, A National Latina Organization
Mexican American Legal Defense and Educational Fund
National Alliance of Latin American and Caribbean Communities
National Association of Hispanic Federal Executives
National Association of Hispanic Publications
NALEO Educational Fund
National Association of Latino Independent Producers
National Conference of Puerto Rican Women, Inc.
National Council of La Raza
National Hispanic Caucus of State Legislators
National Hispana Leadership Institute
National Hispanic Council on Aging
National Hispanic Environmental Council
National Hispanic Foundation for the Arts
National Hispanic Medical Association
National Hispanic Media Coalition
National Institute for Latino Policy
National Latina Institute for Reproductive Health
National Puerto Rican Coalition
SER Jobs for Progress – National
Southwest Voter Registration Education Project
United States Hispanic Chamber of Commerce
United States Hispanic Leadership Institute
United States-Mexico Chamber of Commerce

December 10, 2013

Honorable Charles Schumer
Chair
U.S. Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Honorable Pat Roberts
Ranking Member
U.S. Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

RE: Election Assistance Commission Nomination Hearing
United States Senate Rules and Administration Committee
Wednesday, December 11, 2013

Dear Senators:

On behalf of the National Hispanic Leadership Agenda (NHLA), a coalition of the nation's 36 preeminent national Latino organizations, we write in support of the nomination of Ms. Myrna Perez, Esq. as Commissioner of the Election Assistance Commission (EAC). We request that this letter of support be placed into the official record of the Senate Committee on Rules and Administration.

For American democracy to function effectively, all eligible voters must be allowed to participate in elections. Minority communities are often subject to discrimination as they organize politically and begin to make new political gains. Latino voters have also increasingly become targets of voter suppression in recent years. For this reason, please note that it is our intent to score any votes associated with this nomination in our NHLA Congressional Scorecard on the 113th Congress. The NHLA Congressional Scorecard rates members of Congress on votes taken in the House and Senate that our membership deems important to the social, economic, and political advancement and quality of life of Hispanic Americans.

Ms. Perez, who President Barack Obama previously nominated by to serve as EAC Commissioner in 2011 and re-nominated six months ago on June 7, 2013, has been at the forefront in the effort protect Latino voting rights.

She currently serves as Deputy Director of the Brennan Center for Justice at NYU School of Law, a nonpartisan law and policy institute. In this capacity she has worked on a variety of voting rights issues, including redistricting, voter registration list maintenance and access to the ballot box. Prior to joining the Center, Ms. Pérez was the Civil Rights Fellow at Relman & Dane, a civil rights law firm in Washington, D.C., and a clerk for the Honorable Anita B. Brody of the United States District Court for the Eastern District of Pennsylvania and for the Honorable Julio M. Fuentes of the United States Court of Appeals for the Third Circuit.

In addition to her extensive legal experience, Ms. Pérez offers an impressive educational background. She earned her undergraduate degree in Political Science from Yale University in 1996 and her master's degree in public policy in 1998 from Harvard University's Kennedy

815 16th St. NW. 3rd Floor • Washington, DC 20005 • 202-508-6917 • nationalhispanicleadership.org • info@nationalhispanicleadership.org

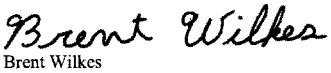
School of Government, where she was the recipient of the Robert F. Kennedy Award for Excellence in Public Service. As a Presidential Management Fellow, she served as a policy analyst for the United States Government Accounting Office where she covered a range of issues including housing and health care. Ms. Pérez then went on to graduate from Columbia Law School in 2003, where she was a Lowenstein Public Interest Fellow.

In 2002, several NHLA member organizations supported the Help America Vote Act (HAVA), a bill passed by the United States Congress to make sweeping reforms to the nation's voting process. HAVA also mandated the creation of the Election Assistance Commission, a commission that has provided the nation's growing Latino community with a national voice in the administration of our federal elections thanks to the leadership of former EAC Commissioners Ray Martinez and Rosemary Rodriguez.

When confirmed, we are confident that Ms. Pérez will continue a legacy of leadership serving admirably as an EAC Commissioner. We hope you will join us in recognizing her strong qualifications by voting to advance her nomination to the full Senate floor and by working with your colleagues to secure her final confirmation on the Senate floor.

Sincerely,

Hector Sanchez
Chair, National Hispanic Leadership Agenda
Executive Director, Labor Council for Latin American Advancement



Brent Wilkes
Vice-Chair, National Hispanic Leadership Agenda
National Executive Director, League of United Latin American Citizens

CC: Members, U.S. Senate

HEARING—SENTRI ACT (S. 1728) IMPROVING VOTER REGISTRATION AND VOTING OPPORTUNITIES FOR MILITARY AND OVERSEAS VOTERS

WEDNESDAY, JANUARY 29, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:01 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, King, Roberts and Blunt.

Staff Present: Jean Bordewich, Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Benjamin Hovland, Senior Counsel; Ellen Zeng, Counsel; Phillip Rumsey, Legislative Correspondent; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Lean Alwood, Chief Auditor; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF SENATOR KING

Senator KING. The Rules Committee will come to order.

Good morning, and I see that our—well, if you—oh, let's have our witnesses take their seats at the table.

Our hearing today is on the SENTRI Act, legislation intended to improve voter registration and voting opportunities for military and overseas voters.

I am Angus King, Senator from Maine, sitting in at the beginning of today's hearing for Senator Schumer, who is at a meeting of the Judiciary Committee. He will be joining us a little bit later.

With me is Senator Roberts of Kansas, who is the Ranking Member of this Committee, and we will proceed.

Voting is our most fundamental democratic right. Today we are going to discuss legislation which is aimed at ensuring that members of our military and other American citizens who are overseas are able to cast a ballot and participate in our democracy.

Americans who are on the other side of the world clearly face barriers to voting that most of here in this country do not. Congress has previously passed two pieces of legislation to improve access and participation for our military and overseas populations.

The first was the Uniformed and Overseas Citizens Absentee Voting Act, known as UOCAVA, and that was passed in 1986.

And, as with most legislation—all legislation, in my experience—after implementation, we learned that improvements can and should be made. This is particularly true where advancements in technology allow for new innovation and can help modernize existing practices. With these factors in mind, many improvements were made to the UOCAVA legislation in 2009 with the passage of the Military and Overseas Voter Empowerment Act.

Reports from the 2012 general election, however, show that only 70 percent of the ballots sent to military and nonmilitary voters were returned—only 70 percent. On top of that, many of the ballots that were returned were unable to be counted because they arrived after the deadline.

We think we can do better than this. We must do whatever we can to ensure that the men and women who serve our country in uniform are not disenfranchised by unnecessary administrative barriers.

I am also a member of the Armed Services Subcommittee on Personnel, and this is an issue which I take very seriously.

The SENTRI Act builds on past legislation to provide many of the solutions that our military and overseas voters deserve. This bipartisan bill makes improvements to military and overseas voting that I believe Congress can reach agreement on.

The SENTRI Act provides important safeguards to the right to vote for military and overseas voters in a number of ways.

First, the SENTRI Act improves voter registration and voting opportunities for service members through the use of an online system, certainly not part of the original Act in 1986. It requires voter assistance as a routine part of service members' annual training. Simplifying, streamlining and reducing the time associated with voter registration will ensure that more of our citizens overseas are able to vote in future elections.

Also, this legislation ensures requests for absentee ballots remain valid for one full Federal election cycle, thereby eliminating some of the confusion and variance in implementation that has been seen across the country.

Another important feature of the SENTRI Act requires reporting on implementation and effectiveness of new voter assistance obligations that would allow for better monitoring and deeper understanding of the voting experience of our military and overseas citizens.

Overall, the SENTRI Act strengthens protections of voting rights of military and overseas voters. For this reason and others, the SENTRI Act enjoys support from a number of nonpartisan organizations dedicating to serving members of our military, veterans and protecting the right to vote for all Americans.

I am proud to be a co-sponsor of this important piece of legislation, and I would like to thank everyone who is able to join us today to discuss this topic, and I look forward to hearing the testimony of the experts on our panel.

Now I would like to turn to Senator Roberts for his opening remarks.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Why thank you, Mr. Chairman. I appreciate your willingness to preside here again so we can stay on schedule.

I want to thank the witnesses for agreeing to testify, and I look forward to their remarks.

I also want to thank my friend, John Cornyn, for his work on this issue. I look forward to hearing from him later.

We have a good panel of witnesses before us, and I want to hear from them. So I will not take up too much time.

I am glad we have witnesses from both the Federal and state agencies because they have to work together to ensure our service personnel are able to vote and have that vote counted.

As a Marine, I obviously care deeply about those who serve us abroad and want to make sure we are doing everything possible to make sure that those who wish to vote are able to do so.

This Committee produced, as the Acting Chairman indicated, the Military and Overseas Voter Empowerment Act, the MOVE Act, in 2009, to make sure ballots were sent out in sufficient time for them to be received and returned in time to be counted. Now we have gone through two general elections since those requirements went into effect, and it appears some problems remain.

The question is where those problems lie and what really needs to be done to address them. Is the problem at the state and local level, or the Federal level, or both?

I hope our hearing today will shed some light on that question. We need to know where the problem is before we can figure out how to fix it.

The SENTRI bill proposes some changes at both the state and Federal levels. I look forward to its consideration and the testimony of our witnesses here today.

Thank you, Mr. Chairman.

Senator KING. Senator Blunt, we are just getting underway. If you would like to make a statement, we would be delighted to hear from you.

OPENING STATEMENT OF SENATOR BLUNT

Senator BLUNT. Mr. Chairman, I have a statement for the record.

This is obviously an important issue. It is one that when I was the chief election official in Missouri for eight years, and the secretary of state, I was very involved in.

I hope we can continue to find things that ensure that people who are serving in the military not only get to cast their votes but get that vote counted, get it back in a way that gets it counted.

And I look forward to the testimony, and I am glad that we are talking about this bill.

[The prepared statement of Senator Blunt was submitted for the record:]

Senator KING. Thank you.

We will move to our first panel, who is at the table.

We have Mr. Matt Boehmer—we are going to go in alphabetical order—Director of the Federal Voting Assistance Program in the U.S. Department of Defense. Second is Mr. Kevin Kennedy, the Director and General Counsel of the Wisconsin Government Accountability Board, and third, Mr. Donald Palmer, the Secretary of the Board of the Virginia Board of Elections.

Thank you all, gentlemen, for joining us today.

And I would like to ask, if you possibly can, to limit your statements to five minutes, and if you have provided the Committee with a longer written statement, we would be delighted to accept that for the record.

Mr. Boehmer, please proceed.

STATEMENT OF MATT BOEHMER, DIRECTOR, FEDERAL VOTING ASSISTANCE PROGRAM, U.S. DEPARTMENT OF DEFENSE, WASHINGTON, D.C.

Mr. BOEHMER. Chairman King, Ranking Member Roberts and distinguished members of the Committee, thank you for the opportunity to discuss the Department of Defense's voting assistance activities and our view on the SENTRI Act.

Senator Cornyn and Senator Schumer, for the record, thank you for your continued commitment to our men and women in uniform.

As Congress and the courts have repeatedly affirmed, voting is a citizen's most fundamental right.

The Federal voting assistance program is committed to two voting assistance tenets—promoting the awareness of the right to vote and eliminating barriers for those who choose to exercise that right.

Last year, FVAP and the Department exemplified this commitment by advancing three major initiatives—creating a robust information portal, implementing greater voter assistance capabilities and commencing work to increase the efficiency of mail delivery.

We recently optimized our web site, which is FVAP.gov, by reorganizing content to enhance the user experience, implementing a section of the portal to track performance metrics for our voting assistance officers and updating online training which will be released in the early spring of 2014.

To improve our voting assistance capabilities, FVAP created a suite of materials in 2013 to provide absentee voter-specific information.

We are also providing online and in-person trainings for our voter assistance officers and election officials to make sure they are prepared to assist our UOCAVA voters.

Realizing that the time required to redirect mail once overseas may serve as a hindrance to casting an absentee ballot, the Military Postal Service Agency is serving as the lead agency in an effort with the Department of State and the United States Postal Service to lead an effort to modernize military mail delivery. The system will redirect election materials to military and diplomatic addresses, similar to how the civilian change of address system works, and should be available in October of 2014.

These activities illustrate the continuous work of the Department, and the proposals in the SENTRI bill enhance the notion of change and offer some real benefits to our UOCAVA voters.

The Department supports the initiatives in the SENTRI bill as written. However, we would like to work with the Committee to clarify some of the technical requirements to make sure that we are successful in meeting the intent of the bill.

FVAP is already working to address some of the initiatives listed in SENTRI.

We currently link voters to state systems where they are available.

And, we are working with an internal department system to prompt service members when they update their address to complete a new Federal Post Card Application upon every single address update.

We are also willing and capable to create an annual training by the 2016 general election for our active duty military members, which would then lead them to FVAP.gov to complete a new FPCA or to decline assistance. We would then be able to provide you with the aggregate numbers on the users who chose to go to FVAP.gov for assistance and for those who declined.

The language in Section 201, which requires electronic transmission of a completed FPCA by the Department to the appropriate state and local election officials, is where we have our greatest concern. The bill, as written, appears to focus entirely on an electronic process which would prove costly and could be incompatible with the 55 states' and territories' election rules, specifically in regard to the different rules governing physical signatures and the approved method of transmission of elections.

Removing this requirement would remedy the Department's concern with this section and recognize the role of states to field their own systems and offer electronic voter registration. The cost associated with the requirement to simply pre-populate our forms would be relatively low.

Senator King, Ranking Member Roberts and the Committee, thank you for the opportunity to share the Department's view on the SENTRI Act. We appreciate the Congress's ongoing interest in improving military voting. I look forward to your questions.

[The prepared statement of Mr. Boehmer was submitted for the record:]

Senator KING. Thank you, Mr. Boehmer.

I presume you will give to the Committee the details of the suggestions you have on those matters that you just mentioned.

Mr. BOEHMER. Absolutely, sir. Thank you.

Senator KING. I appreciate it.

Mr. KENNEDY.

STATEMENT OF KEVIN KENNEDY, DIRECTOR AND GENERAL COUNSEL, WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, MADISON, WI

Mr. KENNEDY. Thank you, Chairman King, Ranking Member Roberts and distinguished Committee members. I appreciate the opportunity to provide information to this Senate Committee on the SENTRI Act.

A little bit of background. I am Wisconsin's Chief Election Officer. I am a nonpartisan, appointed official and have served in that capacity for more than 30 years.

Wisconsin has been—I am also a former president of the National Association of State Election Directors.

Wisconsin has been a leader in making changes to facilitate voting for our military and overseas voters. In Wisconsin, we administer our elections at the local level. I have 1,852 local election officials who are responsible for getting the ballots out to all of our voters, including our UOCAVA voters.

We have developed an electronic delivery system that we put in place in 2012 that has cut the ballot transit in time and allowed us, even when some of those clerks fail, to ensure that ballots are delivered and returned in time for counting before the election.

When you are herding a group of cats, such as we often do, we find some human failings, but we have found with our electronic ballot delivery system, even with a handful of ballots that might have missed what was then the 45-day deadline, we were still able to get the ballots back in time.

The SENTRI Act makes a number of reforms and improvements to safeguard elections, and the spirit behind these reforms and improvements is commendable and has the support of state election officials. However, implementation of some aspects of these reforms, while not insurmountable, could be problematic.

For example, with data collection, the time frames for collecting and reporting data present challenges, especially around the deadline for transmitting ballots—46 days before the election.

If a Federal election is held on a Tuesday, as is the norm, day 46 is always a Friday. This means local election officials are scrambling to get the UOCAVA ballot requests filled before the mail goes out. The next two days are not business days. Yet, state officials must collect and compile data from local election officials and submit a report on the Monday following the transmission deadline.

This is particularly challenging for a state like Wisconsin, and other states, where the municipal election officials are responsible for fulfilling UOCAVA absentee ballot requests.

The SENTRI Act provides for express delivery of ballots that are not transmitted by the deadline.

We can still effectively implement the reporting deadline if we move it to 5 or 7 days after the 46-day deadline. This is particularly true when the UOCAVA voter has requested to receive the ballot electronically. Because the SENTRI Act provides for express delivery of ballots that are not transmitted by that 46-day deadline, the required information would still be captured with a slightly later reporting deadline, but it would also have the advantage that it would not be an incomplete report.

What you are going to get under the current provisions is a report, if there are failures, of incompleteness.

If we postpone that deadline by two or four more business days, what you will get is a report that tells you if the ballots were not delivered, how that was remedied, because the SENTRI Act provides for the express. Instead of having several reports, you will get one complete report, and the Department of Justice and the Federal Voting Assistance Program will know where there was a problem but also how that problem was solved.

So I really encourage you, instead of having that day 43 reporting, that it be day 41 or, even better, day 39 because you will get one report that will be much more complete.

Our goal has been to make it as easy as possible for our local election officials to complete the reporting requirement so that they can maximize the time they spend serving the voters as we do at the state level.

Another suggestion is that the Department of Defense and the U.S. Elections Assistance Commission have coordinated their collection of post-election data. Yet, there are two different deadlines for filing and getting that information. I would suggest that rather than the 90-day deadline we have currently that we dovetail that

with the deadline that is available for reporting to the U.S. Elections Assistance Commission.

As has been said, elections are the cornerstone of our democracy. A citizen's right to vote is one of our most enduring principles. Our uniformed services and overseas voters make extreme sacrifices to protect that right for us. They deserve the commitment and effort of all of our public officials to enable them to fully participate in the electoral process.

I appreciate the opportunity to share my thoughts with you, and I would be happy to answer any questions Committee members have.

[The prepared statement of Mr. Kennedy was submitted for the record:]

Senator KING. Thank you, Mr. Kennedy.

Your testimony about what day election day is allows me, perhaps for the only time in my service in this body, to share one bit of knowledge that I have carried around for a long time.

Do you know the definition of when a presidential election occurs? It is the first Tuesday after the first Monday in November of every even-numbered year, equally divisible by four.

[Laughter.]

Senator KING. Isn't that a wonderful rule to have?

Mr. KENNEDY. That is a great rule.

Senator KING. I am afraid that may be taking up room in my brain for other more useful things, but—Mr. Palmer, please.

STATEMENT OF DON PALMER, SECRETARY OF THE BOARD, VIRGINIA BOARD OF ELECTIONS, RICHMOND, VA

Mr. PALMER. Thank you, Chairman King, Ranking Member Roberts and members of the Committee. Thank you for the opportunity to testify today on the SENTRI Act, which continues the improvements to the military voting process under the MOVE Act.

The recent release of the report from the Presidential Commission on Election Administration noted the continued difficulties of UOCAVA voters in registering to vote, receiving their ballots in a timely manner and returning their ballots to election officials in time to be counted.

The SENTRI Act recognizes that military voters have lower registration and participation rates and much lower rates of absentee ballots that are successfully returned and counted. The rate of successful return for overseas military ballots remains in the high 60s while the successful return of domestic absentee ballots is closer to 98 percent.

In a world full of technology, we must not forget the very human purpose of this legislation, and that is to allow all members of the republic to vote, no matter where they are on the globe.

The Presidential Commission also noted the difficult situation that UOCAVA voters continue to find themselves. The sponsors of the SENTRI Act have shown focus and foresight to determine where the MOVE Act is succeeding and where it must be amended. While the language was drafted well before the Commission report, the legislation reflects many of the bipartisan recommendations on how to improve that registration and absentee ballot process.

The Presidential Commission also specifically called for online mechanisms for UOCAVA voters to easily and quickly update their address or registration status. The SENTRI Act requires annual voter assistance and updates of registration data by the military member with online tools. DoD would facilitate the update of registration information at the same time that members would normally update their information due to deployments, overseas duty or changes in duty station or some other change in status.

Based on my military experience, there are more than a dozen different forms that must be updated online each year, not only before deployment or a new duty station but for training purposes or for a calendar, or fiscal, new year. This process should fit nicely into existing procedures for updating materials.

The Commission noted in its report that military and overseas voters represent the population most likely to benefit from the increased use of the internet and the registration process. And, again, DoD members are a very mobile population of voters. Because of this mobility, inaccurate addresses and information lead to significant delays in ballots reaching the military or result in undeliverable ballots where the ballots never reach the voter at all.

The SENTRI Act would provide online mechanisms to maintain accurate voter registration information on UOCAVA voters for the benefit of all state and local election officials.

My experience with electronic registration in Virginia shows that an online process can be secure with appropriate verification of identity and will improve the overall integrity of the registration process and voter rolls.

The Presidential Commission specifically recommended the data exchange of voter registration information between states. Data from other states allow state and local election officials to maintain accurate voter rolls by keeping up with a mobile population. Similarly, any DoD system that provides a consistent and reliable flow of updated data for military voters would dramatically increase the accuracy of the registration data at the local and state levels.

The Commission also noted that compliance with UOCAVA and the MOVE Act for military and overseas voters continues to be inconsistent and inadequate, and enforcement must be strengthened.

The SENTRI Act does provide special rules in the case of failure by state or local officials to transmit their ballots on time. Despite good efforts, there have been some failures in 2010 and 2012. State election officials often do not have the authority to require local election officials to report the transmission of ballots and are not aware of failures.

As time goes by, jurisdictions get better with this process. However, the failures have resulted in a great deal of litigation.

The SENTRI Act may resolve the litigious nature of the MOVE Act. The law would require jurisdictions to automatically send ballots by express delivery if they fail to meet the 45-day deadline. The proposed law would reduce the amount of lawsuits by immediately providing a built-in remedy for the voter. Federal law would prioritize the express transmittal of the ballot over waiting for post-election litigation and appropriate judicial relief.

The SENTRI Act is a bipartisan piece of legislation on which election community has been consulted on a number of occasions.

The authors have responded to the input of state and local election officials and other stakeholders. Many sections of this bill are aligned with the major bipartisan recommendations of the Presidential Commission.

In my estimation, the use of technology, data-sharing and other common-sense reforms will help UOCAVA voters more efficiently register and request absentee ballots, improve the integrity of UOCAVA registration data and improve election administration in the United States.

Thank you for the opportunity to testify on this important issue.

[The prepared statement of Mr. Palmer was submitted for the record:]

Senator KING. Thank you, gentlemen.

We will now have a five-minute round of questions, and there will be, hopefully, some opportunity for follow-up.

Mr. Kennedy, you testified about the deadlines and moving the 46 days to 39 or some other number.

I guess the first issue is, is there an issue with making that change?

It seems sort of straightforward. But, is there a counter argument as to why not to shorten those deadlines or, actually, lengthen them?

Mr. KENNEDY. Well, the main argument would be to have the data as quickly as possible, but I think what cuts against that argument—you know, to have the data in the hands of the Department of Justice and the Federal Voting Assistance Program.

What cuts against that—and I base this on our experience from 2012—is that if there has been a failure, that information is going to be incomplete and the state officials are going to be working hard to remedy this.

I think Mr. Palmer made the point—and I tried to as well—that we have built in remedies that normally would be part of litigation or a discussion. And, by moving that deadline by two days, we are going to give one report that is going to say the ballots were sent out, or if they were not, this is what was done to make sure that they got sent out even though they missed the 46-day deadline.

Senator KING. Is there any cost on the local election officials to implementing this whole structure?

Mr. KENNEDY. It is a time cost. As I said, they are busy trying to make sure that they fulfill the absentee ballots. It is a matter of how much time they have.

We have built in Wisconsin a very good data collection tool which we will refine to ensure that we have that. As I said, we spent a lot of time in Wisconsin with a handful of municipalities that were difficult to track down, contacting them by e-mail, phone, to make sure that they got their data into us. That is really the challenge—is making sure that that information is available.

Senator KING. Mr. Palmer, you talked about online registration, and clearly, we are moving in that direction. Talk to me about security of online registration and utilizing the internet for these kinds of transactions. Are local election officials comfortable that there is not a high risk of fraud in this kind of situation?

Mr. PALMER. Mr. Chairman, I believe that local and state officials are very much leaning toward online or electronic registration

because you are usually taking the registration and the information from the voter and you are actually comparing it to a database such as at the Department of Motor Vehicles. So you have confirmation of the person's identity. You have confirmation of the person's—you will have their signature online, and you will have their photo.

So there is already a process where that individual has been confirmed with another state agency, and so once there is that match, it raises the level of confidence of election officials on the integrity of that registration.

Senator KING. Mr. Boehmer, would you like to comment on moving in this direction?

Mr. BOEHMER. Sir, from the Federal Voting Assistance Program, as I mentioned in my oral testimony, we actually on our web site will link to the states that have these online voter registration systems.

So, from an assistance standpoint, you know, the use of the internet and the tools will really help our voters. And, from that point, we hand it off to the states and let the states do the administration of elections.

Senator KING. So, in the states that have those systems, a young member of the military who had not registered at all when they left the country could register in Virginia or in Wisconsin from abroad and then go through the voting process; is that correct?

Mr. KENNEDY. Absolutely. Wisconsin has the same online system, and it has worked very well in 2012 for us.

Senator KING. And how many states have this kind of system?

Mr. PALMER. Mr. Chairman, I believe it is probably up to 18. It is just above 15 to 18, I would say—the number of states that have some sort of online registration.

Senator KING. And I presume that is growing each election year, that states are adding this capacity.

Mr. PALMER. Yes, Mr. Chairman.

Senator KING. Mr. Boehmer, what are the gaps that you see the SENTRI Act filling that you are unable to do under the current law?

Mr. BOEHMER. Mr. Chairman, I believe that regardless of the SENTRI Act we are always looking to improve our processes and improve the assistance that we provide our military and overseas citizen voters.

The SENTRI Act offers provisions that we think will be very helpful for our voters. A couple of these, for example:

Increasing the validity period of the Federal Post Card Application from one calendar year to one general election cycle makes sense, particularly from a voter's expectation standpoint. You know, a voter expects to be able to request to register, excuse me, to register and then request an absentee ballot only once in a general election cycle, and so increasing the validity of the FPCA to one general election cycle should align with our voters' expectation.

In addition, we mention the issue is not necessarily all about registration. Sometimes it is about the fact that our military population is particularly mobile. And, as I mentioned again in my opening statement, we are working on initiatives already that are mentioned in SENTRI on making sure that our military members

know the importance of every time they move to notify their local election official. That provision is actually in SENTRI.

And we are actually working on taking some of the Department's internal systems, where military members naturally go to update their address information for health care benefits, for example, and then prompting them at that time, to say, you just changed an address; it is important for you to remember that you need to notify your local election official.

And they can then go to FVAP.gov and actually fill out a new FPCA to change their address right there online.

Senator KING. Senator Roberts.

Senator ROBERTS. The Election Assistance Commission's Election Administration Voting Survey for 2012 found that of 33.1 million domestic absentee ballots transmitted, 83.5 percent were returned and submitted for counting.

For military and overseas voters, 876,000 were transmitted—and that prompts one question, if you have 3 million people in the military why only 876,000 requested to vote—but then only 66 percent were returned and submitted for counting.

So, obviously, the lower rate of return for military and overseas voters is cause for concern, but the question arises—whose fault is this? Where is the problem?

Let's start with you, Mr. Boehmer.

Mr. BOEHMER. Thank you for the question, sir.

I think what we really want to take a look at are assistance activities and what we can do to help our military members.

We say that the military is registered at a higher rate that their civilian counterparts, and what we need to make sure is the fact that the military members, who, again, are a very mobile population—we need to recognize that. So making sure that military members receive their absentee ballot is going to be incredibly important.

Again, voting is an absolutely personal choice, and we want to make sure, though, that for those who want to vote that they really do have the tools and resources to do that.

Therefore, initiatives such as the Military Postal Service Agency, you know, working hand in hand with the Department of State and the United States Postal Service to modernize the mail delivery system is something that is going to be really important—so that a change of address, that the local election officials will send out the absentee ballot. A change of address will happen right there at the local post office instead of having to wait all the way to an overseas location for that to change.

So we know that the issue of time is something that is against our military members, and this should go towards helping solve that.

Senator ROBERTS. Mr. Kennedy, any comments?

Mr. KENNEDY. Yes. I think increased use of technology will help. The states like Wisconsin and Virginia that have electronic ballot delivery have been able to ensure that our end of the bargain has been fulfilled. Even in Wisconsin, where out of about 10,000 ballots we had 4 that missed the deadline, those ballots went out with electronic transmission and were returned before the election and counted.

And I think the emphasis has to be looking at the electronic return of the ballots and improving the return rate—the focus of the Federal Voting Assistance Program on increased communication with the members.

Senator ROBERTS. So it is electronic capability——

Mr. KENNEDY. I think that would——

Senator ROBERTS [continuing]. That you are talking about our technology.

Mr. Palmer, do you have anything to say about this.

Mr. PALMER. Yes, sir. It is time and distance. It is the age problem that we have with the mail system getting to a remote voter in a land far away, and there is really no margin of error in the absentee balloting process. If there are any errors, there is a potential of delay that may impact the voter.

I think Kevin Kennedy talked about the ballot return. The return of the ballot is the problem. It seems to be in most cases. Thirty states allow the return of the ballot by some sort of e-mail or fax to sort of mitigate that problem, and that is not an issue with this legislation, but it shows that the Postal Service has some issues with getting the ballots back on time.

Senator ROBERTS. Let me just say that on page 4 of the Act—and my reference here—Mr. Chairman, pardon my delay. I am not sure I can even—oh, dear.

Well, under G and 1 and A and B and then the capital letter I, Roman number II, iii, we finally get down to this should not be paid by the voter but may be required by the state to be paid by a local jurisdiction if the state determines election officials in such jurisdiction are responsible for the failure to transmit the ballot by any state required under this paragraph.

In 105 counties in Kansas, that is not in the bill.

There is Harriet out there, who is the local county election official. She has been doing a good job for many years. She would like to retire, but everybody wants to keep her on because they have had no ballot fraud. We do not know what ballot fraud is in Kansas, thank goodness.

But I just wonder; is the county going to pay for this if, in fact, you know, they do not get this ballot back?

What kind of costs are you incurring in the State of Wisconsin with regard to county election officials?

This is a follow-on of the Chairman. This looks like to me it could be a real problem with another unfunded mandate.

Mr. KENNEDY. Well, it may be an unfunded mandate, but it is a mandate that is created by the failure of the local election official.

We do it at the municipal level. So, rather than my 72 counties, it is my 1,852 municipalities. As I indicated, we had 4 that missed the 45-day transit time——

Senator ROBERTS. Right.

Mr. KENNEDY [continuing]. And we were all over them.

And, to me, the fact that we have a remedy built into the system—I can point to this and say, you are going to pay the cost for this, and this will be a lesson learned.

Our compliance has gone up tremendously with the more oversight that we do.

Senator ROBERTS. Well, you only had 4, but 34 percent did not return them, and that seems to me to be a big problem.

I am out of tine, Mr. Chairman. Thank you, sir.

Senator KING. Senator Blunt.

Senator BLUNT. Thank you.

Senator Roberts, I may be wrong on this, but I think a lot of that 34 percent did not receive them in time.

One of the things that Senator Cornyn and I have worked on—and others I am sure have, too—is to get the Post Office to buy the equipment for military mail that they have for everybody else, and they have just agreed in the last defense discussion to do that.

If something was mailed to anybody in this room who is not in the military, in almost all cases, if there is a forwarding address that gets disrupted in the process of the first delivery.

In the military, they do not have that equipment yet for military mail. So it either goes to the location, as I think Mr. Palmer suggested it might, where the person was when they first requested the ballot, or it comes back to the APO address and then goes again.

So just getting an investment in equipment here, which the Defense Department has agreed to do—so, hopefully, by the next cycle, that part of this problem will minimize the rest. But, if you do not get the ballot before the election is over, you obviously cannot mail it back.

And I agree totally with Mr. Kennedy that the penalty needs to be on the election official that does not get the job done. There is no reason for the Federal Government to make it easy for that person not to do their job. And it is a minimal kind of penalty, but it is one you do not want to explain to your boss, if you are the local election official, why it is.

And what would the remedy be again, Mr. Kennedy? Is it you have to send it under some sort of expedited mail?

Mr. KENNEDY. You send it by express mail, and if it is delayed, the local election official will pay the express mail cost as well.

Senator BLUNT. Right, right.

On the registration—the electronic registration—apparently, Mr. Boehmer, you are concerned that there may be some conflict here with state laws that require the application for a registration to come in writing. Am I right on that?

Mr. PALMER. That is correct, sir.

Senator BLUNT. And in the states that have electronic registration, do any or all of them have that just for military, or military and overseas, registrations?

In the states that have electronic registration, Mr. Palmer, is it your view that anybody can do that, or are there categories of people that have that electronic registration available to them?

Mr. PALMER. If you are a registered voter in a state which has a program like that, you could either update your registration online or update your status with that program.

Senator BLUNT. Online. And you think about 18 states are doing that now?

Mr. PALMER. Eighteen states. And I believe that, obviously, a lot of different states have different requirements on what they want

on the document, either the registration document or the FPCA, which is the military absentee ballot request form.

But, if that information could be sent—prepopulated and then sent to the jurisdiction, it would serve the same purpose until the individual state makes the policy decision to go with online registration.

Senator BLUNT. And we could override the registration in writing for Federal offices, I believe, but we could not override it for state and local offices. And you want to be sure that everybody can participate in every election they should be eligible to participate in, no matter how they register. Is that right, Mr. Boehmer?

Mr. BOEHMER. Our assistance is for Federal elections.

Senator BLUNT. Right.

Mr. BOEHMER. So what we want to make sure of is that our voters from the Department of Defense standpoint do not get confused about the requirements of individual states. So, when we can link off to states' own registration systems, it really serves our voters well, and as you mentioned, states are actually moving towards these online registration systems.

To Mr. Palmer's point, what we can definitely do at the Federal level is prepopulate that form to make it easier on the voter so that when they can send it to the state that information would already be filled out.

Senator BLUNT. And does anybody disagree with—Mr. Kennedy, as I understand your view on the deadline, you just think a few days there would make a big difference. From the deadline we have in the legislation to what deadline would you suggest?

Mr. KENNEDY. I would suggest that it be day 39.

Senator BLUNT. Instead of 40?

Mr. KENNEDY. Instead of 43.

Senator BLUNT. Three.

Mr. KENNEDY. In other words, it is one week after the deadline that ballots should be out. What you will get is a more complete report that says: Yes, we hit our target. If we missed on four, this is how we solved the problem because the SENTRI Act puts the remedy right in there.

Otherwise, what you are going to get is a report that says: We have not got all of the data yet. Or, if we have the data, here is what we have. And, if it is incomplete, this is what we are doing.

And then you get another report under the Act.

This way, you get one report that is more complete.

And, if you do have an outlier clerk or local election official, that will be focused. But most of these problems are going to get solved in that time period.

Senator BLUNT. Okay. I see the Chairman and the principal sponsor of the bill is here, and my time is up.

Senator ROBERTS. Mr. Chairman, I would like to ask unanimous consent, with the permission of the distinguished Chairman, that the Senator from Missouri be granted another two minutes and if he would yield for a question.

Senator BLUNT. I will be glad to yield.

Senator ROBERTS. I am sorry. I did not see you leaving. I would not have interrupted.

Senator BLUNT. I am on the way to the floor.

Senator ROBERTS. Well, you have some unique experience with the State of Missouri, obviously, with your past experience. I am still troubled by the 3 million people in the military and 876,000 requested ballots, and then of that, only 66 percent were returned. There is 34 percent missing right there.

And then on the top of it, something seems to be wrong.

I mean, you know what? Well, I guess you would like to have a system where it was 100 percent.

But the thing that bothers me is that I think from your expertise and from the panel's discussion and their expertise that you have got a lot of problems with the Post Office and the Defense Department.

I am not trying to point anything to you, sir.

And I just do not want, again, Harriet out there in some county that does not have the technology yet, that that is going to cost the state something and that the burden of cost is on that county despite the fact that they have had a spotless record to date. If, in fact, it is a Post Office problem or a DoD problem, they ought to pay for it.

I do not like unfunded mandates, which I know everybody here agrees that is not the case, but I worry about it.

Senator BLUNT. Right. I think the challenge on the delivery is not that the local election official does not get the ballot in the mail on time. But you do have a very mobile population that in the normal delivery system their mobility would be taken care of in transit of the mail itself wherein the way that DoD does it, they do it like they would have done it 20 years ago, where it has to go somewhere and then be forwarded or maybe go back——

Senator ROBERTS. Right.

Senator BLUNT [continuing]. To the original APO box.

And I do not know how much of that problem will be solved by new equipment, but a significant amount of this problem is an equipment problem, and the Department of Defense has agreed to buy for the Post Office the equipment the Post Office needs to treat military mail like they treat all other mail now, and the way mail moves forward. So that will take care of a lot of it.

But that is not a case where the local election official got the ballot in the mail late. They do not get it not because it got in the mail late but because it does not catch them where they are until perhaps it is too late to cast the ballot.

Senator ROBERTS. I appreciate that insight, and I thank you very much.

Senator KING. No further questions?

[Pause.]

Senator KING. Thank you very much, gentleman.

Chairman SCHUMER [presiding]. Well, thank you.

I want to thank our panel and thank Senator King for stepping in and chairing the hearing. He is a great new member of the Senate and of this Committee.

We are proud to have you on.

Senator KING. Thank you.

Chairman SCHUMER. And now we will call our next panel, our next witness, Senator Cornyn.

Okay. I want to thank my good friend, Senator Cornyn, for speaking with us this morning about the SENTRI Act, for sponsoring this important bill.

He and I have worked together as a team because we feel it is so important that the men and women who are risking their lives for our right to vote have that right themselves. We share a deep commitment to protecting and strengthening voting rights of military and overseas voters.

So, Senator, I have read your statement. I could not agree more with it and with your statement on the Senate floor four years ago, that if our soldiers can risk their lives for us, we can at least allow them to vote.

And I thank you. You are so concerned about this, and your diligence is helping us move this forward.

I will ask unanimous consent my statement be put in the record and call on our witness, Senator Cornyn.

[The prepared statement of Chairman Schumer was submitted for the record:]

STATEMENT OF THE HONORABLE JOHN CORNYN, A UNITED STATES SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Well, thank you, Mr. Chairman.

And thank you, Ranking Member Senator Roberts, for your important work on this subject, and I am glad to be before you this morning.

Of course, Senator Roberts is the most senior Marine in the United States Congress, and of course, there is no doubt about his commitment and our collective commitment to making sure that our men and women who are deployed overseas can exercise the most basic right of a citizen, which is to cast their vote effectively.

The 2012 election made clear that there are too many barriers to military service members and their families voting, and to having their votes actually counted, and we need to do more.

In the weeks before the last election, November 2012, I heard from many military service members from Texas, both overseas and stateside, because they were having trouble casting their ballots. They reached out for help because election day was rapidly approaching and they still had not gotten their absentee ballot.

I heard from the grandmother of one Texas Marine, who was serving in Afghanistan, and the father of another because both deployed Marines were missing their ballots.

I heard from the mother of an Airman from Texas that was in the middle of moving from one Air Force base to another and did not know where his ballot was going to be sent and whether it would reach him in time.

These are just examples of the hurdles that our military voters have in every election cycle.

Of course, we all understand—and Mr. Chairman, you just acknowledge again—that these Americans make tremendous sacrifices in the defense of our Nation and those sacrifices should not include giving up their most basic rights as citizens.

Without question, it remains much more difficult today for military service members and their families to exercise their right to vote than their civilian counterparts. Most problems experienced by

the military stem from their being gone from their home voting jurisdiction on election day, which is a direct result of their service. While it may never be as easy to vote for service members who are away from home, we owe them our best efforts to remove as many obstacles as possible.

To that end, this past November, I introduced—along with the Chairman, Senator Schumer—the Safeguarding Elections for our Nation's Troops Through Reforms and Improvements Act, the so-called SENTRI Act. This represents the third effort, Mr. Chairman, you and I and others have made together to improve military voting, and I want to thank all of those members who have joined us in this important bipartisan effort.

Congress has already removed some major hurdles that have hampered military voting in the past, for example, in 2009, by enacting a number of important reforms through the so-called MOVE Act that was supported by Senators Schumer and Chambliss, among others. And I was proud to support the MOVE Act and author two parts of it.

The 2012 election was the first presidential election since the MOVE Act, and post-election analysis shows that this law has improved various aspects of the process, including reducing the number of marked ballots that were rejected by local election officials.

But this data also reveal a large number of military and overseas voters who continue to experience problems. For example, all of the blank absentee ballots that were sent out to military and overseas voters—of all of them, only 30 percent—I should say 30 percent did not make it back.

Let me state that again just for clarity. For example, of all the blank absentee ballots that were sent out to the military and overseas voters in 2012, more than 30 percent never made it back to local election officials to be counted. This suggests that many of those ballots never reached the intended voter likely due to outdated voter registrations or ballot delivery problems.

So the MOVE Act made a difference, but clearly, there is more that needs to be done.

The area perhaps most demanding of our attention is military voter assistance. The significant drop in absentee ballot requests in 2012 points to the need for the Department of Defense to enhance its military voter assistance to put them more on par with motor voter-style assistance programs that benefit civilians stateside.

Blank absentee ballots have a significantly better chance of reaching registered military voters at the correct mailing address if those service members are able to keep their voter registration current, which can be challenging because of the transient nature of military service.

In the MOVE Act, we attempted to address this issue by creating a voter assistance office on every military installation, but the DoD was resistant, honestly, to that. And I had conversations with the Chairman of the Joint Chiefs of Staff, among others, about that.

So the SENTRI Act would require the DoD to offer military voters an affirmative annual online opportunity to fill out a voter registration and absentee ballot request form.

Helping military voters to keep their voter registration current would also aid local governments, which I know is a big concern

of the Ranking Member—the burdens on them. So this would help facilitate that.

So, in conclusion, the SENTRI Act is aimed at fixing the system's most glaring deficiencies which continue to inhibit our service members' ability to vote, and I hope the Committee will vote this out favorably.

There is no one-size-fits-all solution to the various problems that our military face when it comes to voting, but I am hopeful that we can continue to make good progress.

And I am grateful to you, Mr. Chairman, and to Senator Roberts, the Ranking Member, for your commitment to this noble cause. And so I look forward to working with you to see its final passage.

Finally, Mr. Chairman, I would ask unanimous consent that various letters of support I have in favor of the SENTRI Act be made part of the record, following my remarks.

[The prepared statement of Senator Cornyn was submitted for the record:]

Chairman SCHUMER. Without objection.

[The information was submitted for the record:]

Chairman SCHUMER. And thank you, Senator Cornyn, not only for your eloquent testimony on behalf of the men and women serving us overseas but also your just steadfastness on this bill and on the whole issue. We are not going to get things done without your—it would not get done without your leadership. So thank you for caring.

I do not have any questions.

I have submitted my statement in the record.

Senator Roberts.

Senator ROBERTS. Thank you, Mr. Chairman.

I would like to submit three questions—one to Mr. Boehmer with regard to the law requiring voting assistance for military voters and clear must be enforced, et cetera, et cetera, and we did not have enough time to really get into that, and then one with the MOVE Act and its requirements.

The Defense Department Inspector General attempted to contact every one of the installations' voting assistance offices but was unable to do so 50 percent of the time. So that is a real problem. And he, the IG, simply recommended we change the law to get rid of the requirement and make it discretionary, which is pretty—it notes a significant difference with regard to the testimony today. So that would go to Mr. Boehmer.

And then one other question—I do not need to go into it other than to make the statement that if the distinguished Senator from Texas has any problem, any area in Texas, we can send pretty fast horses with saddle bags from Dodge City anytime he needs it.

Chairman SCHUMER. Or, from Brooklyn, New York.

[Laughter.]

Chairman SCHUMER. I would like to thank Senator Roberts and assure him—first, without objection—those questions are submitted for the record. We would ask the witnesses to respond within a week in writing, if that is okay.

Okay, without objection.

And I want to thank Senator Cornyn.

I want to thank Senator Roberts and assure him we want to work with him to try and deal with the problems he has so we can move forward.

So, without objection, the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing—okay, I gave a week. I will modify that to five days—for our first panel of witnesses to answer.

I want to thank my colleagues for participating, particularly Senator King, who pinch-hit for me, and sharing his thoughts.

And, since there is no further business, the Committee is adjourned.

[Whereupon, at 10:54 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Statement of Chairman Charles E. Schumer
Senate Committee on Rules and Administration

Hearing on

The SENTRI Act (S.1728) –
Improving Voter Registration and Voting Opportunities for Military and Overseas Voters

January 29, 2014

First, I would like to thank Senator John Cornyn for sponsoring this bill with me. He and I share a deep commitment to protecting and strengthening the voting rights of military and overseas voters. I couldn't agree more with his statement on the Senate floor four years ago that if our solders can risk their lives for us, we can at least allow them to vote.

The SENTRI Act has already garnered strong bipartisan support. I want to recognize my partners in this effort—Senator John Cornyn, Senator Roy Blunt, Senator Sherrod Brown, Senator Thad Cochran, Senator Ted Cruz, Senator Angus King, Senator Rob Portman, Senator Marco Rubio, Senator Mark Warner, and Senator Roger Wicker.

The difficulties facing military and overseas voters are not new. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act – known as UOCAVA. That required states to register service members and their families and other voters living overseas and to allow them to vote absentee.

While UOCAVA was an important step forward, many problems for military voters persisted. In 2009, I'm proud to say, Senator Cornyn and I worked together with other Senators to pass the Military and Overseas Voter Empowerment Act – or the "MOVE Act" as we call it – as part of the fiscal year 2010 National Defense Authorization Act. On a bipartisan basis, we agreed that in a land where elections are the bedrock of our democracy, those who risk their lives should be able to choose their next commander-in-chief.

The MOVE Act was intended to ensure that ballots would be sent to military and overseas voters early enough to give them ample time to return the ballots and have them counted. It also prohibited states from rejecting otherwise valid voter registration and absentee ballot applications due to minor issues like notarization.

What we did in the MOVE Act has already improved voting for military and overseas voters by removing some of the biggest hurdles, but it is not enough. In the 2012 general election, only 70% of ballots transmitted were returned and the number one reason for returned ballots being rejected was that they were returned too late. Large numbers of military and overseas voters continue to experience problems with absentee voting caused, at least in part, by outdated voter registration or ballot delivery problems.

The recent report from the Presidential Commission on Election Administration highlighted some of the continuing challenges for military and overseas voters. In their work, the Commissioners found inconsistent implementation of UOCAVA and MOVE Act provisions. The Commission also found that utilizing technology to improve the voter registration process and increase access to election information would significantly help military voters. Many of the reforms of the SENTRI Act are designed to address these exact issues.

In this era of advanced technology, we can and need to do more to make sure that our troops receive their requested ballots in a timely manner and those ballots get counted on Election Day. The SENTRI Act does precisely that by correcting some of the remaining problems with the absentee balloting process for overseas and military voters.

The legislation improves voter registration and voting opportunities by requiring the Department of Defense to implement an online system where service members can register to vote, update voter registration information, request absentee ballots, and receive automatic notifications regarding voter status. In an age where accessing information online is par for the course, this online system is crucial.

The legislation also protects voting rights of military and overseas voters by requiring states to submit a pre-election report to the Justice and Defense Departments on the status of absentee ballot transmission. Having this information will allow the Justice Department to determine whether enforcement actions are necessary.

Additionally, states that fail to transmit ballots on time will be required to send them by express delivery, further ensuring that our service members can complete the ballot in time for the election.

The legislation also makes some technical corrections, such as clarifying that service members need only request absentee ballots once for all races in the two-year Federal election cycle.

Four years after we passed the MOVE Act, it is time to update and remedy known problems. It is simply unacceptable that those who fight to defend our freedom often face the greatest obstacles in exercising their right to vote. We cannot forget the plight of these voters.

Good work has been done in the last four years to make voter registration and voting easier for military and overseas voters. I firmly believe that the SENTRI Act will further that progress. With the 2014 elections 10 months away, passing this bill will end the effective disenfranchisement of our troops and their families.

I look forward to working with my colleagues to pass the SENTRI Act and see it signed into law.

January 29, 2014

Opening Statement on "Improving Voter Registration and Voting for Military and Overseas Voters"

Committee on Rules and Appropriations

Senator Roy Blunt

Our servicemen and women make tremendous sacrifices every day to protect our freedom, but those sacrifices should not include giving up their right to participate in the voting process.

Members of the military deserve the basic assurance that their votes will count no matter where they are stationed.

I have always been a champion of ensuring this right for our men and women in uniform. In 2009, while I was still in the House of Representatives, I was proud to vote in favor of the Military and Overseas Voter Empowerment Act as part of that year's National Defense Authorization Act.

That was a strong step in the right direction, but it is clear that more needs to be done.

As a member of the Senate Armed Services Committee, I continue to work closely with the Federal Voting Assistance Program, the Military Postal Service Agency, and appropriate

civilian agencies through the annual National Defense Authorization process to ensure members of the military receive their absentee ballots in time to vote.

I am proud to cosponsor the SENTRI Act. However, I agree with some of the witnesses that we must be careful to avoid any unintended consequences that may inadvertently create new frustrations for members of the military when trying to vote.

I am confident that the members of this committee can work together in a bipartisan manner to ensure the effective and efficient delivery of absentee ballots so members of the military can have their voices heard.

Thank you.

STATEMENT OF

MR. MATT BOEHMER

DIRECTOR

DEPARTMENT OF DEFENSE

FEDERAL VOTING ASSISTANCE PROGRAM

BEFORE THE

UNITED STATES SENATE COMMITTEE ON

RULES AND ADMINISTRATION

HEARING ON

SAFEGUARDING ELECTIONS FOR OUR NATION'S TROOPS

THROUGH REFORMS AND IMPROVEMENTS ACT (SENTRI - S. 1728)

January 29, 2014

Chairman Schumer, Ranking Member Roberts, and distinguished members of the Committee, thank you for the opportunity to discuss the Defense Department's view on the Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act, also known as SENTRI.

The Department is always striving to advance the tools and resources needed for our Service members, their families and overseas citizens to vote absentee successfully from anywhere in the world. In 2013, the Federal Voting Assistance Program (FVAP) and the Department advanced three major initiatives by creating a robust information portal, implementing greater voter assistance capabilities, and commencing work to increase the efficiency of mail delivery with the establishment of the Military Postal Automated Redirection System (Military PARS).

FVAP has optimized its website, FVAP.gov, by reorganizing content to better suit users, deploying key portions of the site to track performance metrics for our Voting Assistance Officers (VAOs), and beginning to update online training for release in spring 2014. The information-rich portal was designed and implemented to allow for: a dynamically generated Voting Assistance Guide for Unit VAOs to use in the field; standardized metrics across the Services; and dedicated content for voters on how to navigate the absentee voting regulations for each State.

FVAP is always looking for ways to improve its voter assistance capabilities. In 2013, FVAP created a suite of materials for use by VAOs, election officials and other stakeholders. These materials provide absentee voter specific information on such things as completing the Federal Post Card Application (FPCA) and Federal Write-In Absentee Ballot (FWAB), and laws surrounding absentee voting, to ensure all parties are aware of their right to vote and have the tools and resources to do so. Simultaneously, FVAP has updated online training for VAOs and election officials to ensure awareness of their role and that they are prepared to assist Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) voters.

We realize the cycle time to request and return an absentee ballot may serve as a hindrance to voting absentee successfully. The Department, with the Military Postal Service Agency (MPSA) as the lead agency, is coordinating with the Department of State and the United States Postal Service (USPS) to modernize military mail delivery. Military PARS will redirect undeliverable-as-addressed election materials to military and diplomatic addresses in the same manner as civilian mail. This will occur at the first processing point stateside — rather than at a distant, overseas processing center. Military PARS is on track for the scheduled completion date in October 2014, and will be fully established in preparation for the 2016 election cycle.

We are also working closely with State and local election officials to ensure they understand the requirements of UOCAVA by offering online and in-person training. During 2013, the Department awarded research grants to examine improvements to the election process for military and overseas voters by providing assistance to develop online blank ballot delivery tools and to establish a single point of contact in State election offices. The concept of the single point of contact was recommended by Congress in the Help America Vote Act. Since 2002, that recommendation has been adopted by one state only, Maine. Thanks to the Department's research grants, Arizona and Maryland will implement a single address statewide for UOCAVA voters this year, and we look forward to the findings at the conclusion of our grant program.

These activities illustrate the continuous work at FVAP, and the proposals in the SENTRI bill embrace the notion of change and offer some real benefits to UOCAVA voters. The

remainder of this statement focuses on the Department's position on how SENTRI, as written, would affect these Uniformed Service members.

Title I: Amendments Related to the Uniformed and Overseas Citizens Absentee Voting Act

The amendments to UOCAVA in Title I include many of the proposed changes that the Administration has submitted to Congress, most recently as part of the Department's 2014 National Defense Authorization Act submission.[1] Those proposals, submitted in coordination with the Department of Justice, would greatly benefit military and overseas voters, and we continue to support enactment of these changes.

Title II: Provision of Voter Assistance to Members of the Armed Forces

The Department agrees with the intent of Title II of the SENTRI Bill; however, we would like to work with the Committee to clarify some of the technical requirements to make certain we are successful in meeting the intent of the Bill.

Section 201 (a)(1) amendments to 10 U.S.C. Sec. 1566b (a)(2)(C)(ii)(II) requires electronic transmission of a completed FPCA by the Department to "the appropriate State or local election officials." While this can be completed, the Department is wary of its usefulness and unintended consequences based on the proposed language in regard to the electronic transmission of the completed FPCA.

Almost every State requires a physical, hand-written signature on the FPCA, and the automated nature of the process described in this section does not appear to anticipate the need for a voter to print and scan the completed form to return it electronically. States are responsible for establishing acceptable requirements for return of the FPCA, and thus each State may have slightly different rules. For example, if the voter sends an electronic copy, digitally signed using his or her Common Access Card (CAC), to a State that requires a hardcopy, physical signature the ballot request may be rejected. States frequently use the hardcopy signatures to ensure the voter's identity by comparing the signatures on the FPCA and the voted ballot. Replacing a hardcopy signature with an electronic signature removes this checkpoint. Additionally, information acquired when using the user's CAC to pull address information from internal Department systems may not reflect the address used for voting purposes by the Service member.

Removing the requirement above for electronic transmission of the completed FPCA would remedy the Department's issue with this section. Should the committee remove this electronic transmission requirement, the costs associated with prepopulating forms to assist voters would be relatively low and would recognize the role of the States to field their own systems and offer electronic voter registration.

Title II of the SENTRI Bill also requires the development of an integrated alert for members of the military to receive assistance with updating their address information any time they submit an address change to the Department's personnel systems. FVAP is currently developing just such a tool to offer the very same level of service to Service members each time they process an address-changing event online. Each time a voter initiates an address change within this system, known as milConnect, the system will provide reminder information and a

[1] For reference, *see Third Package of Legislative Proposals Sent to Congress for Inclusion in the National Defense Authorization Act for Fiscal Year 2014 (Sent to Congress on May 15, 2013)*, "UOCAVA Amendments.pdf," available at http://www.dod.mil/dodgc/olc/legispro14.html

link for submitting a new Federal Post Card Application with their local election official. This update is on track for its scheduled completion in summer 2014.

Title III: Electronic Voting Systems

Title III of the SENTRI bill removes the existing requirement for FVAP to conduct an electronic voting demonstration project, often referred to as the internet voting project. At this time, the Department raises no objection to the repeal of this project as State election officials are ultimately responsible for the security of elections.

Conclusion

Chairman Schumer, members of the Committee, thank you for the opportunity to share the Department's view on the SENTRI Act. FVAP, and the Department, look forward to continuing to provide the best possible assistance to our Service members, their families and overseas citizens. I look forward to your questions.

Matt Boehmer
Director
Federal Voting Assistance Program

Office of the Under Secretary of Defense
Personnel and Readiness

Mr. Matt Boehmer is the Director of the Federal Voting Assistance Program. He served as the Acting Director of FVAP from January 14, 2013, until his selection as permanent Director in November 2013. FVAP is a component of the Defense Human Resources Activity (DHRA). In his capacity as the Director, Mr. Boehmer administers the Federal responsibilities of the *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)* for the Secretary of Defense, who is the Presidential designee. The Act covers the voting rights of Uniformed Services personnel, their eligible family members and all U.S. citizens residing outside the United States.

Mr. Boehmer brings more than 10 years of experience in program and fiscal management, as well as, marketing communications and outreach from his tenure as the Director of the Joint Advertising Market Research and Studies (JAMRS) office. JAMRS enables DoD Leadership and the Services to make informed research-based recruiting decisions eliminate unnecessary redundancies across the recruiting communities and conduct focused outreach efforts that are distinct from, yet integral to, those of the Services in order to preserve and enhance the All-Volunteer Force.

Mr. Boehmer began working for the Federal government in December 1991, when he joined the Department's Outstanding Scholarship Program after receiving a Bachelor of Science degree in Psychology from The University of Mary Washington. He has spent his 21-year career working for the Office of the Under Secretary of Defense for Personnel and Readiness, initially at the Defense Manpower Data Center (DMDC) and currently at the DHRA.

Mr. Boehmer graduated from the 1999 Executive Leadership Development Program, received the Joint Meritorious Unit Award in 1999, and in 2007 received the Medal for Exceptional Civilian Service from the Office of Secretary of Defense.

Testimony of Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

United States Senate Committee on Rules and Administration
January 29, 2014

SENTRI Act: Wisconsin's Experience Serving Military and Overseas Voters

Chairman Schumer, Ranking Committee Member Roberts and Committee Members:

Thank you for the opportunity to provide information to the Senate Committee on Rules and Administration about the SENTRI Act. It is an honor to be here. This is a subject the state and local election officials in Wisconsin take very seriously. Please allow me to provide a brief background on the organizational structure of elections in Wisconsin along with a description of our approach to military and overseas voter services. I will also provide some general recommendations based on our experience in Wisconsin.

Introduction

I have served as Wisconsin's non-partisan chief election official for more than 30 years. I am also a member of the National Association of State Election Directors (NASED). I served as NASED President in 2006 and currently serve on the NASED executive committee.

I am currently appointed by and report to a non-partisan, citizen board of six former circuit court and appellate judges who comprise Wisconsin's Government Accountability Board. The Board oversees the state's elections, campaign finance, ethics and lobbying laws.

The Board has general supervisory authority over the conduct of elections in the State of Wisconsin. The Board has delegated to me its compliance review authority over Wisconsin's 1,924 local election officials and their staffs. This means any complaint alleging an election official has acted contrary to law or abused the discretion vested in that official must be filed with the Government Accountability Board before it may proceed in court. I have the authority to order local election officials to conform their conduct to law.

The Board has developed comprehensive training programs for local election officials. The Board is also required to certify the chief election inspector, the individual in charge of each of the state's 2,822 polling places. The Board is required to emphasize the integrity and importance of the vote of each citizen in its training programs. Wis. Stat. §5.05 (7)

Wisconsin's elections are administered at the municipal level in our 1,852 towns, villages and cities. The municipal clerk, an elected or appointed non-partisan public official, is responsible for processing all absentee ballots, including those for Wisconsin's uniformed services and overseas voters.

The State of Wisconsin has been a leader in reaching out to voters in our uniformed services, overseas electors and voters with disabilities. Military voters are not required to register in order to vote. Wis. Stat. §6.22 (3). As early as 2000, our Legislature authorized electronic delivery of absentee ballots. 1999 Wisconsin Act 182. Wisconsin accepts and counts absentee ballots postmarked by Election Day if they are received by 4 p.m. on the Friday following Election Day. Wisconsin is one of several states that developed an electronic ballot delivery system for its uniformed services and overseas (UOCAVA) voters. Our *My Vote Wisconsin* tool was put in place for the 2012 election cycle. https://myvote.wi.gov/ *My Vote Wisconsin* provides valuable information for all Wisconsin voters, but it is designed to provide special services for military and overseas voters.

In 2012, Wisconsin clerks issued just under 10,000 UOCAVA ballots. While this is a very small percentage of the total number of Wisconsin voters participating in the 2012 general election (.31%), our state and local election officials made extraordinary efforts to ensure UOCAVA ballots were sent 47 days before the election as required by state law. In the case of UOCAVA applications received later than 48 days before the election, ballots were sent within 24 hours of receipt of the application, up to and including Election Day as provided by Wisconsin law. Wis. Stat §6.86 (1)(b).

The SENTRI Act – Safeguarding Elections for our Nation's Troops through Reforms and Improvements

The SENTRI Act makes a number of reforms and improvements to safeguard elections for uniformed services and overseas voters. These reforms and improvements include:

- Increased data collection and reporting by state election officials;
- Specific deadlines for transmitting UOCAVA ballots;
- Remedies for late transmission of ballots;
- Permitting a UOCAVA voter to request an absentee ballot for all federal elections beginning with the year of the general election and any federal elections in the subsequent year;
- Requiring review by the Comptroller General of the reports related to UOCAVA voting prepared by the Department of Defense;
- Requiring the Department of Defense to develop a comprehensive voter assistance program for uniformed services voters including an electronic database to assist military voters in registering to vote, requesting an absentee ballot and updating voter information;
- Extending the guarantee of residency for voting purposes to all dependents of absent military personnel.

The spirit behind these reforms and improvements is commendable and has the support of state election officials. However, implementation of some aspects of these reforms and improvements, while not insurmountable, could be problematic.

Data Collection

The timeframes for collecting and reporting data present challenges, especially around the deadline for transmitting ballots 46 days before Election Day. If a federal election is held on a Tuesday, as is the norm, Day 46 is always a Friday. This means local election officials are scrambling to get the UOCAVA ballot requests fulfilled before the mail goes out. The next two days are not business days, yet state officials must collect and compile data from local election officials and submit a report on the Monday following the transmission deadline. This is particularly challenging for a state where the municipal election officials are responsible for fulfilling UOCAVA absentee ballot requests.

Wisconsin experienced this problem in 2012. A handful of our 1,852 municipalities failed to transmit a small number of UOCAVA ballots before the April Presidential primary. As part of an agreement with the U.S. Department of Justice (U.S. DoJ), Wisconsin collected extensive data similar to what is required by the SENTRI Act for the partisan primary and general election and provided detailed reports to U.S. DoJ. The Wisconsin Government Accountability Board (G.A.B.) devoted almost 2,000 staff hours fulfilling this requirement. Because of the efforts of the G.A.B. and local election officials, all of the late ballots were received before Election Day.

The SENTRI Act provides for express delivery of ballots that are not transmitted by the deadline. This can still be effectively implemented if the State reporting deadline is moved to five or seven days after the 46-day deadline. This is particularly true when the UOCAVA voter has requested to receive the ballot electronically. The required information would still be captured, but the report would also contain a description that the late ballots were sent by electronic transmission or express mail.

The States could also benefit from funding that would enable them to augment their HAVA-required statewide voter registration systems to more easily collect this data from local election officials. Wisconsin has developed a data collection portal that enables our 1,852 municipal clerks to enter election administration data required to comply with state and federal post-election reporting requirements. We hope to enhance this tool to address this pre-election reporting requirement.

Our goal has been to make it as easy as possible for local clerks to complete the reporting requirement so that they can maximize their time spent serving voters, as can we at the State level. Policies that reduce transit time (electronic ballot delivery and/or return) and those that give UOCAVA voters the opportunity to request their ballot earlier, rather than placing additional mandatory reporting requirements on the overwhelming majority of election officials who are already in full compliance with the law, may improve the likelihood that voters will receive and return their ballots in time.

The Department of Defense through its Federal Voting Assistance Program (FVAP) has worked with the U.S. Elections Assistance Commission (U.S. EAC) to coordinate the collection of post-election voting data related to UOCAVA electors required by federal law. It would be good to dovetail the States' 90-day post-election reporting requirement with the U.S. EAC's deadline. This also works well with the new biennial report deadline of June 30 for the Department of Defense.

Role of the Department of Defense

Through acts of Congress such as HAVA and the MOVE Act, States have made great strides in improving the delivery of ballots to uniformed services and overseas voters. Much of this has been done through the allocation of federal resources to improve the election administration infrastructure at the state level. States have more time and resources to ensure timely transmission of UOCAVA ballots. The Department of Defense is uniquely positioned to provide more robust assistance to military voters.

The SENTRI Act provides direction to ensure the mission and role of the Department of Defense to assist uniformed services voters is strengthened. Adding a layer of oversight by the Comptroller General provides an objective outside evaluation of the efforts of the Department of Defense.

Technology has served states well as state election officials seek to improve services for all voters, including uniformed services and overseas voters. Our *My Vote Wisconsin* website is one of many state-level examples. The SENTRI Act requires the Department of Defense to develop a comprehensive online system and electronic database integrated with the existing systems of the military departments to facilitate the requirement to provide enhanced voter assistance. This could prove to be a sword that cuts both ways, improving assistance to uniformed services voters while creating a mishmash of online voter assistance tools that do not relate well to each other.

Not only does each military department have an existing online tool to provide a myriad of services to uniformed services personnel, but the states and territories along with civilian organizations such as the Overseas Vote Foundation also have already developed online tools to assist uniformed services and overseas voters. On behalf of state election directors, I encourage the Department of Defense to carefully evaluate the development of this online service to integrate not only with existing military departments, but also with state and civilian online voter services. Significant investments at the state level in online voter tools may be diminished if the addition of Department of Defense tools does more to create voter confusion than to assist military voters.

Congress also needs to be mindful of the privacy rights of uniformed services personnel when developing a tool that tracks voter participation of military voters. We ask a lot of the Department of Defense to support our uniformed services personnel and the SENTRI Act reinforces Congress' commitment to ensure military voters have the best opportunity to participate in the electoral process. It is equally important to safeguard the confidence

of uniformed services personnel in the outreach and assistance provided by the Department of Defense.

Other Provisions of the SENTRI Act

The SENTRI Act provides that a UOCAVA voter may with a single request ensure that absentee ballots will be sent for all federal elections beginning with the year of the general election and through any federal elections in the subsequent year. This appears to be a compromise from the change in the MOVE Act requiring UOCAVA voters to make a separate request for each election. Prior to the MOVE Act, Wisconsin required local election officials to honor military requests for three full election cycles and overseas absentee requests for two full election cycles. This led to a bloated roster of UOCAVA voters, resulting in a large number of undeliverable ballots at each federal election.

The exemptions for UOCAVA voters who change their registration or whose ballots are undeliverable provide some relief from a return to outdated UOCAVA voter lists. Similarly, the required Department of Defense electronic database should assist state and local election officials with keeping UOCAVA lists current. However, this will still result in a list of UOCAVA voters that is not current. The MOVE Act recognized the responsibility of the voter to keep the application current.

The SENTRI Act provision extending the guarantee of residency for voting purposes to all family members of military personnel will improve access to voting for all uniformed services UOCAVA voters.

Conclusion

Elections are the cornerstone of our democracy. A citizen's right to vote is one of our enduring principles. Our uniformed services and overseas voters make extreme sacrifices to protect that right for us. They deserve the commitment and effort of all public officials to enable them to fully participate in the electoral process.

Thank you for the opportunity to share my thoughts with you. I would be happy to answer any questions Committee Members may have.

State of Wisconsin\Government Accountability Board

Post Office Box 7984
212 East Washington Avenue, Third Floor
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
http://gab.wi.gov

KEVIN J. KENNEDY
Director and General Counsel

Kevin J. Kennedy

Kevin J. Kennedy is Director and General Counsel for the Wisconsin Government Accountability Board, a position he has held since November 2007. Before assuming the top staff position for the Board, he was Executive Director – and before that Legal Counsel – for the Wisconsin State Elections Board. Kevin has served as the Chief Election Official for Wisconsin since August, 1983.

Kennedy was in private practice before joining the Elections Board in 1979, and prior to that served as an assistant district attorney in Washington County, Wisconsin. He graduated from the University of Wisconsin-Madison Law School in 1976, and received his Bachelor of Arts degree in Mathematics and Communication Arts from the University of Wisconsin-Madison, College of Letters and Science in 1974.

Kennedy is a member of the National Association of State Election Directors (NASED) and served as NASED President in 2006. He also served as co-chair of the National Task Force on Election Reform established by the Election Center, a non-profit organization dedicated to training and educational opportunities for state and local election officials. Kennedy is a Certified Elections and Registration Administrator (CERA), having completed the professional certification program (2003) and along with continuing recertification (2006, 2009, 2012). He is also a member of the Council on Governmental Ethics Laws (COGEL) and has served on the organization's Steering Committee. In December 2008, he received the COGEL Distinguished Service Award.

###

"Improving the Registration, Absentee Request and Voting Process for the UOCAVA Voter."

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the SENTRI Act, which continues the improvements to the military voting process under the MOVE Act. **The recent release of the report from the Presidential Commission on Election Administration ("The Commission" hereafter) noted the continued difficulties of UOCAVA voters in registering to vote, receiving their ballots in a timely manner, and returning their ballots to election officials in time to be counted.** Similarly, the SENTRI Act recognizes that military voters have lower registration and participation rates and much lower rates of absentee ballots that are successfully returned and counted. The rate of successful return of absentee ballots for overseas military voters' remains in the high 60%'s while the successful return of domestic absentee ballots is closer to 98% of ballots.

> Last week in a hearing on military voting in the Virginia legislature, a former spouse of an overseas civilian employee explained why it is so important to solve this problem. She described how it felt to be overseas citizen with her husband representing her government in a place far away from her country. She described how there was a sense of patriotism and duty that motivated her to serve in a remote and dangerous region on behalf of her country. Because of this heightened sense of duty, she felt a real need to vote because she believed it also fulfilled her duty as a citizen. When she was unable to exercise that right to vote due to a delay in the postal service, it was a blow to that sense of duty, that somehow she failed. Many who have served or deployed overseas relate to her story. Because overseas citizens and military members often represent the US Government while serving in these remote areas, we have a duty to find new ways to improve an imperfect process and give them every opportunity to successfully vote.

The Commission noted the difficult situation of UOCAVA voters continue to find themselves and the disproportionate impact of failing to accommodate these voters with processes that allow them to fully participate in the voting process. The sponsors of the SENTRI Act have shown focus and foresight as they carefully reviewed the data available from the States after 2012 to determine where the MOVE Act is succeeding and where it needs to be amended. As a result of their independent findings, the Commission specifically called for more accuracy in voter registration data, that registration materials be available on websites and recommended the use of electronic means for UOCAVA voters to register or update their addresses online. While the language of the SENTRI Act was drafted well before the Commission report, the legislation reflects many of the bipartisan recommendations made on how to improve the registration and absentee ballot request process for military and overseas citizens.

The Commission specifically called for online mechanisms for UOCAVA voters to easily and quickly update their address or registration status. The SENTRI Act requires annual voter assistance and updates of registration data by the military member with online tools. DOD will use technology and website interaction with its military members to facilitate the update of registration information at the same time that members would normally update their information due to deployments, overseas duty or change of duty station or some other change in status. Based on my military experience, there are more than a dozen different forms that must be updated online each year, not only before deployment or a new duty station but for training purposes or it is a new calendar or fiscal year. Therefore, this process should fit nicely into existing procedures for updating of materials.

The Commission noted in its report that military and overseas voters represent the population most likely to benefit from the increased use of the Internet in the registration process. The members of the Department of Defense (DOD) are a highly mobile population of voters and because of this mobility, inaccurate addresses and information lead to significant delays in ballots reaching the military or result in undeliverable ballots where the ballots never reach the voter. The SENTRI Act would provide online mechanisms to maintain accurate voter registration information on UOCAVA voters for the benefit of all state and local election officials across the country. As a state election official and former member of the military, this proposal would dramatically increase the ability of election officials to maintain the most up-to-date information on absent and overseas military voters. Lastly, my experience with electronic registration in Virginia shows how this online process can be secure with verification of identity and will improve the overall integrity of the registration process and voter rolls. A system that allows for the annual update of registration information will reduce the high potential for registration error, out of date address information, and the unnecessary delay that exists with traditional paper based systems. The online system would provide cities and counties significant monetary savings and produce a more satisfied UOCAVA population. FVAP surveys consistently show that due to challenges with time and distance, overseas and remote voters are tied to the Internet as their life-line for registration and voting purposes.

The Commission specifically recommended the data exchange of voter registration information between states. This type of data from other states allows state and local election officials to maintain the voter rolls more accurately by keeping up with a mobile population. Similarly, any DOD system that provides a consistent and reliable flow of updated registration address data from military voters would dramatically increase the accuracy of the registration data at the state level.

The Commission noted that compliance with UOCAVA and the MOVE Act for military and overseas voters continues to be inconsistent or inadequate, and enforcement must be strengthened. The SENTRI Act provides special rules in the case of failure of state or local election officials to transmit their ballots on time. Despite good faith efforts, the record indicates there have been failures in this area by a number of jurisdictions in 2010 and 2012. State election officials often do not have the authority in law to require local election officials to report the successful transmission of absentee ballots and are not aware of mailing failures. As time goes by, jurisdictions have become more consistent in meeting these important deadlines and working with state officials. However, these failures have resulted in great deal of litigation against states and resulted in dozens of consent decrees and memorandums of agreement that then require federal oversight for a number of years.

The SENTRI Act may actually resolve the recent litigious past of the MOVE Act. Because the law would require jurisdictions to automatically send ballots by express delivery if they fail to meet the initial 45 day mailing deadline for any reason. The proposed law would reduce the amount of lawsuits by immediately providing a built-in remedy for the benefit of the voter. Federal law would prioritize the express transmittal of the ballot to the voter over waiting for post-election litigation to determine the extent of the failure and appropriate judicial relief. In most cases, local and state jurisdictions already pay the extra money to send ballots by express delivery due to human mistakes or logistical challenges that sometimes result in ballots being sent late. The bottom line is the SENTRI Act will codify what election officials instinctively do when errors occur and is a reasonable remedy that the DOJ routinely requests in litigation.

Lastly, the SENTRI Act requires a biennial report on the effectiveness of activities of the Federal Voting Assistance Program (FVAP). Much of the SENTRI Act is based on the facts and statistical evidence that we have from the 2012 election, post MOVE Act. The Commission recommendations are based on much of the same data. The continued collection of election data both at the Election Assistance Commission and FVAP is important to identify the continued effectiveness of voting assistance, the proper use of technology and what areas the Congress and the states may need to address in the future.

The SENTRI Act is a bipartisan piece of legislation in which the election community has been consulted on a number of occasions. The authors of the legislation have responded to the input of state and local election officials and other stakeholders involved with the electoral process. Many of the sections of this bill are aligned with the major bipartisan recommendations of the Commission. In my estimation, the use of technology, data-sharing, and other common sense reforms will allow UOCAVA voters to more efficiently register and

request absentee ballots, improve the accuracy and integrity of UOCAVA registration data, and generally improve election administration in the United States.

Thank you for the opportunity to testify on this important issue.

Donald L. Palmer
Secretary, Virginia State Board of Elections

Donald Palmer currently serves as the Secretary of the Virginia Board of Elections. Appointed in 2011, he is chief election official of the Commonwealth of Virginia and the head of the state agency charged with implementation and uniformity of state and federal election law. Previous to his current position, he served as the Director of Elections with the Florida Department of State during the successful 2008 and 2010 election cycles. Since 2009, he has served on Election Assistance Commission (EAC) advisory boards, including the Standards Board Executive Board and the Technical Guidelines Development Committee (TGDC) representing the National Association of State Election Directors (NASED) and the Commonwealth of Virginia.

Prior to his tenure in Florida, he served as a trial attorney with the Department of Justice, Civil Rights Division where he enforced the federal voting laws and provided guidance to states on compliance with the federal voting laws. In that position, he enforced the voting rights of Americans under the Voting Rights Act (VRA), the Help America Vote Act (HAVA) and the National Voter Registration Act (NVRA). He also monitored compliance of the states with the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA). Prior to his entry into the arena of voting law and election administration, he served in the U.S. Navy as an Intelligence Officer and as a Judge Advocate General deployed overseas onboard the USS John F. Kennedy and with tours of duty in Florida, Italy, and Washington D.C.

Statement of Senator John Cornyn (Texas)

Before the
Senate Committee on Rules and Administration

Hearing on
SENTRI Act (S.1728): Improving Voter Registration and Voting Opportunities for Military and Overseas Voters

January 29, 2014

I want to thank Chairman Schumer and Ranking Member Roberts for holding this important hearing this morning. Both Senator Schumer and Senator Roberts, the most senior Marine in the Congress, are tireless supporters of our men and women in uniform and their families.

The 2012 election made clear that there are still too many barriers to military service members and their families voting and having their votes counted, and that we must do more to protect their voting rights. In the weeks prior to the November 2012 election, I heard from numerous military service members from Texas and their families, both overseas and stateside, because they were having trouble voting. They reached out for help because Election Day 2012 was rapidly approaching, and they still had not received their absentee ballots. I heard from the grandmother of one Texas Marine who was serving in Afghanistan and the father of another, because both deployed Marines were still missing their ballots. I heard from the mother of an Airman from Texas who was in the middle of moving from one Air Force base to another and did not know where his ballot was going to be sent and whether it would reach him in time. These examples are typical of the hurdles our military voters face every election cycle.

These Americans make tremendous sacrifices in the defense of our nation, but those sacrifices should not include giving up their right to participate in our democratic process. Without

question, it remains much more difficult today for military service members and their families to exercise their right to vote than it is for their civilian counterparts. Most problems experienced by military voters stem from their being gone from their home voting jurisdictions on Election Day, which is a direct result of their federal military service. While it may never be as easy to vote for service members who are away from home as it is for civilians who can go to their local polling place, we owe military voters our best efforts to remove as many obstacles as possible. To that end, this past November, Senator Schumer and I introduced the Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act (the SENTRI Act). I want to thank Senator Schumer and his staff for working with me on this important bipartisan reform bill.

Congress has already removed some major hurdles that hampered military voters in the past, most recently in 2009 by enacting a number of important reforms through the Military and Overseas Voter Empowerment Act (the MOVE Act), championed by Senators Schumer and Chambliss. I was proud to support the MOVE Act and to author two parts of it. The 2012 election was the first presidential election since the MOVE Act, and post-election analysis by the Election Assistance Commission (EAC) shows that this law improved various aspects of the process, including reducing the number of marked ballots that were rejected by election officials. However, the EAC data also reveal that large numbers of military and overseas voters continue to experience problems. For example, of all the blank absentee ballots that were sent out to military and overseas voters in 2012, more than 30 percent never made it back to local election officials to be counted. This suggests that many of those ballots never reached the intended voters, likely due to outdated voter registrations or ballot delivery problems. So, the MOVE Act made a difference, but clearly there is still room for improvement.

The area perhaps most demanding of our attention is military voter assistance. The significant drop in absentee ballot requests in 2012 points to the need for the Department of

Defense (DoD) to enhance its military voter assistance programs to put them more on par with "motor voter"-style assistance programs that benefit civilians stateside. Blank absentee ballots have a significantly better chance of reaching registered military voters at the correct mailing address if these service members are able to keep their voter registrations current, which can be challenging because of the transient nature of military service. In the MOVE Act, we attempted to address this problem by creating a voter assistance office on every military installation, but the program was never fully implemented by DoD. So, the SENTRI Act would require DoD to offer military voters an affirmative, annual, online opportunity to fill out a voter registration and absentee ballot request form. Helping military voters to keep their voter registrations current would also aid local governments in reducing waste and inefficiency by preventing blank ballots from being sent to outdated addresses.

The SENTRI Act includes several provisions to strengthen the enforcement of laws that protect military voting rights. It also relieves DoD of an unfulfilled 2002 mandate to put in place an Internet voting system. Lastly, the SENTRI Act extends to voting-age military children the guarantee of state residency for voting purposes, which Congress provided to military spouses in 2010, to allow these children to have the same state of residency as the military service member, so long as they qualify as dependents.

The SENTRI Act is aimed at fixing the system's most glaring deficiencies, which continue to inhibit our service members' ability to vote, and I hope the Committee will consider it favorably. However, there is no one-size-fits-all solution for the various problems faced by military voters, and I am hopeful that members of this Committee will offer additional ideas for preventing further disenfranchisement of our military voters. I look forward to working with the Committee to achieve that objective. Thank you, Mr. Chairman.

Senator Richard J. Durbin
Hearing on Improving Voter Registration and Voting Opportunities for Military and Overseas Voters
U.S. Senate Committee on Rules and Administration
January 29, 2014

I would like to thank Chairman Schumer for holding this important hearing. The opportunity to vote is one of the most important rights we have as American citizens. In fact, voting is "the right preservative of all other rights." Our access to the ballot box is so important that the Constitution has been amended six times to expand and protect the right to vote, more than any other issue. These six Constitutional Amendments—the fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth—ratified over the course of 100 years underscore our nation's commitment to ensuring that all adult citizens enjoy free and full access to the ballot.

As chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, I have held a series of hearings on voting rights. From those hearings, one thing is abundantly clear: protecting the right of every citizen to vote is not a Democratic or Republican value, it is an American value. That's why it's so very important to ensure that members of the military, their families, and all American citizens overseas can vote without unnecessary burdens or delays. We should do everything we can to clear any barriers to the ballot faced by the brave Americans who fight for our country and protect our democracy.

The Safeguarding Elections for our Nation's Troops through Reforms and Improvements (SENTRI) Act is an important step forward in that direction. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment Act (MOVE) Act removed some of the most difficult obstacles military and overseas voters faced. The SENTRI Act will build upon that progress and help improve the ability of our soldiers and overseas citizens to participate in elections.

I believe more members of the military would exercise their right to vote if they faced fewer obstacles in doing so. First, the SENTRI Act would require the Department of Defense (DOD) to implement an online system that service members can use to register to vote, update voter registration information, and request absentee ballots. This system would also remind service members who have recently moved to update their registration and mailing address. Notably, this bill would also require DOD to provide voter assistance as a routine part of each service member's annual training. These concrete steps would simplify the process for members of our Armed Services to vote, regardless of where they are stationed.

Second, the SENTRI Act streamlines the process for requesting absentee ballots. Instead of sending in an official form every time there is an election for a federal office held in a state, this bill would allow a person to send just one form to receive absentee ballots for each of those elections during a general election cycle.

Finally, this bill would strengthen reporting requirements so that the Department of Justice can determine whether military and overseas voters are receiving absentee ballots in a

timely manner. The SENTRI Act would also track the efficacy of DOD voter assistance programs and the new online system for voter assistance via a biennial report following the conclusion of each normal federal election cycle.

I want to thank Senator Cornyn and Chairman Schumer for their work on this bill. I look forward to the discussion today, as we work to ensuring that members of the Armed Forces, their families, and all overseas citizens have simple and straightforward access to the ballot box.

SERVING WITH PRIDE

AMVETS

NATIONAL HEADQUARTERS
4647 Forbes Boulevard
Lanham, Maryland
20706-4380
TELEPHONE: 301-459-9600
FAX: 301-459-7924
E-MAIL: amvets@amvets.org

20 November 2013

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, DC 20510-4305

Dear Senator Cornyn:

On behalf the quarter of a million members of AMVETS (American Veterans), a leader since 1944 in preserving the freedoms secured by America's armed forces and providing support for Veterans, Active Duty military, the National Guard/Reserves their families and survivors, we heartily offer our support for S. 1728, the Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act (SENTRI Act).

Military and overseas civilian voters, typically absent from their home voting jurisdiction on Election Day, often face obstacles to exercising their right to vote. Congress has taken action to remove some of the biggest hurdles that hampered military and overseas voters, passing the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") in 1986 and the Military and Overseas Voter Empowerment Act ("MOVE" Act) as part of the FY10 NDAA. Problems remain, however, with large numbers of military and overseas voters continuing to experience problems with absentee voting caused, at least in part, by outdated voter registration or ballot delivery problems. The SENTRI Act is intended to address these problems and strengthen protection of voting rights of military and overseas voters.

This much needed legislation:

- improves voter registration and voting opportunities for service members through use of online systems which allow individuals to register to vote, update their voter registration information, request absentee ballots, get automatic voter-specific notifications and by requiring voter assistance as a routine part of a service members annual training;
- ensures requests for absentee ballots are valid for one full federal election cycle;
- strengthens protection of voting rights of military and overseas voters; and
- requires reporting on implementation and effectiveness of new voter assistance obligations.

Members of our Armed Forces and their family members must be afforded every opportunity to vote, regardless of their assigned geographic location. We are confident that the SENTRI Act's protections and reforms will help ensure that ballots cast by service members are delivered to the appropriate state election officials in a timely manner. AMVETS thanks you for introducing this important piece of legislation and for all you do in support of American Veterans.

Sincerely,

Dave M. Zumatto

AMVETS National Legislative Director
301-683-4016/dzumatto@amvets.org

22 November 2013

The Honorable John Cornyn (TX)
United States Senate
517 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Charles Schumer (NY)
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn and Senator Schumer,

On behalf of the Association of the United States Navy (AUSN), we applaud and support your bill S. 1728, the Safeguarding Elections for our Nation's Troops through Reforms and Improvements (SENTRI) Act, which would amend the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA) to improve ballot accessibility to uniformed services voters and overseas voters.

Our nation's men and women in uniform make sacrifices every day to preserve our democracy and the cherished right to vote that goes with it. It is alarming; however, that many of our servicemembers face challenges when it comes to voting as a result of frequent relocation and often having to vote from remote locations. It is unacceptable that servicemembers and their families face such challenges trying to exercise their right to vote, a right that is enshrined in our Constitution which our servicemembers fight to defend.

S. 1728 would help ensure our servicemembers receive their ballots and are able to vote on time. The SENRI Act strengthens existing military voting rights by clarifying residency requirements of servicemembers and their families so that these individuals can cast ballots even if they are outside of their State of residency for extended periods of time. The bill also ensures that absentee ballot requests are valid for one full election cycle and establishes more accountability for counting votes of servicemembers and their families. Finally, the bill also maintains reporting requirements for overseas voting assistance programs and provides more opportunities for servicemembers, spouses, and dependents to participate in elections by allowing online registration and ballot casting for overseas voters.

Thank you for taking an active role in such an important issue to the military community by introducing legislation that would help ensure our overseas servicemembers and families are able to cast their ballot in elections as well as register to vote. Please feel free to contact me with any questions or concerns at 703-548-5800.

Sincerely,

Anthony A. Wallis
Legislative Director, AUSN

1619 KING STREET • ALEXANDRIA, VA 22314 • 877.NAVY.411 P • 703.683.3647 F • AUSN.ORG

January 29, 2014

Dear Senate Rules Committee Member:

We are writing to you today to express support for *Safeguarding Elections for our Nation's Troops through Reforms and Improvements (SENTRI) Act,* S. 1728, bipartisan legislation that was introduced by Senators Cornyn and Schumer on November 19, 2013.

Common Cause is a nonpartisan, nonprofit organization that is dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process. Common Cause has over 400,000 supporters across the country and 35 state chapters advancing reforms and holding power accountable. We share Senators Cornyn and Schumer's commitment to guard with special care the voting rights of military voters, and this legislation enhances the Military and Overseas Voter Empowerment (MOVE) Act of 2009 to ease the burden our service men and women face in exercising their right to vote.

The MOVE Act did much to facilitate the voting process for military and overseas voters but opportunities for improvement remain. The SENTRI Act addresses these areas and will further ease and improve access to the ballot box for military voters.

Since the MOVE Act has been implemented, the Department of Defense (DoD), the Obama administration, the U.S. Election Assistance Commission, military groups, and other stakeholder organizations have collected and studied military and overseas voter participation data from federal elections in the last three years and made recommendation for improving the voting process. The SENTRI Act incorporates recommendations from all of these sources to further improve voting access for military and overseas voters.

The SENTRI Act:

- **Improves voter registration and ballot access opportunities for military and overseas voters through online systems**. Under the MOVE Act, DoD designated offices in military installations where soldiers and their families could seek voter assistance. The SENTRI Act improves voter assistance opportunities by requiring DoD to implement a complementary online system through which service members can register to vote, update their voter registration information, request an absentee ballot, pre-populate the official postcard form used to request absentee ballots, and get automatic notification regarding the need to update their voter registration or absentee mailing address after a change of address. The bill also requires DoD to offer voter assistance as a routine part of each service member's annual training.

- **Clarifies that requests for absentee ballots should remain valid for a full federal election cycle.** Military and overseas voters may use the official postcard form prescribed

under UOCAVA to request an absentee ballot. The SENTRI Act clarifies that the official postcard form may be used to request an absentee ballot for each election for Federal office held in a State through the next regularly scheduled general election for Federal office. Due to concerns about the expense of continuing to send ballots that never reach intended voters, the bill provides exceptions to the one full election cycle rule, including where a ballot is returned as undeliverable by mail or, in the case of a ballot delivered electronically, if the email is rejected.

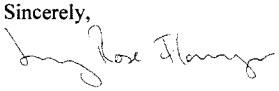
- **Strengthens protections of voting rights for military and overseas voters.** Voter registration and absentee ballot procedures established under the MOVE Act should result in timely transmittal of blank ballots to military and overseas voters. This has not always been the case in recent Federal elections. The SENTRI Act would require states to submit a pre-election report to DoJ and DoD on the status of blank absentee ballot transmissions to military and overseas voters not later than 43 days before a Federal election. Information from the states on the number of ballot requests received and ballots transmitted would enable DoJ to determine whether enforcement actions are needed to obtain timely remedies for military and overseas voters. In addition, states that fail to timely transmit requested absentee ballots would be required to transmit such ballots by express delivery.

- **Protects civilian overseas voters from undue rejection of their absentee ballot requests.** The SENTRI Act extends to overseas civilian voters a MOVE Act provision that precludes states from rejecting absentee ballot requests from military voters that are received early (i.e., in the same calendar year as the federal election, but prior to the state-designated start date for ballot requests). The inclusion of overseas civilian voters in this provision is consistent with other provisions of the MOVE Act.

- **Requires reporting on implementation and effectiveness of voter assistance obligations.** To measure the effectiveness of DoD's voter assistance programs, as well as progress implementing the new online system for voter assistance, the SENTRI Act requires a biennial report to coincide with the Federal general election cycle. The report will be subject to independent GAO review assessing the effectiveness of DoD's voting assistance programs.

Our brave men and women who serve our country in uniform must have every opportunity to cast a valid ballot and participate in our democracy. Additionally our overseas civilian voters should not lose their voting rights due to temporary relocation. We strongly support these measures to ease and improve the voting process for military and overseas voters and are privileged to express our support for the SENTRI Act, S. 1728.

Sincerely,



Jenny Flanagan
Vice President for State Operations
Director of Voting and Elections
Common Cause

5535 Hempstead Way • Springfield, VA 22151-4094
naus@naus.org -- www.naus.org
Tel: 703-750-1342 • Toll Free: 1-800-842-3451
Fax: 703-354-4380
"The Servicemember's Voice in Government" Established 1968

November 20, 2013

The Honorable John Cornyn
United States Senate
Washington, D.C. 20510

Dear Senator Cornyn:

On behalf of the more than 150,000 members and supporters of the National Association for Uniformed Services, I write to offer our support of the Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act (SENTRI Act).

NAUS supports the SENTRI Act as an important step to improve a voting system that is too often frustrating to our troops seeking a voice in the electoral process. As a nation, it is our responsibility to do everything possible to protect the right to vote for those who put their lives on the line to protect the freedom of all Americans.

NAUS urges passage of this bipartisan bill quickly so that elections officials have time to prepare for the coming election cycle. We are confident that the protections and reforms of the SENTRI Act will help ensure that ballots cast by service members are delivered to the appropriate State election officials in a timely manner. Surely, these brave men and women have earned the protections offered in the SENTRI Act.

Sincerely,

RICHARD A. JONES
Legislative Director

U.S. Senate Rules Committee

Hearing on the SENTRI Act (S.1728), "Improving Voter Registration and Voting Opportunities for Military and Overseas Voters Act."

Statement for Record by
Verified Voting

January 29, 2014

Thank you Chairman Schumer, Ranking Member Roberts for the opportunity to provide a statement for the record concerning S. 1728, "Improving Voter Registration and Voting Opportunities for Military and Overseas Voters Act."

Verified Voting is a non-partisan, nonprofit organization founded and governed by expert technologists in the U.S. working to safeguard elections in the digital age since 2004. The organization is the nation's leading advocate for secure, reliable and accessible voting systems and election administration practices. Verified Voting recently released the seminal study: *"Counting Votes 2012: A State by State Look at Voting Technology Preparedness."*

As you may know, like the National Institute of Standards and Technology (NIST), the Federal Voting Assistance Program (FVAP) at the U.S. Department of Defense, does not advocate for the electronic return of voted ballots for the military because of the security risks. FVAP considers postal mail return the most responsible method of voting for military voters. Verified Voting also supports these positions by NIST and the U.S. Department of Defense. Verified Voting is very encouraged to hear about the efforts being undertaken to improve military postal mail. We support recommendations about the need for military mail to be able to connect with U.S postal mail.

We are especially encouraged to hear the that Senator Roy Blunt (R- MO) and Senator John Cornyn (R-TX) have succeeded in convincing the U.S. Department of Defense to buy the same equipment for the military mail that the U.S. Postal Service has for everyone else in the US, and that the DOD has agreed to do that. Because of this action, we agree with Senator Blunt that for military that didn't receive their ballots in time, "by next election cycle that problem should be minimized."

We applaud the testimony by Mr. Kevin Kennedy, Director and General Counsel of the Wisconsin Government Accountability Board, that out of 10,000 ballots they had sent, only four missed the deadline. It appears he is referring to four that didn't get to the voter 45 days out, not that didn't come back timely, but either way, that's an excellent record and demonstrates a commendably diligent effort.

Mr. Don Palmer, Secretary of the Virginia Board of Elections, points to 30 states allowing return by email or fax as an indication that the postal service has problems getting them back. His comment does not acknowledge expedited return of voted ballots authorized by the Military and Overseas Voter Empowerment Act (MOVE). It also doesn't indicate at what point those ballots were requested; if not until late in the early voting process for UOCAVA voters, then getting them back is more challenging. That's why MOVE mandated the 45-day window. The comments do not acknowledge the significant cybersecurity risks inherent in the return of electronic ballots. States

likely did not know about those risks when they decided in favor of that option, and many did so before MOVE was passed.

It is also notable that in the Election Administration survey conducted by U.S. Election Assistance Commission (EAC) for 2012, we've found no explanation for why Virginia failed to accept for counting a number of the ballots that were submitted. They cite a smaller percentage for lateness, but the larger portion (approximately 60 percent) were not accepted for "other" reasons which are unexplained. Other states did substantially better on accepting submitted ballots for counting, including other states that do not do conduct the electronic return of voted ballots.

Verified Voting believes that more research is needed to understand why more than 30 percent of ballots sent to the military in 2012 never made it back. It is possible, as Senator Cornyn suggests, that "many of those ballots never reached intended voters," but without data we cannot know. We look forward to continued improvements in getting blank ballots to voters both through electronic transmittal per the MOVE Act and through upcoming improvements in the postal services that are now under development.

Finally, we applaud Mr. Matt Boehmer, Director, U.S. Department of Defense, Federal Voting Assistance Program for this statement:

> "Title III of the SENTRI bill removes the existing requirement for FVAP to conduct an electronic voting demonstration project, often referred to as the Internet voting project. At this time, the Department raises no objection to the repeal of this project as State election officials are ultimately responsible for the security of elections."

Thank you for the opportunity to submit our comment for the record.

###

Senator Amy Klobuchar
U.S. Senate Committee on Rules and Administration
Full Committee Hearing
"Improving Voter Registration and Voting Opportunities for Military and Overseas Voters"
January 29, 2014
Questions for the Record

Mr. Palmer

State Experiences

- Are there any unique features of your state's voting procedures that benefit military voters and could serve as a model for other states?

Virginia, home to 21 military installations, over 88,000 residents serving in the Armed Forces and over 100,000 military dependents, has several unique programs benefiting military voters, to commend to other states:

Continuous improvement of voting technology: Virginia continues to improve and expand the online voter portal launched in 2013 to enable online application for registration and updates to registration information. Military voters can use this system to apply to register to vote and update their registration records. Virginia hopes to expand the portal features to include the Federal Post Card Application (FPCA), state applications for absentee ballots, sending absentee ballots

and returning them securely (legislation pending). Virginia has been developing and analyzing mobile voting solutions for all military voters including those with severe combat injuries. For example, the State Board of Elections partnered with the Virginia Department of Military Affairs to study the feasibility of mobile voting technology at Virginia-based military units and local veteran hospitals. In 2012, Virginia received a grant of $1.8 million dollars from the Department of Defense to further develop ballot delivery efficiencies in alignment with the federal MOVE Act.

Dedicated staff position: Virginia employs a full time absentee expert available extended hours to provide personalized expert attention to resolve problems on an expedited basis. The coordinator maintains key dates and deadlines of interest to military voters on the state election website. The coordinator also works with local election officials to ensure the timely processing of registration applications and absentee voting requests for military voters and their families. Service personnel and voting assistance officers often need personal help to navigate increasingly complex voting laws and technology. Virginia's absentee expert frequently receives calls on an urgent basis from deployed military that would not otherwise be able to vote without her help locating the correct form and procedure for the voter's particular situation.

Support legislative and regulatory initiatives: Virginia has an active workgroup of state and local absentee experts to

recommend and support legislation such as Virginia's 2012 enactment of the Military and Overseas Voters Act (UMOVA) and the State Board of Elections passed a regulation in 2011 to allow electronic registration for absent military and overseas voters using the Federal Post Card Application (FPCA) by fax or email (scanned attachment).

Statewide outreach to military voters: for several months before statewide general elections, Virginia conducts a "Boots and Ballots" campaign in partnership with the Heroes Vote Initiative to provide voter education resources on new voting tools available to Virginia's military installations throughout the state. Boots and Ballots provides information to Voting Assistance Officers (VAOs) and service members at each Virginia installation or military base to help facilitate voting preparedness for military members and dependents. State and local election officials partner with the VAOs to disseminate information on upcoming elections, Virginia's new online application to register and update registration information, and how to request an absentee ballot in the event the member is absent or deployed overseas.

Partner with FVAP: To maximize the scope and effectiveness of its outreach, SBE staff maintains a close working relationship with staff at the Federal Voting Assistance Plan (FVAP). Joint efforts include website enhancements, forms and a roundtable with Virginia local election administrators in Yorktown last May.

State of Wisconsin \ Government Accountability Board

212 East Washington Avenue, 3rd Floor
Post Office Box 7984
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
http://gab.wi.gov

JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

DATE: February 13, 2014

TO: U.S. Senate Committee on Rules and Administration

FROM: Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

SUBJECT: Response to Question for the Record

Following the full committee hearing on January 29, 2014 about "Improving Voter Registration and Voting Opportunities for Military and Overseas Voters" we received the following question for the record: *Are there any unique features of your state's voting procedures that benefit military voters and could serve as a model for other states?* Senator Amy Klobuchar requested the question for the record. This memo provides our response to the question.

In Wisconsin, military voters are not required to register, but must provide some basic information to ensure they receive the correct ballot. Military and permanently overseas voters can access their ballot online, and then mail the ballot with a signed certification to their municipal clerk. This capability can significantly reduce ballot transit time, and thus help these voters return their ballot in time to be counted.

The definition of military voters in Wisconsin statute includes dependents, and those dependents have the same rights and opportunities regarding voting as members of the military. Permanently overseas voters are defined in Wisconsin Statute as those who no longer reside or have never resided in the United States, and have no intent to return to the United States. These voters must have last resided in Wisconsin before leaving the United States, or their parent/guardian last resided in Wisconsin before leaving the United States if they were born overseas. Wisconsin does not consider voters who are temporarily overseas to be overseas voters.

Wisconsin statute also goes beyond the requirements of the MOVE Act and requires that ballots for federal elections are available at least 47 days prior to the election. Ballots for non-federal elections must be available at least 21 days prior to the election. Military voters can vote for all contests on the ballot, regardless of whether or not they are currently residing in Wisconsin. Permanently overseas voters may only vote in federal contests.

Our agency also has a current and a retired member of the military on staff who are personally familiar with the issues and concerns of military voters. We also communicate frequently with the Wisconsin Department of Military Affairs to coordinate information sharing and voter outreach.

Senator Amy Klobuchar
U.S. Senate Committee on Rules and Administration
Full Committee Hearing
"Improving Voter Registration and Voting Opportunities for Military and Overseas Voters"
January 29, 2014
Questions for the Record

Question for Mr. Boehmer

Online Voter Registration

A recently released report from the Presidential Commission on Election Administration recommends wider adoption of online voter registration systems. A number of states already have these in place and more are likely to follow in the coming years.

- How will your office work with individual states to ensure that their systems are compatible with the Defense Department's Federal Voting Assistance Program?

RESPONSE:

To address the compatibility issue, the Federal Voting Assistance Program (FVAP) links directly into State online registration systems, when available. When voters access the online assistant at FVAP.gov, they are first given the option to go to their State system. If there is no State system available, the voter is then directed to FVAP's online assistant to complete the Federal Post Card Application to print, sign and send to the local election official.

QUESTIONS FOR THE RECORD

U.S. Senator Patty Murray
Senate Committee on Rules and Administration
January 29, 2014, 10:00am EST

"SENTRI Act, Improving Voter Registration and Voting Opportunities for Military and Overseas Voters"

Questions for Mr. Boehmer

Question1: This is an incredibly important topic for this Committee to examine. I believe that voting is fundamental to our democracy, and it is Congress's responsibility to periodically re-examine our voting laws and update them to meet the changing needs of our democracy. For the past 10 years, we have had large number of servicemembers and government employees who are stationed and living overseas. And, this has presented new challenges to make sure every American has the opportunity to vote.

I'm proud that my home state of Washington has been a leader in developing innovative strategies to improve voter access, increase voter participation, and safeguard the privacy of servicemembers and others Americans living overseas. But I know this is not the case in every state. And, this highlights the need for our national voting laws.

As I mentioned, Washington state does a great job of identifying servicemembers and enrolling them as absentee voters. They also provide a simple way of registering online, and receiving and returning their ballot online. How can the Department Defense do a better job of integrating electronic military technology services, with those online tools already available to servicemembers and overseas voters?

RESPONSE:
The Federal Voting Assistance Program (FVAP) links directly into all State online registration systems that are available. When voters access the online assistant at FVAP.gov, they are first given the option to go to their State system. If there is no State system available, the voter is then directed to FVAP's online assistant to complete the Federal Post Card Application to print, sign and send to the local election official.

In addition, FVAP supports States in their efforts to research new technology through the Effective Absentee Systems for Elections research grant program, to include such areas as evaluating the effect that innovative technologies have on the ballot return rate for military and overseas voters. As State systems become available, FVAP will provide voters with access to those systems.

Question2: In your written testimony, you indicated that the Department of Defense is already working to implement a tool that is required by SENTRI—an integrated alert for member of the military to receive assistance with updating their address information any time they submit an address change to the Department's personnel systems. Pleas provide me a detailed timeline of the implementation of this program. Are there any other aspects of the bill that the Department is already working to implement? If so, please describe them and provide a timeline for implementation.

RESPONSE:
In 2013 the Federal Voting Assistance Program (FVAP) began developing a tool to prompt proactive address change messages to Service members each time they process an address-changing event online. Every time a voter initiates an address change within this system, known as milConnect, the system will provide reminder information and a link to FVAP.gov to complete a new Federal Post Card Application for submission to their local election official. The timeline for milConnect is:

- April – Define requirements
- May/June – Develop and test
- July/August – Deploy

Additionally, the Defense Manpower Data Center (DMDC) will provide FVAP with email addresses of Service members that have moved or updated their address, and FVAP will send an email reminding them to update their information with their local election official. The first batch of emails will be sent the first week of April.

There are no other aspects of SENTRI that the Department is already working to implement.

Question 3: As you indicated in testimony, the Department has developed several tools under the Federal Voting Assistance Program designed to make sure Voting

Assistance Officers have the materials and training required to help their colleagues vote. Can you tell me what efforts the Department has taken to evaluate the efficacy of those materials? Do you receive regular feedback from Voting Assistance Officers on these materials and training? Do they contribute to the training program development?

RESPONSE:
Ensuring that Voting Assistance Officers (VAOs) understand their responsibilities in carrying out the law and State-specific rules and deadlines is critical to voter success. As such, the Federal Voting Assistance Program (FVAP) provides in-person training for VAOs at military installations and embassies worldwide. The training provides the VAOs the information they need in order to assist Uniformed and Overseas Citizens Absentee Voting Act voters.

So far this year, FVAP has conducted in-person training for more than 1,500 VAOs worldwide. One way of measuring the efficacy of these training sessions is via VAO pre- and post-training self-assessments. During post-training evaluations the VAOs were asked to rate themselves on how knowledgeable they were in regard to completing their responsibilities. The sliding scale goes from 1 (unknowledgeable) to 5 (very knowledgeable). The average self-assessment rating went from 2.4 before the training, to 4.6 after the training, showing a drastic improvement in competency and confidence. When asked how prepared VAOs felt to complete their voting assistance duties following the training, the average response was 4.4.

To help ensure accurate training program development and deployment, FVAP regularly engages the Senior Service Voting Representatives and Service Voting Action Officers via conference calls and email for input.

Though the training sessions are consistently rated positively through VAO self-assessments, FVAP is continuing to evaluate the training provided to the Services and the Department of State by working with a Federally Funded Research and Development Center.

Senator Pat Roberts
U.S. Senate Committee on Rules and Administration
Full Committee Hearing
"Improving Voter Registration and Voting Opportunities for Military and Overseas Voters"
January 29, 2014
Questions for the Record – Matt Boehmer

Question 1:

The President's Commission on Election Administration report describes the inconsistencies in the services voters receive from Installation Voting Assistance Officers. These officers are tasked with helping service members register to vote, yet the Commission found, "In some instances, the Commission heard, these difficulties may arise from discomfort of some members of the military about getting involved with anything 'political.' In other instances, similar to the plight of election officials in dealing with local governments, voting assistance may simply be considered a lower priority than the many other critical responsibilities of unit commanders. Whatever the cause, the law requiring voting assistance for military voters is clear and must be enforced." (PCEA Report p. 15-16)

What is your reaction to this Commission finding? Do you agree with it? Have you had problems with a military culture that doesn't regard this as a priority? How do you plan to overcome it?

Answer:

The Department plans to reach out to the Commissioners on this and other topics to clarify the Recommendations and Best Practices highlighted in their report. The Department's primary purpose in the election process is providing assistance to military and overseas voters and facilitating communication with their local election official. An individual's decision of whether or not to cast a vote in a particular election is a personal choice.

As evidenced by the plethora of voting assistance provided by the Services and the Federal Voting Assistance Program, the importance of providing a reliable avenue to register, request, receive and return a ballot in a timely manner is taken very seriously by the Department, the Services and the Military Postal Service Agency.

The Department will continue to provide and improve upon the tools and resources necessary for Military members, their families and overseas citizens to successfully vote absentee from anywhere in the world.

Question 2:

The MOVE Act required voting assistance offices to be established at every military installation (other than those in a warzone). The Defense Department's Inspector General issued a report in August 2012 that revealed they were unable to contact half of the installation voting assistance offices listed on the FVAP website. This indicates the law is not being complied with but rather than make suggestions for improved compliance, the IG recommended that we change the law to get rid of the requirement and make it discretionary.

Does FVAP support this recommendation? Please describe your views on the utility of the existing requirement and the Defense Department's efforts to comply with the law in this regard.

Answer:

The April 2013 DoD IG report following the 2012 election confirmed the Services were compliant with their voting assistance activities, to include Installation Voter Assistance (IVA) Office requirement.

The August 2012 DoD IG report had used an outdated contact list, and after failing to make contact via telephone, concluded that 50 percent of the IVA offices weren't established. The Federal Voting Assistance Program (FVAP) addressed the outdated information and conducted weekly outreach to IVA Offices to ensure information stayed current. FVAP continues to reach out to the IVA Offices to validate their contact information.

FVAP supports the Inspector General's recommendation in their August 2012 report that the mandatory IVA Office requirement be changed to one that is discretionary to the Secretary of the Military Departments with the intent that the Services optimize voting assistance to military personnel and other overseas citizens.

FVAP agrees with providing flexibility for the Service to make the determination as to whether the IVA Offices should play a role in their installation voting assistance programs. IVA Offices are only one of many tools that UOCAVA voters have available to them including the FVAP.gov online assistants, the FVAP call center, informational handouts and Voting Assistance Officers at the installation and unit level, to name a few.

Question 3:

The SENTRI bill would require establishment of new online systems at DoD to help facilitate registration and ballot delivery.

Is a change in federal law needed for FVAP to develop this system? Does FVAP intend to develop online systems along the lines of those required by SENTRI (S. 1728 – Section 201) now or will it await the passage of the legislation? If FVAP intends to develop the system now, what elements would it share with the system required by SENTRI, and how would it differ?

Answer:

No change in law is needed for the Federal Voting Assistance Program (FVAP) to develop an online training system that will link to FVAP.gov to facilitate completion of registration forms and provide information on ballot delivery. At present, FVAP does not have plans to develop online systems as required by S. 1728, sec. 201. However, if the legislation passes as written, FVAP will comply with the law and develop the online training system as required by legislation.

HEARING—BIPARTISAN SUPPORT FOR IMPROVING U.S. ELECTIONS: AN OVERVIEW FROM THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION

WEDNESDAY, FEBRUARY 12, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer presiding.

Present: Senators Schumer, Klobuchar, King and Roberts.

Staff Present: Jean Bordewich, Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Benjamin Hovland, Senior Counsel; Ellen Zeng, Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Correspondent; Lynden Armstrong, Chief Clerk; Lean Alwood, Chief Auditor; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Okay, the Rules Committee will call to order.

Our hearing today is on The Presidential Commission on Election Administration, the report and recommendations on best practices in election administration.

At the core of our national identity as Americans is a pride that we live in a democracy and, of course, have the right to vote.

It is a beautiful thing to me that on November nights in New York, cold November nights, citizens, tired, coming home from work—they want to get home and put dinner on the table for the kids, just get home because they have had a hard day at work, put their feet up on the table, and on the coffee table, and watch their TV show.

But, in quiet dignity, they line up, go into the polling place, do their duty, and the next morning we all abide by the decision.

It is an amazing thing that does not happen in most countries still to this day and has not happened in any country for as long as it has happened in ours. So it is a beautiful thing.

And, in the 225-year journey since the first presidential election, many things about elections have changed. Of course, more people are eligible to vote.

As I look around the room here, I do not know if either King or Roberts is a property owner, but half of us would not be allowed to vote when the Republic was founded.

And, if you guys—your ancestors did not own property——

Senator ROBERTS. I am a property owner.

Chairman SCHUMER. That is right. I should not have brought that up.

Yes, you are.

Senator ROBERTS. Do you want to emphasize that?

Chairman SCHUMER. No, no, it was unintended. Okay.

Anyway, more people are eligible to vote—African-Americans, 18 to 20 year-olds. Today's expanded electorate is much more reflective of our Nation. But, as recent examples have shown, there are still problems with our elections, many of which could be addressed by improving the way we administer them.

Election administration is a difficult, often a thankless, task. So, before I go any further, I would like to thank the election administrators and officials for all of the Election Days that have gone right over the years. It is not an easy job. Because it is so important to our democracy, we have to aspire to perfection.

In reality, most Americans do not even think about running of an election until something goes wrong. We all remember Florida 2000 and Minnesota's 2008 Senate race, where recounts put our election process under a microscope. As recently as the 2012 election, many polling places throughout the country had unacceptably long lines, and this was not the first election with that problem, but we would all like it to be the last.

In his election night victory speech, President Obama referenced those long lines, declaring, "We need to fix that."

That is a difficult task because elections in the United States are uniquely run at the state and local level. With our 50 states, we have 50 unique election systems and thousands of election districts, with this patchwork system sometimes creating challenges.

Former Supreme Court Justice Louis Brandeis famously called the states "laboratories of democracy." They sometimes provide us with examples of innovation that can be shared throughout the country.

Soon after the last election, the President acted and created a bipartisan commission to study election administration and best practices for improving voting in America. The President insisted this not be a partisan exercise. The Commission was supposed to seek out the best ideas for making voting easier and better no matter where they came from, and that is just what the Commission did.

The Presidential Commission on Election Administration was made up of 10 members, included current and former election officials, executives from successful customer service-oriented businesses and two chairs—both well known, one a Republican, one a Democrat, but each with a long storied history in this area.

And so, Mr. Bauer and Mr. Ginsberg, you have been on opposing sides in political campaigns and in the courtroom. You both have top-notch credentials as advocates and champions of your respective parties. So you are uniquely qualified to identify areas where we should move forward.

And I think on behalf of our whole Committee, those present and those not, I would like to thank you for serving on the Commission and finding places where we can move beyond partisanship and

focus on the nuts and bolts of making running elections easier and better for voters and administrators alike.

Your Commission's report, in my judgment, is an outstanding piece of work, a valuable road map for improving election administration in this country.

While the Commission's charge did not include recommendations for Federal legislation, the report makes it clear there are areas of existing law and its enforcement that must be improved, and our Committee will study your report and your testimony today carefully.

So I hope my colleagues on both sides of the aisle will join me in using this report to help improve our election system and strengthen our democracy.

So we thank you for your work and look forward to hearing your testimony.

And, with that, let me turn it over to Senator Roberts.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman.

I look forward to hearing the presentation of our witnesses.

I want to thank you for your service. They are to be commended for giving their time on this project, and lending their experience and their expertise, which is considerable.

I know there were a number of other well-qualified commissioners who are not with us today, but I thank them as well for their efforts.

The Commission was charged with making best practice recommendations rather than legislative recommendations, and that is what the report has done. It recognizes that elections are carried out at the state and local level and that is where we must focus our attention.

For our elections to function properly, we need all of the parties—election officials, poll workers, and the voters themselves—and the voters themselves—to do their part. This requires proper planning and effective administration.

I hope the work that the Commission and the recommendations that it has made will help advance the effective administration of our elections and improve the voter experience.

I look forward to the testimony of our witnesses.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Roberts.

I welcome opening statements by the other members of the panel.

Senator Klobuchar.

OPENING STATEMENT OF SENATOR KLOBUCHAR

Senator KLOBUCHAR. Well, thank you very much, Senator Schumer.

I just want to, again, as a member of the Judiciary Committee and having looked at some of these voter issues from that perspective, want to thank our witnesses today for their good work.

And also, I would note while you did mention Minnesota with the recount, okay, and the fact that, as we all remember, someone did vote for someone named Lizard Person in that particular election

when we painfully looked at every single ballot in the State, our State actually has a very proud tradition of high voter turnout. We are always, consistently in the top few states of voter turnout, and a lot of that has to do that we have same-day registration.

And I studied and looked, and of the top six states for voter turnout they are not necessarily Democratic or Republican states. Iowa is usually one of the top ones. Maine is one of the top states. But they tend to have something in common; most of them have same-day registration.

So I know that is not necessarily part of what you looked at in terms of legislation, but I think that it would go a long way. And I have a bill with Senator Tester to look at rolling that out on a national level.

Thank you very much, Mr. Chairman.

Chairman SCHUMER. Thank you.

I would say my experience is as broad as either of yours. Minnesota has one of the best election systems and really tries to do it fairly and in a nonpartisan way, as does Maine actually.

Senator King.

Senator KING. I do not really have a statement, Mr. Chairman, except that since Minnesota and Maine have been brought up, Jesse Ventura and I always thought it was states with independent governors that had the high voter turnout.

[Laughter.]

Senator KLOBUCHAR. But I will point out that Senator King did not wear a feather boa at his inaugural party.

Senator KING. Well, you do not know that, Senator.

[Laughter.]

Senator KING. No, I have.

Chairman SCHUMER. This hearing is proving to be much more interesting than anyone ever imagined.

Senator KING. I will reserve my comments, and I look forward to hearing from the witnesses. Thank you, Mr. Chairman.

Chairman SCHUMER. Okay. So we want to thank our witnesses—first, Mr. Bob Bauer.

In addition to serving as a Co-Chair of the Presidential Commission we are here to discuss, Mr. Bauer is a partner in the law firm of Perkins Coie. He is general counsel to the Democratic National Committee and, in the 2008 and 2012 election cycles, was general counsel to Obama for President. So, as you can see, his credentials on the Democratic side are strong.

Equally strong is Mr. Ben Ginsberg. In addition to serving as Co-Chair of the Commission, Mr. Ginsberg is a partner in the Patton Boggs Law Firm. In 2012 and 2008, he served as national counsel to the Romney for President campaigns. And I will not get into it, but he has had a profound effect in our electoral system.

In 1992 and 1994, you changed America, not in a way I would like, but it was amazing what you did.

And, with that, let me turn it over to Mr. Bauer.

We would ask each of our witnesses to limit their statements to five minutes, and additional statements, without objection—additional remarks, without objection, will be read into the record.

Mr. Bauer.

STATEMENT OF ROBERT F. BAUER, CO-CHAIR AND MEMBER, THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, WASHINGTON, D.C.

Mr. BAUER. Thank you very much, Senator Schumer, Senator Roberts, members of the Committee. Thank you for the opportunity of testifying here today with my Co-Chair, Ben Ginsberg.

We discussed in advance how we would organize this. So I am going to open with, very quickly, some general considerations identified in the report that we asked our readers to keep in mind as we laid out then our recommendations and the best practices we identified, and then I am going to illustrate a little bit of the approach that we took by talking about the signature issue—the issue most associated with the Commission—and that is the problem of long lines at the polls.

There are, of course, a number of other issues that Ben will cover that we address in six major recommendations along with, as I said, highlighted best practices.

But let me say first that the Commission was structured, and its membership was selected, on the theory that election administration is a topic of public administration and needs to be treated as such and that the voters ought to be considered very much as we would consider any other recipients of services provided. That is to say, elsewhere in their lives, Americans think a good bit about customer service and about how customer service is rendered to them in their roles as consumers and in other walks of life.

And, likewise, our view was—and I think the President's intention was—that the Commission consider the voters as entitled to that level of customer service and provided the kind of service in the voting process that we all believe, as the drivers of our democracy, the voters deserve.

So this theme of public administration was essential to our work.

One illustration of the importance to the Commission and the approach the Commission took in this thought about public administration and this emphasis on public administration is our reliance on data. Our view was that we ought to look at election administration as thoroughly as possible through the lens of the best possible information, social science and research that was available.

And we were very fortunate that some of the witnesses who came before the Commission were able to fashion fresh data for purposes of their testimony that the Commission could rely upon, and that included an extraordinary survey of several thousand state and local election administrators conducted by some of the country's top political scientists and survey research experts. And we gleaned very significant information about some of the issues that we addressed from that survey.

But, overall, throughout the report, the effort was to look very closely at the evidence—how the electoral system was performing. And, in that connection, one of the recommendations that we make is that we need, in this country, much more systematic collection and analysis of data to enable us to pinpoint both the strengths and the weaknesses in the performance of our electoral process.

Beyond that, there were a few other—and I will tick through them very quickly—considerations that we discuss at the outset of our report.

Does one size fit all? We have many different jurisdictions. Some believe that you cannot generalize reforms across all jurisdictional lines. To some extent, that is true, but it is also true that there is enough in the way of common features to election administration across the United States that one size in many respects can fit all for many of these recommendations. And the recommendations we have made, we have made on the basis that they truly fit all.

Issue of resources. Election administration costs money. And, too often, we heard from administrators that budget priorities are such, and the fiscal pressures on the states and local jurisdictions are such, that too often the needs of election administrators—the fiscal needs of election administrators—are shuffled to the bottom of the deck.

We do not make specific recommendations. That was not our charge. But, clearly, it was important for us to note that we cannot have soundly conducted elections without money.

Thirdly, the technology challenge. I will leave this to my colleague, Mr. Ginsberg, to discuss in greater detail, but it is clear that one warning bell that we rang here was the impending crisis in voting technology.

Enforcement of existing law. It is very important, even though we do not make legislative recommendations, for us to call attention to problems in compliance with existing Federal statutes that were enacted to protect certain populations of voters—language minority voters, disabled voters and the voters among our uniformed military and overseas populations.

Some of these statutes, like the MOVE Act, have had significant salutary effect, but there are still gaps in compliance we identify in our report—compliance with the Americans with Disabilities Act, compliance with the Voting Rights Act and the provisions that protect language minorities and performance of public assistance agencies under the National Voter Registration Act in supporting the registration process.

So those are some fundamental points that we make.

And then let me say very briefly the point about lines. I just have a few seconds left.

There are many factors that feed into lines. We tried to analyze what those factors might be. They raise a whole host of issues that each can be individually addressed, and then in the aggregate the problem of lines can be substantially resolved.

And we also—and this is something we call attention to—are publicizing certain online tools now on our web site and to be permanently hosted on the Cal Tech-MIT Voting Technology Project web site, that administrators can use immediately and, over time, improve upon that will enable them to efficiently allocate resources within the polling place and plan for long lines and address them.

This is a report, but it is also a project. And our work begins now, to work with you, the Congress, state legislative leaders, community leaders and election administrators around the country, to see to their effective implementation.

Thank you, Mr. Chair.

[The prepared statement of Mr. Bauer was submitted for the record:]

Chairman SCHUMER. Mr. Ginsberg.

STATEMENT OF BENJAMIN L. GINSBERG, CO-CHAIR AND MEMBER, THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION, WASHINGTON, D.C.

Mr. GINSBERG. Thank you, Mr. Chairman, for having us here today.

It has been a pleasure to work with Bob on this, and it is fair to say we are both proud of the work of our Commission.

We were charged with making recommendations to the state and local officials who actually put on our elections, to remove barriers to duly qualified citizens being able to cast their votes easily.

Elections and voting is an area where there can be conflict between Republicans and Democrats, but it is also a subject where Republicans and Democrats can agree on the basic principle and on common-sense solutions to make the voting experience better.

Bob and I were fortunate to work with eight other commissioners and a talented research director from whom we learned a tremendous amount.

We were able to reach bipartisan and unanimous agreement on the report's recommendations and best practices. We found that the basic principles on which Republicans and Democrats agree is that every legally registered voter has the right to be able to cast his or her ballot easily and without impediments.

As to the details of voting, Bob and I had some history to fall back on. We have been on the opposite side of many partisan battles over the years and, undoubtedly, will be again as we amble along the path to the old election lawyers' home.

Among those battles have been a lot of recounts. All those recounts were instructive to this exercise because they provide an unparalleled view of how the system works.

We will both tell you that there are problems with our system of voting. The Commission presented a unique opportunity for us to address some of those topics that both Republicans and Democrats know are problems and which we need to do something about.

That is not a partisan issue. It is trying to get right something that very much needs to be gotten right. In fact, it is so important to get it right that it deserves doing even if it does not satisfy everything that one party or another believes needs to be fought in this area.

As for fixing these problems, the Commission recognized that our elections are administered by approximately 8,000 different jurisdictions, largely using volunteers who do not receive much training. As a result, achieving uniformity in our elections has proven challenging.

Let me turn to a couple of the big-picture issues that jurisdictions face.

As Bob mentioned, the state of our voting equipment and technology is an impending crisis. The machines now being used in virtually every jurisdiction, purchased 10 years ago with HAVA funds after the Florida recount, will no longer be functional within the next 10 years.

Voting equipment, generally, has not kept up with technological advances in our daily lives. The current equipment is expensive and unsatisfactory to virtually every elections official with whom the Commission spoke. That is heavily due to a Federal certifi-

cation process that is broken and must be reformed. This is a subject to which few are paying attention and which will not end well on its current path.

One of the issues we heard about consistently was having adequate physical facilities for polling places. In most communities, those facilities are schools, but officials in an increasing number of jurisdictions cite safety concerns as a reason for not making schools available for voting.

Adequate facilities to vote and safety for our children cannot be competing interests. The Commission felt a strong need to call attention to the problem and to recommend that security concerns be addressed by making Election Day an in-service day for students and teachers.

Bob already talked about long lines. Let me touch quickly on some of the other subjects of the Commission's specific recommendations and best practices to the state and local officials.

Early voting was one. Our Commission charge was to make it easier for all eligible voters to vote. A majority of states, with both Democratic and Republican state officials leading the way, now have early voting and told us that early voting is both here to stay and increasingly demanded by voters. The details of the number of days and hours will vary by state and county and locality, and the decisions are best made there.

More accurate voting lists. Whether to help ensure that only dually qualified voters vote or to facilitate more people being able to vote more easily, the Commission found agreement and support across the political spectrum for more accurate voter lists. We made two recommendations in that regard.

One is the adoption and use of more online registration. The SupportTheVoter.gov web site has examples of tools that can do that.

And, secondly, we recommend that all states join two existing and complementary programs—the Interstate Voter Cross Check, or Kansas, Project and the Election Registration and Information Center. Both allow states to share data in ways that will make their lists more accurate on their own initiative.

Finally, the report also touches on a number of subjects that are summarized in my testimony:

Military and overseas voting;

Disabled policies and law that require accessible polling for the Nation's voters with disabilities, a group that is growing larger with the Baby Boom generation, recommendations that entail state and local voting officials meeting with members of the disabled community and those with language proficiency issues to be able to work out solutions for local polling;

And, data and testing. There should be testing of our machines after each election to see how well they performed and to share information among jurisdictions. And there should be more uniform collection of data because, as our political scientist friends—led by our research director, Nate Persily, of Stanford University—told us, more data leads to better solutions.

With that, thank you again for having us, and I know Bob and I would be happy to answer questions.

[The prepared statement of Mr. Ginsberg was submitted for the record:]

Chairman SCHUMER. Well, thank you both for your great report and excellent testimony.

I will start off.

The report recommends that states adopt online voting registration, a reform that improves accuracy and saves money. Nineteen states have done it. So that means 31 have not, if my math is correct.

What is the barrier to the other states doing it, and is there anything that we can do to overcome those barriers?

[Pause.]

Mr. BAUER. You will notice we continue the bipartisan effort with each other——

Chairman SCHUMER. I see that.

Mr. BAUER. —to make sure that we do not interrupt. We will start interrupting as soon as we return to our day jobs, yes.

We are not seeing a barrier so much. Sometimes it takes a while for the discussions to take place within a state and, ultimately, decisions to be reached in favor of changes like online voter registration.

We are optimistic that this is one of the developments, a key and, I think, well-tested introduction of a technology into the electoral process that is going to sort of move irresistibly across the country.

And one of our goals in keeping with the slogan—this is not a report; it is a project—is to go out and, as we have been invited to do, make the case wherever we can.

And wherever, Senator, that case can be made, whether it is by Federal legislative leaders, state legislative leaders, voting rights groups, community leaders or election administrators, that case does need to be made. I think it will wind up being an effective case.

Chairman SCHUMER. Is there an up-front cost?

Mr. BAUER. There is an up-front cost, but the——

Chairman SCHUMER. How much? Is it significant?

Mr. BAUER. No, it is not significant, and over time it is clear from studies that have been done in states that have adopted online registration that that cost is more than recovered. It is a net savings—fiscal savings.

Chairman SCHUMER. Right. We have a lot of instances in our government where an up-front cost is recouped over the next 10 years, but because of budget processes, which are not that different in the states, people do not want to make the expenditures in year 1 and year 2.

But that is not proving to be barrier. That is not a barrier in your eyes as of yet.

Mr. BAUER. No, Senator, it is not.

Chairman SCHUMER. Right.

Second, the report states that electronic poll books have the potential to solve Election Day issues, that election officials want this technology. Can you discuss how electronic poll books make a difference and what is the delaying the adoption of that one?

Mr. GINSBERG. It is much easier to describe how they make a difference than to describe why it has been a problem so far.

Chairman SCHUMER. Okay.

Mr. GINSBERG. They make a difference because the information that can be put on an electronic poll book takes care of a lot of sort of the antiquated paper that is in a polling place. You can call up much more information, including signature verification and photo IDs for people. It can cut down on the traditional line problems that have plagued some jurisdictions on Election Day. So they are a low-cost simple solution to putting a lot of paper in one place where poll workers can access it easily.

Chairman SCHUMER. What is delaying their implementation?

Mr. GINSBERG. Well, this goes into the whole sort of morass we have fallen into with technology. Part of the problem is that the certification program for new ballot systems is kind of fatally broken, and new systems are having a great deal of difficulty coming online because the certification process now takes so long and is virtually impossible to get through. Some of these solutions are just proving very nettlesome for manufacturers to find a market to put them in place.

Chairman SCHUMER. Got it. Okay.

Next, Delaware is highlighted in your report as a national leader in implementing the National Voter Registration Act. Delaware seems to seamlessly transfer information from the DMV—motor vehicles—to the election rolls. Can you tell us a little bit more about this and explain why it is better than what most other states do and, again, why aren't more states doing it?

Mr. BAUER. We, Senator, laud Delaware in particular because of our concern about the inconsistent performance of Departments of Motor Vehicles across the country in implementing their responsibility under the National Voter Registration, or Motor Voter, Act. This is a significant issue.

One of our commissioners, Chris Thomas, is intimately familiar with this issue, twice Director of the National Association of Election Directors, and has really called attention to this as a major, major shortfall in compliance with Federal law.

And we are calling attention to the fact that (A) there is no reason why this DMV performance cannot be improved and (B) there are models like Delaware to which states can look that really illustrate how effectively this can be done and what a difference it makes in election administration.

There really needs to be major consistent attention to the fact that this is a serious, serious problem in the operation of current Federal statutes. That is to say compliance with those statutes.

Chairman SCHUMER. Thank you.

My time is expired.

Senator Roberts.

Senator ROBERTS. Well, thank you, Mr. Chair.

I want to talk about the long line problem, and we often hear about long lines are the result of some kind of a real plan of some sort that certain areas are being targeted and the lines are a result of a deliberate effort to disenfranchise groups.

My question is, did you find any evidence of that?

Second, are these lines resulting from management problems or deliberate schemes to disenfranchise people?

Mr. GINSBERG. Well, I will let Bob address this as well.

What we saw is that almost exclusively——

Chairman SCHUMER. Please turn the microphone towards you. Yes. Thank you.

Mr. GINSBERG [continuing]. That this was a management issue, that there are any number of solutions that we put forward in the report to deal with the specific problems of long lines.

We held extensive hearings with the jurisdictions, in the jurisdictions, where long lines had occurred, and we found that there are—the problems are all identifiable, and they are all solvable, and there were no plots or conspiracies that caused the lines.

In fact, if you—we spent some time in the jurisdictions in south Florida and held a hearing in Miami, and what we found was that in the polling places where there were long lines in those counties that occurred in less than 1 percent of the polling places in that particular county. That would suggest a resource allocation issue and a way to look at management techniques and facilities to be able to improve that.

And one of the things that Bob mentioned in his testimony was the providing of online tools for precinct officials to be able to gauge the flow over the course of the day and better allocate the equipment that they have within a county——

[Audio system malfunction.]

Senator ROBERTS. ... casting ballots a month before the actual Election Day, don't we want voters to be casting their ballots based on the same set of facts?

Is there a value in the communal act of voting [inaudible]? Are we wise to sacrifice that in the name of convenience?

Does early voting increase turnout, or does it just spread it around?

Is it bringing in people who otherwise would not vote, or is it just making it more convenient for those who would be voting anyway?

The thing that I am trying to point out here is you are voting 45 days before the Election Day and then within the 45 days several big issues come up with regard to the campaign and the voters who have voted 45 days early have no chance to factor that in, in regard to the Election Day period.

Now I have asked you about four or five questions. I will stop there.

You know, I have not heard from Bob. Why don't you go ahead?

Mr. BAUER. Certainly, Senator. Thank you.

Senator, the——

Senator ROBERTS. You will have to speak up. I am sorry.

Mr. BAUER [continuing]. There are two points that I would make about the early voting and the issue that you raise about whether or not it cuts off the opportunity for citizen deliberation prior to the casting of ballots.

The first is that without speaking now to the amount of early voting that a state might be prepared to provide, the expense of the early voting provided, voters actively resist the notion that they all need to be funneled through on one day, on Tuesday, from 7:00 a.m. until 8:00 p.m. or 9:00 p.m. at night. The traditional Election

Day model has not only broken down from the standpoint of administrators—it is less feasible from their perspective—but it simply runs up against the grain of voter expectation that they should be cramped in, if you will, to this one day to vote.

I think it creates a whole host of problems and does contribute, for example, to issues like lines.

The second point I would make, Senator, is that the studies show that the voters who vote early are the voters who are the most settled on their choice. They are voters who have made up their minds, whether you call them the most partisan or the most ideologically committed, but one way or the other, those are the voters least likely to be moved by any sort of anticipated changes in the campaign agenda over the remaining days of the season.

So, on balance, when you weigh what voters expect and what they believe they ought to be offered in the way of options for voting against the risks that they will be denied an opportunity for information they really need for deliberation, our Commission concluded that early voting in some form or another wins out.

Mr. GINSBERG. I believe this is an area where the individual states really have the best feel for how much early voting their voters want. And we did hear across the political spectrum from officials of both parties, who say that voters in many jurisdictions really appreciate and expect to be able to have some options at the time that they cast their vote.

In terms of resources, it can be more efficient for jurisdictions to have early voting and not have to jam everything onto Election Day. That is not always true.

But I think this is one of those areas where we aim the report at state and local officials, and they are the ones who end up deciding.

Senator ROBERTS. Thank you.

There is an article by Norm Ornstein, and it is back in 2004, but I feel I still think it is very relevant. The headline said "Early Voting Necessary But Toxic in Large Doses."

The article forcefully details the dangers inherent in early voting, and the points he makes, I think, are at least worth considering. I commend it to the attention of all of our colleagues.

I have some other questions, but my time is expired. Maybe we can get back on another round, or I could submit them for the record.

Chairman SCHUMER. Well, thank you, Senator Roberts.

I have a prior commitment. Senator King has graciously agreed to continue to chair the hearing. No problem with the second round if it is okay with the Chairman.

Senator Klobuchar is next.

And we do have an executive session to nominate two people to the Election Assistance Commission—Thomas Hicks and Myrna Pérez. We will do that off the floor at about noon, when we have a series of votes.

So, with that, let me call on Senator Klobuchar and thank Senator King for once again generously agreeing to chair.

Senator KLOBUCHAR. Thank you very much.

I first want to start by thanking you for that kind of consumer model you have developed here—that people should not be waiting in line. And you can look at it in that simple fashion.

But I did want to follow up on something that Senator Roberts was asking about, of you, Mr. Ginsberg, and that was when you looked at these and studied these things, were people trying to disenfranchise people or was it management issues, and you said it was management issues.

And I could see that in our State sometimes when we have problems at polling booths. Mistakes are made.

But I do think that some of the efforts that are going on right now in some of the states—you have come out for early voting. Yet, North Carolina and Florida recently started efforts or enacted laws that would cut back on early voting, or North Carolina stopped same-day registration, or some of these other things that you see states doing.

What I am concerned about is the effect of this is to disenfranchise voters, whether it is done at the individual precinct level or not. This is about laws that are being enacted with stringent license requirements and things like that.

So my question is, one, do you think that some of that is going on.

And, number two, just to get the stuff done that you want to get done, is there the political will to do it in these states and in Congress, when we see the kinds of things that are going on in so many of the states and, in fact, backtracking from this idea that we should allow more people to vote?

I guess I start with you, Mr. Bauer.

Mr. BAUER. Senator, two quick responses to your comment.

The first is we were surprised—maybe not surprised. I do not want to overstate the case. But we certainly were struck, I will put it this way, by the wealth of testimony around the country—Democratic and Republican, in jurisdictions that might be thought, you know, much redder than bluer or, in some cases, much bluer than redder—at the uniform wish once the lights were off and the doors were closed, or in hearings where the agenda was well-defined, a wish to see election administration in fact be first-rate public administration for the benefit of the voters.

I mean, across the board, that is what we heard.

And we had, after all, an opportunity at all of our hearings for anybody who wanted to be heard to be heard, and so we might have had an opportunity then for discordant voices then and very partisan voices. But, by and large, the hearings and the other discussions we had seemed to have welcomed as an opportunity for people to voice their wish that we had an election system that we could be proud of.

Now, granted, outside of many of the issues we discuss, there are controversial enactments that the parties are quite divided about.

And I assure you that if Ben and I went off into a room in our non-Co-Chair capacity we would wind up brawling about just those issues again. Right now, we are in statesmanship mode.

Mr. GINSBERG. It is sort of painful.

Mr. BAUER. It is painful, but we are holding out as long as we possibly can.

But that is not the whole story.

The second point I would make—and this is a critical point—is that if we strengthen some of the key administrative sort of features of our electoral infrastructure, if, for example, we have an understanding that we are going to strive toward the 30-minute wait time maximum that we articulate in the report, and address some of the issues that lead to long lines, then we are going to risk the vulnerability of the system to partisan mischief.

Senator Roberts raised the question, could you have plots to sort of create long lines?

Well, there is more vulnerability in the system to those sorts of shenanigans if the system itself is weak, and it will break down under pressure.

If it is strong, it is less likely that it will break down under political pressure or by political design.

So those would be two of the responses I would offer you.

Senator KLOBUCHAR. Okay. Thank you.

Mr. Ginsberg.

Mr. GINSBERG. I think this area is fraught with partisan feelings. I think that is unfortunate.

I think you cannot equate cutting back hours in early voting with trying to disenfranchise people.

The simple fact of the matter is in North Carolina and Florida, as an example, no one has suggested ending early voting. What people have suggested is that there are administrative concerns about having unlimited early voting.

That is a fair debate to have. It does not entail voter disenfranchisement. And we get into sort of nasty rhetorical detours on this issue all too often.

I would also point out that in all the studies that we saw early voting does not increase turnout. That is an unproven assertion—that having more hours actually does increase turnout.

Senator KLOBUCHAR. But does same-day registration—a different matter, of course. Do you think that increases it?

Mr. GINSBERG. Well, it is a different matter. It is a little bit hard to say because the states that you mentioned as having early voting do have a history of increased participation.

So I think the laboratory of the states to see if same-day registration works or not has not yet been taken on.

And I think in some of the states where there is low turnout same-day registration would create all sorts of problems for the administrators that might in fact devolve into problems like longer lines if you had same-day registration.

So I think it is an unproven, untested area so far.

Senator KLOBUCHAR. For eight years, I enforced our election laws and looked back through every single painstaking—every single account of double voting. Ninety percent of them were a father and son with the same name. And we just saw so little fraud in a major county with over two million people.

And every so often there would be someone who was mad and voted twice or a felon who did not know that they were on probation and that they could not vote. We had things like that happen. It was true.

But, for the most part, people were not going to go out there and try to commit a felony and vote.

So that is just my general concern, and why I am so glad about what you are doing is that I just do not see that as the major problem as much as it is that it has become hard for people to vote. Or, for some reason they do not want to go stand in these lines because they hear about the lines, and then they do not want to go out and vote. And that is why I appreciate what you are doing.

And I would just have one more question along the lines of your recommendations. That was on the schools. I wanted to know more about what they identified as these security issues. Have there been incidences at schools?

We still have a lot of voting at schools in Minnesota, obviously, and it is the central place where people feel comfortable to go.

And how do you think we fix it?

Mr. GINSBERG. I think this area was one of the greatest areas of surprise to us when we heard from so many local officials that it was a problem.

The concern is that since the incidents at schools with shootings and violence, that having strangers walking around in the schools and on the campuses was a source of concern, and that is the reason that some states, some localities, are cutting back the use of schools.

It is a tremendous problem because in the majority of jurisdictions schools provide the best facilities for voting. There is ample space. They are accessible—all the things that you want in a polling place.

So the conflict between the interest of safety to children and voters is a conflict that should not be allowed to exist.

Senator KLOBUCHAR. And you had suggested like having volunteers there or something?

Mr. GINSBERG. Well, to have a school holiday basically, on Election Day so that it would be a training day for teachers.

Mr. BAUER. So that would mean, in effect, you are not changing the school calendar; you are not costing them a day, because they would take the in-service training they always schedule anyway and move it to Election Day.

Senator KLOBUCHAR. And have it scheduled on Election Day, with their time to vote as well put in there—that makes sense.

Thank you.

Senator KING [presiding]. Gentlemen, thank you.

I am sure my kids would vote for an extra day off.

Mr. GINSBERG. Not an extra day.

Senator KLOBUCHAR. No, they are just changing the in-service day.

Senator KING. I know. I know. I know.

Senator KLOBUCHAR. All right. All right.

Senator KING. Senator Schumer mentioned laboratories of democracy, and I have often thought that in fact the states are laboratories of democracy. The problem is no one reads the lab reports and we do not do a very good job of sharing the information.

So I commend you because I think what you have done here is exactly that function of collecting data and information across the

states and sharing best practices. This is principally a state and local issue.

I will—in echoing Senator Roberts, we had a situation in a Maine election recently where we had very early voting. I cannot remember how. It was a month or more before the election. The dynamics of the election changed in the last several weeks, and we actually had people going into their town offices, trying to retrieve their early vote to change it because of developments in the election.

So I do think that there is a legitimate issue about how far in advance because elections do tend to sometimes come into focus in the last several weeks.

And we actually had that experience. I knew people that went to their town office and said, how can I get my vote back? I want to change it.

And they could not.

It was a very distinct situation.

The long lines issue—how widespread is it? Is it a national problem, or is extremely localized?

You mentioned in one district it was 1 percent of the precincts or something like that.

I mean, are we searching for a Federal solution to what is really a very isolated local problem that needs to be dealt with by local officials?

Mr. Bauer, do you want to tackle that?

Mr. BAUER. Certainly. We are not recommending a Federal solution. We are definitely recommending, however, a series of reforms and best practices by which state and local governments can keep the wait lines down and, hopefully, comply with the 30-minute standard that we have articulated.

But we did point out that—and this, by the way, is not intended as an adverse reflection in any way on the Election Assistance Commission, which has other duties which it has performed extremely well. Our report is replete with references to the top-flight work that they have done developing best practices and disseminating them to the jurisdictions.

But here, knowing that there is going to be continued conflict about its role, there is a structural blockage here that simply needs to be addressed. And we cannot wait for some day we might hope for, when partisan fevers will subside and the Election Assistance Commission will somehow sort of experience a new dawn in this particular area.

The problem that Ben has identified is just simply too urgent, and therefore, some answer has to be found.

Senator KING. Senator Roberts, second round.

Senator ROBERTS. Mr. Acting Chairman, it occurs to me, coming back at this point, that as usual you have focused on the very questions that I was going to ask. And our witnesses, with their expert knowledge, have already answered them.

So the question is, do I simply repeat the questions that you have asked and have them do it over again or simply ask permission to put this article by Norman Ornstein—it is clear back in 2004, "Early Voting Necessary But Toxic in Large Doses." I am not

going to read it to you, but I would commend it to the attention of everybody. I think it still is very viable today.

Senator ROBERTS. And I want to thank the witnesses and everybody concerned with this.

And, since my questions are a duplication of the questions already asked, I yield back and I thank you, sir.

Senator KING. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

I have a few more questions about some actual individual recommendations you had. The first I thought was interesting was the internet feed idea.

I come from a state where we literally put a camera on rising waters on a river, and everyone in the community tunes in to see what is exactly happening so they can see it.

Or, we use this all the time, obviously, for weather. People are constantly checking today, right, when the storm is coming in tonight.

And the simple idea that people could, with simple technology, check to see what is happening with voting lines in their precincts—could you talk a little bit, how you would envision that working? Would you be tuning a camera on the people, or would you just be giving reports?

Mr. BAUER. I think what we would envision is that the administrators would be continuously assessing wait times and then posting accessible reports that citizens could consult as they sort of plan out when it would be most convenient for them, most efficient for them to vote.

And, as you point out, Senator, quite correctly, this is fairly straightforward. It is one of the ways in which we believe we have to be continuously thinking about the introduction of technology to support the voting process.

Senator KLOBUCHAR. So you are just thinking election administrators in each precinct saying that there are no wait times or something like that?

Mr. BAUER. Twenty minutes, half an hour, forty-five minutes, correct.

Senator KLOBUCHAR. Okay. Then you had another one on poll working training. You spent a lot of time discussing the importance of that and professional workers operating in the polling places and training standards for poll workers. How would this work?

Mr. GINSBERG. Again, it is something that really can be talked about by the state but implemented by either the state or local jurisdictions.

And poll workers are the point of contact for most voters. So having well-trained poll workers is extremely important to the smooth functioning of the system and just the way voters feel about voting. It comes down to training and whether that is a top priority or not with local administrators—to be able to recruit poll workers.

One of the laments we heard from elections officials was how difficult it is to recruit poll workers, to find enough to be in the polling places.

So we have some suggestions about using college students and even high school students. Apparently, high school students are more reliable in showing up than college students. Go figure.

And, to encourage businesses to allow their employees to be able to help out as poll workers on Election Day and then to have sufficient training.

Senator KLOBUCHAR. Your report also talked about the importance of access to information in languages other than English, including ballots in other languages, outreach to non-English media outlets, bilingual poll workers.

I know we have made some efforts in Minnesota with voters, with Asian and Pacific Islander groups.

Why are efforts to make voting accessible to these different groups so important?

Mr. BAUER. We want to stress, and have stressed throughout the entire report, that the broader theme that the Commission struck—and I think it is well within its charge—was improving the voter experience.

For language minority voters to go to the polls and to find that there is nobody there to help them, who can speak their language successfully, is simply just not consistent with offering the kind of experience that all of our voters deserve.

And, as we pointed out, there is support that by Federal law this Congress has tendered to these voters, and the statutes that provide for this protection are not drawing universally consistent compliance.

And so, in a variety of ways, both in the localities recruiting—systematically recruiting—poll workers with language capability and then on the more—sort of on the next scale, next point up the scale, devoting their efforts in compliance with the Voting Rights Act provisions, protecting language minorities, there is a significant amount more to be done. And it is absolutely critical to reflecting respect for the voter.

Senator KLOBUCHAR. One of the things you also talk about in here is the people serving overseas in our military and how having online registration materials would be so helpful to them. I think that it makes a lot of sense. But, do you want to explain that?

Mr. GINSBERG. We found inconsistencies among the states in the sort of usefulness of their web sites for people serving in the military, especially people serving in the military overseas or living overseas. And so there are some states that seem to have more robust sites than others.

Web sites are kind of the easiest way to communicate if you are overseas or in the military, much more so than a postal service or even a direct delivery system. And so we would encourage at least the provision of registration materials on state web sites to be enhanced in the states.

Senator KLOBUCHAR. Okay. Thank you very much.

Senator KING. I want to follow up again on the question of certification because you both identified there is a kind of coming-at-us wave of replacement of machines with new technology, and yet, if the certification system is broken, that could be a real problem in 4 to 6 to 10 years.

Is the problem the structure and the lack of functionality of the EAC, or is it the idea of Federal certification itself?

I see those as two separate issues.

In other words, if the EAC tomorrow became fully functional, would this open the process and we would take care of this in an expeditious manner, or should we seriously consider saying, hey, this is a state and local responsibility; why do we need Federal certification?

Mr. Ginsberg, your thoughts?

Mr. GINSBERG. It is an area where a Federal certification process makes sense in which the states, in some ways, desire it. There certainly needs to be a central body to be able to judge machines and to give the states some comfort in the quality of machines.

Senator KING. Like UL, Underwriters Laboratories for appliances.

Mr. GINSBERG. Well, perhaps something like that. Again, the state election directors forming a group was the model before the EAC.

I would agree that the EAC and its functionality is a completely separate question wrapped up in a lot of other different things.

Senator KING. But it is a question that is important because if it does not get fixed then we do not get the certification, right?

Mr. GINSBERG. Correct. So it should be fixed.

Personally, I am partial to the state election directors solution for it. I think that could happen much more expeditiously, with kind of a greater need. There would be a Federal role in terms of the expertise that would need to be brought to it, but that is not necessarily through the current certification process.

Senator KING. Mr. Bauer, your thoughts on my question?

Mr. BAUER. Yes, I think you posed the question exactly correctly.

I mean, I think that there are—it is possible to confuse the issues.

I do believe that we would not have arrived at this conclusion, I do not think, and made this recommendation if the EAC in this particular area had not been in somewhat of a state of paralysis.

And so, if your question is had this never developed and the EAC was sort of fully functioning, could it discharge this role successfully, the answer in my judgment is yes.

We had to take into account the reality that that may not be prove to be the case. And we cannot wait for a solution that may not be available to us in the political or public policy sphere, or in the political sphere, and so other alternatives have to be developed on a fairly urgent basis.

Senator KING. Would it take legislation for those alternatives because right now isn't the certification—I mean it is just behind the dam, right?

I mean, it cannot happen.

What do we do?

This is a problem that is going to come at us in the next two to four years.

Mr. BAUER. I think that that is where—my Co-Chair will correct me if I am wrong. I think that that is part of the discussion that I think needs to take place right now, which is, what steps should be taken and how could they be taken to fully develop out those alternatives?

We indicated only in broad brush strokes what those alternatives might be, but we did not grapple with the details in this report.

Senator KING. Mr. Ginsberg suggested he thought an alternative where the state directors created a certifying agency would be an acceptable alternative. Would that be acceptable to you, or do you think this has to be a Federal responsibility?

Mr. BAUER. I would certainly be prepared to consider all of the alternatives.

I would not want any position that we take to be—again, one of the concerns we have always had is that it would be taken to be sort of a damning sort of conclusion about the EAC and its future. That is not our intention, certainly not my intention.

But I think any alternative that promises to be the most effective and efficient alternative is one I certainly would consider.

Senator KING. No, my question is even assuming the EAC is perfectly functional, does this need to be a Federal responsibility, I guess is the question I am asking.

Mr. BAUER. I do not know that I would define it as a Federal responsibility by necessity, but I am also not prepared to say that there is an alternative that—I am not prepared at this point because I am not sure I have studied it closely enough or reached a conclusion in my own mind, which of the alternatives, the one Ben suggested or potentially another with more Federal involvement, might be the most effective.

All, in my mind, that we need to do is sort of focus on what would be most effective, and on that I do not have a conclusion.

Senator KING. Well, we have to do something.

I mean, the alarm bells are ringing.

Mr. BAUER. Yes.

Mr. GINSBERG. If I might, Senator, the way the system works is that different states have different standards. Almost inevitably, they say the machines that are used in their state need to have been certified by, right now, the existing structure.

It is not that there is Federal legislation or a Federal role that particular blesses a particular machine when it gets done.

I mean, there is still state legislation that refers back to a central testing facility for the machines to be sure that they are worthy of use. That can or cannot be a Federal function—that group that is judging the quality of the machines.

Senator KING. Thank you.

Mr. BAUER. Or, if I may, Senator, it could be a function that is not federally directed but federally supported.

Senator KING. Right. Well, thank you both for your thoughts on this.

And, if you have additional thoughts on this important issue, please file them with the Committee. I would appreciate having them.

Any other questions, Senator Klobuchar?

Senator KLOBUCHAR. No.

Senator KLOBUCHAR. On behalf of the Committee, I would like to thank both of you, Mr. Bauer and Mr. Ginsberg, for your important testimony and particularly for your work on this Commission. It is important. It is important to the people of America. It is important to our processes. It is important to who we are as a country.

And I really appreciate the work that you have done on this, and thank you very much.

This concludes the panel for today's hearing. On behalf of the Rules Committee, I would like to thank all of our witnesses.

Without objection, the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing for our witnesses to answer.

I want to thank my colleagues for participating in this hearing and sharing their thoughts and comments on this important topic.

This hearing is now adjourned.

[Whereupon, at 11:12 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

The Work and Recommendations of the Presidential Commission on Election Administration

Testimony before the Senate Rules Committee
February 12, 2014

Robert F. Bauer

Thank you for the opportunity to appear today before the Committee to testify with my co-chair Ben Ginsberg about the work of the Presidential Commission on Election Administration. Ben and I had consulted about the most succinct and, we hope, useful way of laying before the Committee our observations about the Commission and its Report and Recommendations. Ben will then follow with an account of our major recommendations.

So I will open with a few general remarks about the charge of the commission and the structure and approach selected as most appropriate to the execution of that charge. I will touch upon some of the general considerations that might be kept in mind when reviewing the Commission's specific recommendations and the best practices it highlights. And a good illustration we can offer is the topic most associated with the establishment of the Commission – – long lines at the polls – – and I will say a little bit about that. Ben will then follow with a discussion of the other key recommendations of the Report and the best practices that we identified.

The Commission was charged with addressing a wide range of issues that adversely affect eligible voters in achieving access to the polling place. By design, the Commission was structured to address election administration as a topic of *public administration,* and to think of service to our voters as no different than the "customer service" they expect from our business and other service providers. The Commission membership included state and local election administrators with vast past or current experience in elections, senior executives of businesses well-versed in the requirements of delivering effective customer service, and election law specialists.

Throughout its work, the Commission relied on research, some of it freshly done for purposes of testimony to the Commission, and other information and data provided by administrators and others experienced in the conduct and study of elections in the United States. We cannot emphasize enough the importance to the Commission of data—of a thoroughly informed discussion of the performance of

our electoral process. Among our recommendations, which will be noted by Ben, is more thorough, systematic and rigorous collection and analysis of the data on election administrative performance.

At the outset of our Report, we attempted to establish critical background for understanding how we reached specific recommendations. They bear brief mention here.

Does one size fit all? We heard repeatedly that jurisdictions are concerned about being urged to adopt reforms that may work in some jurisdictions but perhaps less well in others. The commonly heard phrase was that "one size does not fit all". This, we agree, is true but only up to a point. By and large jurisdictions that administer elections confront a similar set of challenges--from the registration of voters and the verification of eligibility, through polling place management and equipment acquisition, to the successful transmission and tally of the results. So we believe that our recommendations have general application, all of them targeted at common problems that all jurisdictions share. In our report, we concluded that we have developed recommendations "of a size that should fit all".

The issue of resources. Election administration suffers from a shortage of resources. Administrators throughout our review testified to their frustration with the low priority assigned to their budget requests. Elections may occur relatively frequently in our nation, but issues of election administration only infrequently draw public attention. For this reason, and even though election administrators have to turn to preparing for the next election as soon as the last one ends, elections are by and large shuffled to the bottom of the deck of budget priorities. We make no recommendations about the level of resources needed, as indeed we could not , for different jurisdictions confront different challenges. But this resource issue will not go away and successful election administration simply must be funded.

The technology challenge: I will leave this to Ben's part of the discussion, but of all the issues we heard about, this is the one that, if unaddressed, has the most potential for seriously crippling the conduct of elections in the years ahead.

Enforcement of existing law. We did not make federal legislative recommendations – – that was outside of our charge – – but we heard a fair amount about the extent to which jurisdictions have, or have not, successfully complied with different federal laws enacted to protect particular populations of voters. It is fair to say that with the exception of military and overseas voters, who have benefited from the general success of the MOVE Act, other statutes have not attracted the level of

compliance effort that this Congress or the public expects. We emphasize our concern about inattention on the part of public assistance agencies, and in particular Departments of Motor Vehicles, to their registration responsibilities under the National Voter Registration Act. We also note inconsistent compliance with provisions of the Voting Rights Act enacted to support language minority voters. And we heard convincing testimony from disability rights groups about the inadequacy of compliance with the relevant provisions of the Americans with Disability Act and HAVA. One concern that we bring to this Committee is the need for sustained attention to these compliance issues.

When established, the Commission's charge may have been largely defined in the public mind by the problem of long lines at the polling place. The Commission has specific recommendations to make about lines, but it also points out that multiple factors -- weaknesses in the administration of elections -- contribute to this problem. To deal with long lines, these larger problems have to be addressed. For example, long lines might result from the inaccuracy of voter lists that caused delays at the polling place when voters appear, confident they are registered, and discover that they are not on the rolls. But, among other factors, polling place quality, management, staffing levels, and staff training can also contribute to logjams at the polling place.

We make recommendations focused on the widest range of these factors tending to produce or contribute to long lines. And along with these recommendations, the Commission is publicizing and posting to its website online tools that will assist administrators in managing the polling place to anticipate and avoid long lines. These tools are provided on an open-source basis, can be used immediately but also are available for improvement and refinement, and will be permanently hosted on the web site of the Cal Tech-MIT Voting Technology Project.

Our outstanding Senior Research Director, Nate Persily, would often say that our work as a Commission was more a project than just a Report. That is how we will treat it. So in a sense, our work begins now, to engage this Congress, our nation's election administrators, state and local election officials, state and local legislative and community leaders, and many others concerned about the quality of our electoral process in a discussion that we hope will lead to the implementation of these recommendations.

This can happen if we are right, and if others share the view, that election administration is public administration and that it should be treated as such. It should be a topic developed for university instruction, and our officials responsible

for election administration should have on staff professionals who, irrespective of which party controls state or local government, can supply continuity and expertise in the conduct of our electoral process.

I thank this Committee again for your invitation and for your interest and would be glad to answer your questions.

Senate Rules Committee Hearing
Sen. Richard J. Durbin
February 11, 2014

"Bipartisan Support for Improving U.S. Elections: An Overview from the Presidential Commission on Election Administration"

As he addressed the nation on Election Night in 2012, President Obama thanked those who waited hours in line to vote and declared, "we have to fix that."

Studies of the 2012 election indicate that more than 5 million people waited an hour or more to vote. President Obama is right. Waiting hours to vote is simply unacceptable in the United States of America. That's why I am pleased that he created the Commission that is delivering their report and testifying before the committee today.

The opportunity to vote is one of the most important rights we have as American citizens. In fact, voting is "the right preservative of all other rights." Our access to the ballot box is so important that the Constitution has been amended six times to expand and protect the right to vote, more than any other issue. These six Constitutional Amendments—the fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth—ratified over the course of 100 years underscore our nation's commitment to ensuring that all adult citizens enjoy free and full access to the ballot.

As chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, I have held a series of hearings on voting rights. From those hearings, one thing is abundantly clear: protecting the right of every citizen to vote is not a Democratic or Republican value, it is an American value. That's why it's so important to ensure that every citizen can vote without unnecessary burdens or delays – like ridiculously long lines.

For that reason, I would like to extend my thanks to the Chairmen of the Presidential Commission on Election Administration, Bob Bauer and Ben Ginsberg, for their fine work leading this bipartisan effort to find a solution to some of the challenges that faces voters on Election Day.

The Commission's report, "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration,"

provides a blueprint for the more than 8,000 state and local jurisdictions that administer elections to improve the voting experience for American voters.

After deliberating for six months and hearing from experts and stakeholders from across the country, the Commission has issued its findings, identifying best practices in election administration and making recommendations to improve the voting experience.

I look forward to working with my colleagues at the federal, state, and local level to advance the Commission's key recommendations, which include:

- Modernizing the registration process through the expansion of online voter registration;
- Improving access to polling places through the expansion of early voting;
- Increasing the selection of suitable, well-equipped, and accessible polling place facilities, such as schools;
- Encouraging widespread adoption of state-of-the-art techniques to assure efficient management of polling places and efficient allocation of polling place resources; and
- Promptly addressing the impending crisis and technological challenges presented by the soon-to-be obsolete voting machines we use today.

I urge state and local officials to adopt these and other recommendations from the Commission's unanimous, bipartisan report.

As the Commission's well documented report indicates, adopting these recommendations will reduce lines, improve accuracy, increase efficiency, and enhance the voting experience overall.

We live in the greatest democracy on this earth. It's time that we administered our elections in a way that lives up to that standard.

I look forward to the discussion today, as we work to ensure that all Americans can vote their conscience without having to spend hours waiting in line to do so.

TESTIMONY OF BENJAMIN L. GINSBERG
CO-CHAIR, PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION
PARTNER, PATTON BOGGS LLC
BEFORE THE SENATE RULES COMMITTEE
FEBRUARY 12, 2014

Mr. Chairman, Mr. Ranking Member, thank you for inviting us to testify before you today on the Report of the Presidential Commission on Election Administration.

Both Bob and I are proud of the work of this Commission. The President charged the Commission with making recommendations to the state and local officials who put on our elections to ease problems in a number of areas that serve as obstacles to duly qualified citizens being able to cast their votes.

Elections and voting is an area where there can be conflict between Republicans and Democrats. But it is also a subject where Republicans and Democrats can agree on both the basic principle and on common sense solutions to make the voting experience better.

Bob and I and the eight other Commissioners – a remarkable combination of professional election law administrators and leaders of private sector customer service companies who Bob and I learned from and tremendously enjoyed working with – did reach bipartisan and unanimous agreement on our recommendations and best practices.

As to that basic principle, Republicans and Democrats agree that every legally registered voter has the right to be able to cast his or her ballot easily and without barriers.

As to the details, Bob and I had some history to fall back on. We've been on the opposite of many partisan battles over the years and undoubtedly will be again.

Among those battles have been a lot of recounts. All those recounts were instructive to this exercise because they provide an unparalleled view after the casting and initial counting has been completed of how the system worked. Voters who had problems are spotted in recounts.

We'll both tell you that there are problems with our system of voting.

It also meant that this Commission presented a unique opportunity for us to address a series of problems that both Republicans and Democrats know are problems, and which we need to do something about.

That is not a partisan issue. That is trying to help get right something that very much needs to get right. In fact, it is so important to get right that it deserves doing even if it doesn't satisfy all the issues that one party or another believes need to be fought in this area.

As for fixing these problems, Bob mentioned some and I'd like to touch on some others.

First, the Commission recognized that our elections are administered by approximately 8,000 different jurisdictions largely using volunteers who do not receive much training. As a result, achieving uniformity, or federal solutions that actually work, in our elections has proven challenging.

Our Report's recommendations and best practices fall into two areas. First, we believe they provide common sense solutions to those jurisdictions that do experience challenges in the areas detailed in the President's Executive Order. And second, we address some big picture challenges that virtually all jurisdictions either face now or will face in the not too distant future.

Let me turn to a couple of the key big picture issues.

The state of our voting equipment and technology is an impending crisis on which the Commission feels a need to shine a spotlight. The machines now being used in virtually every jurisdiction – purchased 10 years ago with HAVA funds – will become obsolete in the next 10 years. Voting equipment generally has not kept up with technological advances in our daily lives. The current equipment is expensive and unsatisfactory to virtually every election official with whom the Commission spoke. That's heavily due to a federal certification process that is broken and must be reformed. This is a subject to which few are paying attention and which will not end well on its current path.

One of the issues we heard about consistently was having adequate physical facilities for polling places. We address the elements that go into making up a smoothly functioning, accessible polling place. In most communities, those facilities are schools. The Commission strongly recommends the use of schools as polling places, but officials in an increasing number of jurisdictions are citing safety concerns as a reason for not making schools available for voting. Adequate facilities to vote and safety for our children cannot be competing interests. For that reason, the Commission felt a strong need to call attention to the problem and to recommend that to address security concerns, Election Day should be scheduled as an in-service day for students and teachers.

In terms of improving the voter experience directly on Election Day, Bob already talked about long lines and ways to improve a situation whose causes are both identifiable and solvable. Let me touch on some other of the Commission's specific recommendations.

Early voting – The Commission's goal was to make recommendations that would make it easier for all eligible voters to vote. A majority of states, with both Democratic and Republican state officials leading the charge, now have early voting and told us that early voting is not only here to stay but increasingly demanded by voters. The details of the number of days and hours will vary by state and county and locality, and are decisions best made there. But the benefits of early voting, including reducing waiting times and providing voters with choices, is clear.

On-line registration -- Whether to help ensure that only duly qualified registered voters vote or to facilitate more people being able to vote more easily, the Commission found agreement and support across the political spectrum for more accurate voter registration lists. To further that goal, the Commission makes two recommendations.

First, the adoption and use of on-line registration for the ease it provides the voter, the enhanced accuracy it provides the system and the efficiencies it can provide to perpetually strained budgets. The Commission notices on-line tools at supportthevoter.gov that can be used by state and local

jurisdictions and, where permitted by law, by non-government groups to register voters accurately and easily. This on-line open-source program can be used and branded by groups and governments to facilitate accurate, convenient and efficient on-line registration.

Second, we recommend that all states join two existing and complimentary programs – the Interstate Voter-Cross Check program and the Electronic Registration and Information Center. Both allow states to share data and synchronize voter lists so they can, on their own initiative, come as close as possible to having an accurate database of all eligible voters.

Military and overseas voters -- Serving in the military or living overseas, and especially serving in the military overseas, should not be a barrier to voting. There has been improvement over the last few years, but it is still not as good as it should be. We provide a series of recommendations and best practices – including specifics on how states and counties can make their web sites better serve these voters and how to fix a simple flaw in federal registration and voting forms to reduce confusion for those serving or living overseas.

Disabled voters – Both policy and law require accessible polling places for the nation's voters with disabilities, a population that will increase as the Baby Boom generation ages. The Report makes numerous suggestions for increasing accessibility to polling places (another reason being able to use schools as polling places is important since schools must meet basic accessibility standards) and for enhanced poll worker training to meet these needs.

Language minorities – For both the disabled and for those with language proficiency issues, we urge local officials to listen to their voters about their local polling place needs. Bilingual poll workers with increased training can make a real difference in the polling place, as can ballots and ballot materials with plain language and design.

Compliance with existing laws – throughout its deliberations, the Commission heard testimony that existing federal laws impacting voting were not being adequately followed.

For the military, it is the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment (MOVE) Act, which despite the strides, means that many voters covered by these Acts still find difficulties registering to vote, receiving their ballot in time to be voted, or having their voted ballot reach their election office in time to be counted.

Disability rights groups noted concerns with the enforcement of the relevant provisions of the Americans with Disability Act (ADA) and Help Americans Vote Act (HAVA).

For language minorities, the Commission heard from witnesses and experts about failures to comply with Sections 203 and 208 of the Voting Rights Act, which provides assistance to voters.

The federal election statute most often ignored, according to testimony the Commission received, is the National Voter Registration Act (NVRA or "Motor Voter") whose compliance varies widely among the states.

If a law is on the books, it should be enforced.

Data and Testing – Let me close by highlighting a series of recommendations from the Report that should be self-evident but are not. That is the need for more data and testing in this field. There should be regular post-election audits of machines for their accuracy and performance, and the sharing of that information between jurisdictions to spot problems or make more intelligent purchasing decisions.

We were surprised by the lack of standard data about elections. As it turns out, there is not the uniform data on voting from the different jurisdictions. As our political scientists friends tell us, more data uniformly collected about results and process would lead to more and better solutions of many of the problems we have with voting today.

Senators, thank you again for having us here today and letting us report to you on the recommendations and best practices of the Presidential Commission on Election Administration.

Benjamin L. Ginsberg

Co-Chair and Member, Presidential Commission on Election Administration.

Benjamin Ginsberg, a partner at Patton Boggs LLP in Washington, D.C., represents numerous political parties, political campaigns, candidates, members of Congress and state legislatures, PACs, Governors, corporations, trade associations, vendors, donors and individuals participating in the political process.

In both the 2004 and 2000 election cycles, Mr. Ginsberg served as national counsel to the Bush-Cheney presidential campaign; he played a central role in the 2000 Florida recount. In 2012 and 2008, he served as national counsel to the Romney for President campaigns. He also represents the campaigns and leadership PACs of numerous members of the Senate and House, as well as the national party committees. He serves as counsel to the Republican Governors Association and has wide experience on the state legislative level through Republican redistricting efforts.

In addition to advising on election law issues, particularly those involving federal and state campaign finance laws, he advises on ethics rules, redistricting, communications law, and election recounts and contests.

Before entering law school, he spent five years as a newspaper reporter at the Boston Globe, Philadelphia Evening Bulletin, The Berkshire (Mass.) Eagle, and The Riverside (Calif.) Press-Enterprise. He appears frequently on television, is current a guest lecturer at the Stanford University Law School and has been a Fellow at Harvard University's Institute of Politics as well as an adjunct professor of law at the Georgetown University Law Center. He was recently named one of the National Law Journal's 100 Most Influential Lawyers in America.

He lives in Washington, D.C. with his wife Jo Anne. They have two grown children, Josh and Rebecca.

verifiedvoting.org

February 6, 2014

The Honorable Charles Schumer
Chairman
U.S. Senate Rules and Administration Committee
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
U.S. Senate Rules and Administration Committee
109 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts;

As you prepare for the Senate Rules Committee mark-up Wednesday, February 12 to consider the nomination of Thomas Hicks to serve as Commissioner on the U.S. Election Assistance Commission (EAC), we write to urge your support for his confirmation.

As you may know, Verified Voting is a non-partisan, nonprofit organization, and is the nation's leading advocate for secure, reliable and accessible voting systems and election administration practices. Verified Voting recently released the seminal study: *"Counting Votes 2012: A State by State Look at Voting Technology Preparedness."*

Verified Voting strongly supports the nomination of Thomas Hicks to serve as Commissioner on the EAC. Tom has supported and worked on voting issues for more than 20 years. During the last 10 years, he has served as Senior Elections Counsel for the Committee on House Administration. In this role, he is responsible for issues relating to campaign finance, election reform, contested elections and oversight of both the Election Assistance Commission and Federal Election Commission. Verified Voting has worked with Tom to promote accuracy, transparency and verifiable elections throughout the U.S.

Tom, a native of Boston, Massachusetts, earned his Bachelor's Degree in Political Science from Clark University in Worcester, MA. He earned his law degree from the Catholic University of America, Columbus School of Law. He has extensive knowledge of elections law.

Tom works with organizations like Verified Voting in a bipartisan manner to strengthen the confidence voters have in our election process. He would make an excellent and knowledgeable commissioner, who we believe will continue working to ensure integrity in our elections process.

We urge you to support his confirmation during the mark-up and on the Senate floor.

Sincerely,

Pamela W Smith

Pamela Smith
President

HEARING—ELECTION ADMINISTRATION: INNOVATION, ADMINISTRATIVE IMPROVEMENTS AND COST SAVINGS

WEDNESDAY, MARCH 12, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 9:51 a.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, chairman of the Committee, presiding.

Present: Senators Schumer, Warner and Roberts

Staff Present: Jean Bordewich, Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Correspondent; Jeff Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The Rules Committee will come to order. Good morning. You cannot say good morning before you say that the Rules Committee will come to order, I have learned.

Anyway, this hearing is the Committee's second in a planned series on improving the administration of elections. Today's hearing focuses on innovation, administrative improvements and cost savings. Last month, the Committee met to hear from the bipartisan co-chairs of the President's Commission on Election Administration. The president established the Commission to study how elections are administered across the country and identify best practices for improving our elections. And as we heard from two very bright and very thoughtful co-chairs, Bob Bauer and Ben Ginsberg, there are a number of improvements that can be made as to how elections are administered, and they had some bipartisan suggestions.

As Americans, we are and should be proud of our Democratic traditions. Expansion of the voting franchise over the past two centuries reflects the best of America. And part of being American is recognizing the importance of giving a voice to all Americans to participate in our democracy, and that is why we plan to introduce legislation that builds on the best practices recommended by the Presidential Commission on Election Administration.

American voters deserve an election system that allows every eligible American who wants to participate in our democracy the opportunity to do so without unnecessary burdens. Common sense reforms that utilize our existing technology can make our election administration more voter-friendly while increasing efficiency and reducing costs.

Many of our colleagues have been very interested in this issue, and at the top of the list are the two senators testifying first on our panel—they are Senator Boxer and Senator Coons. They are committed to improving the administration of elections and to talk about their legislation, very thoughtful, good legislation that each of them has offered.

Senator Boxer is here to discuss the Lines Interfere with National Elections Act, known quite coincidentally as the LINE Act, which seeks to create accountability and ensure voters never have to wait more than 30 minutes to vote. This goal, also highlighted by the Presidential Commission, is an important one for which we should strive. I think it is a great idea. Nothing pains me more than to see people on a cold November night waiting to go home, put food on the table, relax, waiting in the cold, in line, that goes—and we have it in my home neighborhood and my home borough. So I think Senator Boxer's legislation is needed and thoughtful.

Senator Coons was gracious enough to join us today to discuss the Fair, Accurate, Secure and Timely Voting Act, known as the FAST Voting Act, coincidentally as well. The bill creates an incentive for race-to-the-top structure to encourage states to adopt many of the best of the best practices, and I think that is a great idea too, to have the states compete to do better and give them a reward for doing better, work very well and race to the top. And I think it will work very well in elections too where you have the same idea. Federal interest but basically state laws govern.

At the Presidential Commission, we heard an overview of the reforms, and today we are going to hear a more in-depth explanation of the benefits of online registration and electronic poll books from our second panel of witnesses, which includes state and local elected officials. I look forward to their first-hand accounts of how technological upgrades can help in providing good customer service to voters, and we should regard the voters as customers, as well as cost savings, by eliminating unnecessary data entry. These are the types of common sense, cost-effective reforms we hope to move forward in this Committee.

So at the end of the day, I am going to ask that the rest of my statement be read into the record. It talks about the kinds of things that the Committee is going to pursue.

[The prepared statement of Chairman Schumer was submitted for the record:]

Chairman SCHUMER. But I want to get right to our witnesses, who have been patient and on time. So I will ask Senator Roberts if he wishes to make any opening remarks, ask Senator Warner if he does, and then we will go right to the testimony.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman. Sorry I am late, and special greetings to Senator Boxer and Senator Coons.

I appreciate your calling this hearing and thank the witnesses for their appearance here today. We will hear from folks representing all levels of our government, from our Senate colleagues, state and local election officials as well. I appreciate their commitment to improve our election process.

This is our second hearing to consider the recommendation of the President's Commission on the Election Administration. The Commission recognized that reforms must be implemented at the state and local level, and that is where recommendations were focused.

Wisely, the Commission did not call for federal legislation to implement their recommendations. Our Committee can call attention to the Commission's recommendations and promote their adoption, I think, without seeking to impose and through enactment of federal legislation, with all due respect to my colleagues.

I know my colleagues here today have legislation that seek to do just that, but I think the Commission found, and I agree, that for these reforms to be effective, they must be adopted by and tailored to the needs of the local communities that will be responsible for implementing them. Imposition of federal requirements, though perhaps well intentioned, could make things worse rather than better, as we have seen with the Federal Voting Machine Certification Program which has stifled innovation and increased costs while actually impeding utilization of the best, most modern technologies.

I am pleased to see that states are adopting many recommended improvements on their own, and seen very positive results. I hope we will not advance any federal legislation that could hinder that progress.

With that, Mr. Chairman, I want to thank you again. Thank the witnesses for appearing here today, and I look forward to their remarks.

Chairman SCHUMER. Senator Warner.

OPENING STATEMENT OF SENATOR WARNER

Senator WARNER. Thank you, Mr. Chairman. Thank you for calling this hearing, and looking forward as well to the testimony of Senator Boxer and Senator Coons.

I just want to point out one of the things that drives such interest for me in this issue is that we can and must do better. In Virginia in 2012, we saw folks wait up to five hours in line in America to vote. That is just unacceptable. We saw in Fairfax County, in a precinct in Skyline, folks waiting until about 10:00. We saw in Woodbridge, Virginia folks waiting until 10:45, and I would say our voting hours end at 7.

We saw lines, similar lines downstate in Chesapeake. And the idea that this should be accepted as a status quo is totally unacceptable to me. Part of this may be ratios of machines to voters. Maryland, I think they are at 1 to 250; 1 to 750 in Virginia.

So those are things that probably should be dealt with at the state level. But one of the reasons why I am such a supporter and original co-sponsor of Senator Coons' bill is that this does not take the one-size-fits-all federal approach but says, let us go ahead and put some incentive dollars out there for states to compete on best practices; how we can assure that we get this fair, swifter approach. I think my staff pointed out, if we can find ways to deliver beer to ice fishermen in Michigan in a timely manner in tough conditions, we ought to be able to find a way, through using technology and improve systems, to not have folks wait three and four hours to vote in America at this point.

So I appreciate you calling the hearing, and I know we are a little pressed by time, so anxious to get to witnesses.

Chairman SCHUMER. Thank you. And now let us call on our witnesses. We are honored to have Senators Boxer and Coons with us. We share their interests—or I do—in finding ways to improve the administration of elections. I do not agree with my dear friend Senator Roberts that we do not need any federal legislation. There are things where the Federal Government can improve things. But that is why we have hearings here.

So I will first call on Senator Boxer, then Senator Coons, to proceed as they wish. Their entire statements will be read into the record.

Thank you so much for coming and caring about this vital American issue. Senator Boxer.

STATEMENT OF THE HONORABLE BARBARA BOXER, A UNITED STATES SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you, Mr. Chairman, Senator Roberts, Senator Warner, my friends. I am here very briefly—because I know you have a lot of other things you need to do—to talk about a bill that I introduced with Senator Bill Nelson. I am here to talk about a bill that Senator Bill Nelson and I worked very hard on called the LINE Act of 2014, S. 2017.

The right to vote is something we all share, regardless of what state we come from. It is really the essence of our democracy. It is really a gift that we inherited from our founders. But when you make people wait in line for hours and hours and hours, and you force them to choose between voting or perhaps caring for a sick child or going through severe pain as they wait in line, or perhaps even risking their jobs if they wait in line, and so many other reasons why people suffered through this last election, I think their right to participate in our democracy is fundamentally denied, because many of them did give up. We know that.

So they say a picture is worth a thousand words, and I have brief words for you and I have two photos for you. Here is what we witnessed in states across the nation on Election Day 2012. If you take a look at this picture—and I can give you smaller versions of it—this is Florida, Miami, people waiting for hours and hours to vote. And here are a couple of quotes from them. Mr. Blake Yagman said, quote, "I was there for about three and a half hours. Each of the lines was four to five hours. It took my mom eight and a half hours to vote," unquote.

This gentleman is severely hypoglycemic. He actually—excuse me for using this word because it is not a nice word—he spent several hours actually vomiting after standing in the sun for so long. Ultimately, he had to give up. So this is a gentleman who we know about, and I am sure, Senator Roberts, he would be happy to come up here and explain how painful it was for him.

And who could forget 102-year-old Florida voter Desiline Victor, who waited in line for three hours to cast her ballot—102. She almost turned 103 waiting in line. She persevered—what a patriot—until she got to the ballot box. But many like her, and younger than her, gave up.

Now, the second one is going to be close to Senator Warner's heart. At College Park Elementary School in Virginia Beach, Virginia, the line went all the way from that basketball court all the way into the building around here. It is just unbelievable. They were heart breaking stories. At this precinct, Virginia voter Mary Atkinson said, and I quote, "Some of us have been out here four hours. I have been here three and a half hours. I had knee surgery and my knee is killing me," unquote. Another Virginia voter, Robin Marohl said, quote, "I cannot tell you how many people I have counted leaving and saying, 'the heck with it. I am not going to vote because I cannot get in there,'" unquote.

Unbelievably, many voters in Florida, Virginia and other states were still standing in line, as Senator Warner described, hours after the polls closed and into early Wednesday morning. Mr. Chairman and Ranking Member and Senator Warner, we should not apply survival of the fittest to the right to vote. You should not have to be a marathon runner. That is not what our founders envisioned.

So when we force people to stand in line for hours, our right to vote becomes ephemeral. It is not really a right if you cannot make it. And that is why Senator Nelson and I wrote this bill. Let me quickly explain what it is, and I hope when you consider legislation, you can take this idea. I mean, I am not wedded to every word, but what we said was, we had this test case in the last national federal election, and we had all these problems in certain places. In other places, it was smooth as silk.

So what we say is if you had a situation where voters waited in line longer than 30 minutes, and this is an idea that the bipartisan Presidential Commission came out with really, that you should not have to wait more than 30 minutes. The Attorney General and the Election Assistance Commission should identify those jurisdictions where voters waited a long time—we say 30 minutes; it could be an hour—and then they should talk to the state, talk to the county, and come up with a common sense plan to minimize waiting times at those jurisdictions, because they failed the test.

Now, if there is a problem with Senator Roberts—and I mean, I know Senator Roberts and I know he has a problem with this idea of a federal law. But if you crafted it in such a way that it is not one size fits all, that the local people and the state people come up with their own ideas, this could be a really good way to bring experts together to fix the problems where they occur. So it is not rocket science. Either we have a right to vote or we do not have a right to vote.

I am so proud of this Committee on all sides for holding these hearings, because as the senator said it breaks his heart. I will tell you something—I just got sick looking at this—on the one hand proud of our people, that they would put up with this, on the other hand, knowing full well that some of them, because of their age, because of their circumstance, because of illness, just could not do it, could not make it, and lost that right to vote.

So I stand by ready to help you on both sides of the aisle in any way. We can use our common sense to make this thing get better, because this is not what America should look like on election night.

Thank you so much.

[The prepared statement of Senator Boxer was submitted for the record:]

Chairman SCHUMER. Thank you, Senator Boxer, for your excellent testimony. These pictures are worth a thousand words.

Senator BOXER. I will give them to you as a gift.

Chairman SCHUMER. There are a thousand people, he says.

Senator BOXER. Yeah.

Chairman SCHUMER. Four thousand in one place, I guess. But it is an amazing thing that Americans stand in quiet dignity on cold nights and wait and wait and wait, and it should not be.

Senator ROBERTS. Mr. Chairman, could I just go on record that I am opposed to long lines? I mean, I am not——

Senator BOXER. That you are opposed to long lines?

Senator ROBERTS. I am opposed to long lines and people waiting——

Chairman SCHUMER. He is for cell phones only.

Senator ROBERTS [continuing]. An inordinate amount of time. I just think we can settle that in Tallahassee better than Washington. But that is all I am saying.

Chairman SCHUMER. Senator Warner knows——

Senator BOXER. I hear you, and I think we can craft something that will allow that to occur if we are smart about it. I know that my colleagues, very pragmatic, success-oriented people, are sitting in front of me, and I think you can figure out how to do it without undue intrusion by the Feds.

Senator WARNER. I know we need to get to Senator Coons and the next panel, but I just want to say, you see this in a place like Virginia where we have not always had the best record on voting and protecting voting rights. I mean, this becomes in effect a de facto poll tax.

Senator BOXER. Yeah.

Senator WARNER. Because those who can afford to stand in line for hours can do it. Those who cannot afford, cannot. And that is just not the way we should be operating.

Senator BOXER. Well, that is definitely another aspect. I never thought of it that way. It is an endurance test and it is also a financial test. So whatever it is, we have to make it better, I think.

Chairman SCHUMER. Thank you. And let us hope we can all work together to come to an agreement on how to deal with this.

Senator BOXER. I stand by to help.

Chairman SCHUMER. Senator Coons, who also has an excellent idea, that is cognizant of Senator Roberts' concerns that one size does not fit all. Senator Coons.

STATEMENT OF THE HONORABLE CHRIS COONS, A UNITED STATES SENATOR FROM THE STATE OF DELAWARE

Senator COONS. Thank you Chairman Schumer, and thank you Ranking Member Roberts, for inviting me to testify. And thank you especially to Senator Warner for his leadership and advocacy for the legislation I am here to present on, the Fair, Accurate, Secure and Timely—or FAST—Voting Act.

It is built upon the idea of a federally incentivized competition between states, incentivizing and rewarding those states that make substantial improvements to the administration of their elections

in order to make voting faster and more accessible. It encourages states to put forward their best ideas, and then through a competitive grant program, rewards those with the best proposals that have the greatest impact with the seed money to make it happen.

The critical metrics for this evaluation are clear. In fact, the bipartisan Presidential Commission on Electoral Administration, which you just heard from, highlights the need for all states to improve in a variety of areas which are also enumerated in this FAST Voting Act: Online voter registration to enhance the accuracy and efficiency of voter rolls; early voting by mail or in person so all people who work can also vote; improving the ability of our deployed members of the Armed Forces and other military and overseas members to access ballots and voting materials; electronic poll books for greater accuracy; enhancing the training of poll workers; and addressing the needs of voters with disabilities and limited English proficiency.

We all know what needs to be done. It is time to work together and get moving. These November 2012 elections were a critical wakeup call. Tens of thousands of Americans, Republicans and Democrats in states both red and blue, saw their fundamental right to vote for the candidate of their choice limited by exceptionally long lines and confusing procedures.

We saw errors in voting rolls in Ohio, delays in counting ballots in Arizona. We saw a waiting line, as Senator Warner referenced, of nearly five hours in Virginia, and more than eight hours in Florida. There are documented instances of voting machines recording an opposite vote of that cast in states across the country, from Colorado to Pennsylvania. Frankly, this is unacceptable.

Voting is the ultimate, most foundational civil right in our free society, and we should treat it accordingly. When a polling station runs out of ballots, our friends and neighbors are effectively disenfranchised. When the lines at a polling station are too long, citizens are forced to choose between losing their job and forfeiting their right to vote.

As the chairman of the Africa Subcommittee on Foreign Relations, I have helped lead efforts by our country to encourage dozens of emerging democracies to make all the changes recommended by the presidential commission. It is frankly, to me, an embarrassment that we, the oldest functioning democracy in the world, cannot make these simple fixes in a way that allows the states to lead in implementing reforms.

It does not have to be this way. We can pass the FAST Voting Act to accelerate the adoption by states of efficient and effective practices for the administration of elections. While many states are struggling, there are also some good examples to follow. Not surprisingly, I offer my home state of Delaware. We have an exceptional state election commissioner in Elaine Manlove, who has helped lead the way through her tireless efforts. An instructive example is her leadership on eSignature, or electronic signatures.

eSignature is a voter registration method that could be implemented in registration sites across the country to streamline the transmission from the Department of Motor Vehicles to the voter rolls, the selection of party and registration. In the old system—the need for a signature, which was accomplished on a paper applica-

tion, which would then be collected from DMV locations, transferred to the Election Commission, reviewed and entered by another person and then archived—has been replaced with an electronic signature available on exactly the same interface, collected at the DMV, transmitted and stored directly and error free in voting rolls. Because of Elaine Manlove's leadership in Delaware, Delaware voters experience fewer errors, less wait time and lower operational costs.

We owe it to our fellow citizens to help spread the lessons of state innovation in dealing with the challenges of election administration. As I mentioned earlier, as the oldest currently functioning—continuously functioning democracy in the world, we are sadly showing our age in that with these instances in the 2012 elections, we have failed to make the voting franchise fully and freely accessible to all who seek it. We cannot stand idly by as our elections become a ritual in embarrassment. Let us work together, use competition between the states rather than one uniformed federal mandate, and demonstrate how our states can conduct the elections our constituents deserve.

I look forward to working with this Committee, to the Ranking and to the Chair, and I am grateful to Senator Warner for his early leadership both in voting and on this bill in particular. Thank you, Mr. Chair.

[The prepared statement of Senator Coons was submitted for the record:]

Chairman SCHUMER. Thank you, Senator Coons. I think it is a very, very creative idea to deal with this issue and maybe thread the needle between those who want to see the states have complete control and the Federal Government encourage the best practices.

I thank both—I do not have any questions. I know we are going to have votes at 10:30. We want to get to our second panel I would like to get to.

Do you have any questions, Senator Roberts?

Senator ROBERTS. I was going to ask—Senator Warner said he had a very distinguished career as governor at Virginia. What initiatives did you think would really help out there with regard to the lines that you are experiencing or a poll tax on people when they are voting, or what you said would amount to? But I know that you probably really focused on this. Can you single out just a couple of things?

Senator WARNER. Yeah. I would say that what we have seen in Virginia was this problem dramatically increase over the last decade plus, because we have not changed our ratio of machines to people, number one. In Virginia, we have elections every year. And then we have seen this particularly—and unfortunately, since Virginia has a one-term governor restriction, I was not able to stay as governor through the Obama cycles. But you saw a dramatic upsurge in participation in 2008 and '12, and our system did not keep track, did not stay in track. So——

Senator ROBERTS. Was that mostly in Northern Virginia? Because most of the people were in rural communities.

Senator WARNER. No. The picture that was worth a thousand words—Senator Boxer only got 200 words in on describing the pic-

ture—was actually from Virginia Beach. So we had this in areas across the state.

Senator ROBERTS. I see. I appreciate that. I am fine.

Chairman SCHUMER. Thank you. Thank you, Senator Coons. Great testimony. Senator Warner has graciously agreed to chair the second panel, so we are going to turn it over to him.

And I apologize to the second panel. I will have to excuse myself, but I will assiduously go over your testimony.

Senator WARNER [presiding]. Could we go ahead and get the second panel up here? And with apologies on the front end, because we do have a series of votes starting at 10:30, which means we will probably have to leave here at 10:40. So I am going to ask the panel as they quickly get to the front—all three of the panelists, please quickly get to the front—that we keep your testimony to five minutes apiece so that hopefully Senator Roberts and I will get a chance to get in a couple questions.

I am going to dispense with the long introductions. Again, apologies since we got started a little late. But we have Ms. Linda Lamone, who is the state administrator of elections from Maryland. We have Ms. Tammy Patrick, who is the federal compliance officer for Maricopa County Board of Elections in Arizona. And Senator Roberts, I actually have the individual who served partially as the head of state board of elections when I was beginning of my term of governor and has moved on to Fairfax County; has some ideas as well—Ms. Cameron Quinn, who is the general registrar for Fairfax County in Virginia—but she was also chair of the State Board of Elections.

Senator ROBERTS. I appreciate that very much. Thank you. I am sorry. I apologize.

Senator WARNER. Let us get started.

STATEMENT OF LINDA LAMONE, ADMINISTRATOR OF ELECTIONS, MARYLAND STATE BOARD OF ELECTIONS

Ms. LAMONE. Thank you very much. Linda Lamone, state administrator of elections for the State of Maryland. I appreciate the opportunity to testify here today, and in light of your all schedule, I will try to be as brief as possible.

I am here to talk today about how implementation of electronic poll books in Maryland has improved the election administration process. I want to note at the beginning that under Maryland law, I am required to maximize the use of technology in election administration, and to that effect, the governor and the General Assembly has directed me, and I have implemented, integrated candidacy and ballot databases, a statewide touch screen voting system, a statewide voter registration system.

We offer online registration and a campaign filing system. And we have introduced technology at one of the most public parts of the voting process, the check-in process. The check-in process in Maryland, at least, has historically been a very paper-driven and manual process. And I have with me today, if the members of the Committee or the staff would like to see them, a printed paper registrar that used to be used, as well as an electronic poll book that we use in Maryland to check the voters in.

With the paper process, you had this huge book of thousands of pages perhaps and the poll workers would have to leaf through them and find the voter's name and hope they checked off the right one—Junior or Senior, so forth—manually mark the registers and then manually program the cards that told the voting system what ballot the voter should get. And there were often mistakes made and voters got the wrong ballot, Republican, Democrat, so forth in the primaries, and then, of course, everything had to be manually tabulated.

With the introduction of the electronic poll books, it streamed the check-in process hugely, provided automated voter counts, real time instructions for the poll workers, and most importantly, we did not have to have alpha line breakdowns. The poll books captured data that helped us a lot both in tracking patterns, i.e., what time did the polls open, what time did the voters vote, and gives us information on our poll worker performance.

We implemented the system in 2006. We currently have 6,800 electronic poll books that will be used in 1,700 polling places and 63 early voting centers this year. We chose a poll book that works with our direct recording voting system, touch screen. As you all probably know, the poll book itself programs the card that tells the voting system what ballot to present to the voter.

While there are significant Election Day benefits for poll books, it would be impossible to conduct early voting, at least the way we do it in Maryland, with the same level of integrity without the electronic poll books. For example, if we were to use the paper registrars in Maryland, the judges would have no information if a voter is not in the right polling place. With the electronic poll books, we have all 3.8 million registered voters programmed on to each poll book.

So if the voter goes to the wrong precinct, our poll workers can tell him or her where they should go, not literally but really—and as I said, equally important, there is no need to have the alpha check-in, so that you might have a line from A to C and no line and then one of the others, and people get very frustrated by that.

During early voting, our poll books are all connected throughout the State of Maryland so that when a voter checks in at one early voting center, the poll books throughout the state know that that voter has now voted and helps protect the integrity of the system.

Senator WARNER. What was the cost of the system?

Ms. LAMONE. The cost of the system was, when we bought them, I think it was about $3,000 a piece. Baltimore County, for example, has 847 of them, so they spent about 2.6 million. Now, they were expensive; I admit that. But how do—what is the cost for integrity and accuracy of the election, I guess is the response.

So we have the virtual private network. It protects the integrity. With the paper-based system, you might be able to eventually detect that someone voted twice, but you would never be able to prevent it. With the poll books, you can do that.

And then Montgomery County, for example, which is our largest jurisdiction, all nine of the early voting centers have complete lists of all the 625,000 registered voters in Montgomery County. So there again is another benefit of the poll books. Another one is the—in a jurisdiction in Maryland, a gubernatorial primary there

can be over a hundred different ballot styles in each precinct, and with the poll books, you guarantee that the voter is getting the correct ballot style.

The other real big advantage—and I see my time is running out—is it helps the efficiency of the canvas, because after Election Day, we load the entire results from check-in voters into our central system, and that is available to the counties for the canvas. So when they are doing their absentee and provisional, they know exactly who has voted—either early voting or on Election Day—and therefore, either not count the absentee or not count the provisional ballot. Without the poll books, that would be very difficult.

The other real value to them——

Senator WARNER. Can you wrap up in a minute, because we have a 10:30 fairly hard stop. We do not get to wait three hours in line voting in the Senate. We have to actually vote in a timely fashion, and I want to make sure we get all of the testimony in.

Ms. LAMONE. One of the early concerns that we had was how would the poll workers adopt to the poll books, and we found that when we gave them some training, they just simply love them, absolutely love them. And with that, I will stop.

[The prepared statement of Ms. Lamone was submitted for the record:]

Senator WARNER. Ms. Patrick.

STATEMENT OF TAMMY PATRICK, FEDERAL COMPLIANCE OFFICER, MARICOPA COUNTY ELECTIONS

Ms. PATRICK. Thank you, Senator Warner. It is an honor to be here today to discuss voter registration modernization. I was honored last year to be appointed by the president to the Presidential Commission on Election Administration, and in January, we issued our report on recommendations to improve the voting experience in America, which we recommend online voter registration, sound data collection, and analysis.

In 2007, I worked with the Pew Center on the States and the Brennan Center and studied online voter registration, its cost efficiencies and quality. The result of that collaboration is the oft cited 80-cent processing cost savings for every online voter registration that we receive. And we average—325,000, or 70 to 80 percent of our total voter registrations, annually come online.

After the aforementioned reports were published, I spoke to election officials and state legislatures around the country about online registration. And I have included my testimony, in my written testimony, a presentation that I gave to the National Conference of State Legislators at their national conference in 2012.

There are a couple of points I would like to highlight from that presentation. In addition to the cost savings, there are the benefits of access, accuracy and improved security. Voter registration, particularly for states with mobile ready systems, is now available any time anywhere for voters. Election administrators lament when voters do not keep their information current, but it is incumbent upon us to reduce every possible barrier to the voters doing just that.

With the saturation of internet connectivity with smart devices, access to this channel of voter registration is no longer isolated to

a small segment of our population. There are additional quality benefits to the voters themselves entering in their information, first, no more interpretation of illegible handwriting. Secondly, should a keying error occur, a voter is more likely to notice that their information has been entered incorrectly.

In a paper-based system, applicants complete a form replete with personal information: their signature, date of birth, Social Security number, and then hand it over to a complete stranger. The registration of voters is a noble task, and I do not mean to denigrate it in any manner, nor imply that registration drives should be curtailed. However, we need to improve the process and capitalize on these efforts.

Currently, most forms are turned in on the final deadline for voter registration. But if registration drives submitted forms electronically, the voter is more likely to make it on to the voter rolls on Election Day, particularly if ePoll books are used.

Which brings me to my final point about the benefits of online systems, and that is the ease of expansion. Washington State improved upon the basic system interface with the Department of Motor Vehicles to allow for all NVRA agencies, registration drives, campaigns, et cetera, to get their own exclusive URL extension that allows for data to flow directly into the online system but still have the source of origin tracked. This encourages use of a more efficient system, while giving the users the information that they want—who did they actually register—but not providing them with the voters' more sensitive information and signature. This system has allowed the Secretary of State's office in Washington to expand their footprint with innovative partnerships with Rock the Vote and Facebook.

Improving the data flow, particularly with the Department of Motor Vehicles, is crucial to success. Even in states like Minnesota, where they have Election Day registration, they have found that these applicants, the vast majority of the voters, had applied and updated their information with the DMV, so regardless of the systems, streamlining these governmental data sharing relationships is a benefit to the voter.

Increasing the ability to easily track voter registration forms cannot be underrated. Twenty years after the NVRA was passed, we still have issues with the enforcement of the law and participation. In San Diego County, California, they saw this first-hand when they implemented a more robust tracking mechanism that allows them to identify the volume of registrations coming from each distinct NVRA office. This improvement, going from less than a thousand forms a year to 10,000 forms from NVRA agencies in 2012. Online systems aid in the ability to effectively track applications and therefore, ensuring compliance.

One of the most critical aspects of the expansion of the online system is that it can be used to reach our military and overseas voters. The UOCAVA voter not only benefits from online services but is more reliant on them than any other voting population. With minor additions, the fields present in the Federal Post Card Application that are not on a standard registration form can easily be added. This could, however, create a legal quandary for some states who do not consider our UOCAVA voters to be full, actively reg-

istered voters. They do not accrue a voting history in these states. They are not taken into consideration in the turnout calculations, and their voter registrations, not just their absent ballot applications, are canceled at the end of the FPCA time period.

The real question is then why have not more states implanted the registration of online voters? It is my belief that it is probably out of fear that it somehow may benefit the other side of the aisle. However, there are blue states and red states that have implemented it, and when you look at the data of who is using the online registration, the political composition reflects that of our voting population as a whole.

Lastly, the use of the online system was most often used to keep registrations current, not just as an entry into the system itself—the very behavior we ask of our voters.

And with that, I will be happy to answer any questions we have, should there be time.

[The prepared statement of Ms. Patrick was submitted for the record:]

STATEMENT OF CAMERON QUINN, GENERAL REGISTRAR, FAIRFAX COUNTY, VIRGINIA

Ms. QUINN. Thank you very much. I appreciate the opportunity to speak here today. And Governor Warner, I appreciated your leadership when we worked together, and I am glad we have a chance to do so again.

I want to make three points in talking about innovation and administrative improvements and cost savings. Number one, technology can be a huge plus, really a huge benefit. Number two, not all technology ends up being a huge plus or benefit, sometimes because the technology was not set up properly in the first place; sometimes because of software and sometimes because of people skills that are needed to use it. And the third point is, we do not have enough election officials already, and we are really lagging in being able to attract the ones we need with the right skill sets.

In addressing online voter registration, technology can be a huge plus, and online registration is already proving the case in Virginia. It started in July of this last year, and about 23,000 people registered online, without a lot of publicity about the whole thing, in time for our November elections.

On the day that registration closed, 3,000 people across the state effectively were able to register or change their address online. A thousand of them were in Fairfax County. That thousand people who registered online saved us three seasonal staffers spending two weeks doing nothing else but entering those thousand registrations. It made a huge difference for us. By the time we get to 2016, this is going to be an enormous plus.

Tammy has talked about all of the benefits that you get, the ease of being able to get things right, the ease for everybody in doing it. I will not go over those, but that is going to be terrific, just terrific.

But not all technology is a panacea, and in fact, our experience with electronic poll books in Fairfax County has been rather challenging and troubling. I think some of this may have been due to the particular choices made by the electronic poll books solution

which Fairfax adopted. We continue to have some kind of issues with our technology and sometimes it is hard to tell if it is hardware or software.

Having said that, we think electronic poll books are worth continuing to work with, but we are hoping when we finish our imminent acquisition of new voting equipment in Fairfax County, we will then turn around and acquire new electronic poll books that will be easier for everyone to use.

I would note that in addition, one of the challenges with technology is introducing it early enough you have time to work through the kinks. And fortunately, despite all the kinks, we did that in Fairfax County with the electronic poll books. We are doing that with the new equipment. We are determined to have this equipment in use for this fall's elections, which is a relatively easy administrative election, so that when we get to next year, when we have the highest number of ballot styles in the state—for the 2015 elections, we have already worked through a lot of the kinks. And by the time we get to 2016, many of our voters who are regular voters will be comfortable with the new equipment, making it easier to focus on those people who only vote once every four years.

And the third point, when I started in elections 15 years ago, election officer recruitment was already a challenge in a number of places usually your large suburban and urban areas where they struggle to get enough people to serve at a polling place on Election Day. It has only gotten worse. And one of the things that is sort of stunning—but the last week, or week and a half, before an election we will lose 10 to 15 percent of our election workers who said they would serve, which means we are typically struggling to get up to the number we wanted to recruit in the first place.

So this is already a huge problem, and it has been compounded by the use of technology in the polling places, because one of the things we found in some of our places with longer lines was that our election workers were not checking voters in very well because they were not very comfortable using the technology.

Now, understand, the nice thing in Fairfax is we can provide classes for people, and they can come back again and again and make themselves more comfortable. We still have people with all that training who were not comfortable and were trying to use the technology, and in fact, the technology made it harder in some places rather than easier.

So we need to be, in addition to just recruiting more election officers, recruiting people who are comfortable with the technology which is going to become the absolute critical foundation for our polling place operations with new equipment and electronic poll books.

So those are my points. Thank you for the opportunity to speak. I will be happy to answer any questions.

[The prepared statement of Ms. Quinn was submitted for the record:]

Senator WARNER. Well, thank all three of you for your comments. I have two questions, and we are going to keep plowing until votes start.

First, I guess, is as somebody who is—and I think in Virginia we have had our—generally speaking, a very good system. I cannot

comment much on the others. We have the challenge in Virginia that we have elections every year, so we get to retest in a major way every year.

It seems from a couple steps that there have been secretaries of states or boards of elections and others—unfortunately, it seems like this has gotten a little more political, again, on both sides than it was in the past. Do you all feel, particularly as we look at technology and we think—Ms. Lamone, when you mentioned you buying that in Maryland in '06, it is still a relatively short period of time as we move into this new technology. Is there enough sharing between states and then within states of best practices?

Ms. QUINN. Mr. Chairman, if I could actually start that by saying, when I was at State Board and Linda Lamone was at the Maryland State Board, we were working together on a number of issues, and I very much appreciated the fact that I could call her up, she had a little more experience than I—and she would give me some great suggestions and ideas on how we could do things.

The answer is yes. The biggest challenge is that you do not typically get to meet that many people outside your state to be able to share those ideas.

Ms. LAMONE. And the states are so different in the way they run elections, Senator. In Maryland, it is all centralized. I am the leader of the pack, and the Board and I establish the policy based, of course, upon the law that is enacted. So the local jurisdictions do not have much discretion.

So to answer your question, we do share. We are constantly interacting between the state and the counties in Maryland. But in other jurisdictions, I think, you all would agree, I mean, there are some states where it is very disparate and there is not a lot of sharing that goes——

Senator WARNER. Ms. Patrick, I am going to ask one last question. You get to answer first and then we will take the others. I am going to—again, I think we are down to 13 minutes.

One of the things that I think drives a lot of us was the seeing of the long lines, why we are saying we have to figure out a way to fix this. I guess very quickly—and if you want to submit longer answers as we sort through a solution set—and recognizing the very legitimate concerns Senator Roberts raised that this should not be kind of a one-size-fits-all federal proposition, is the biggest challenge number of machines per voter ratio? Is the biggest challenge the check-in process? Is the biggest challenge not knowing the surge capability in a particular precinct? Obviously, the lines mostly appear in presidential elections. Is it, as Cameron mentioned, the biggest problem having election officials who are fully trained up?

If you could be brief and then give me a longer answer. Because I think the heart of this, we are trying with ideas that—we think competitive grant program, or some of the ideas that Senator Boxer had, but you guys are the experts.

Ms. Patrick, you get first——

Ms. PATRICK. Thank you, Senator. So the answer is yes, all of the above. Of course, it is——

Senator WARNER. You are not a senator, Ms. Patrick. You cannot give the all-the-above answer. That is what we would do. On the one hand . . . on the other hand.

Ms. PATRICK. If I were to say that the number one issue that affects most of the areas where we have long lines, it is voter registration. It is the archaic nature with which we register voters, maintain the voter registration.

Senator WARNER. Not ratio of machines?

Ms. PATRICK. I do not believe it is the ratio of machines, although there are issues in some cases with machine ratios, but that really only ties into the places where they are using touch screen voting machines, because that is the only point where a voter can cast their ballot as opposed to places that are using optical scan where you can hand out 100 ballots and people can vote them at the tables in the school cafeteria.

So I do not think it is necessarily the voting machines, but it could be resource allocations as far as how many ePoll books there are, how many poll workers there are, how many booths are being present. So that is why the Commission conveyed in our report that we have a toolkit of resource allocation tools where local administrators, state administrators can go in and check their own formulas to see against the ones from MIT and some of the other places.

But it all ties into your first question that has to do with the professionalism of the field, and that is something that we discuss in here as well. Because there are some states that have strong state leadership or they have strong state programs where the counties can share information and the best practices amongst themselves.

And what you found, and what we found as the Commission went around the country, is that we see the same counties, the same representatives at all of these national meetings, because not everyone can afford to attend the national conferences. So it is very distinct across the country, whereas, if you had—each state had a very rigorous program—to take some of that information they received and share it with the counties, that everyone would be much better off, I believe.

Senator WARNER. Lighting round, Ms. Lamone and Ms. Quinn. Thirty seconds each, and my apologies to the witnesses. Very important hearing, but I am going to have to go over and vote.

Ms. QUINN. The answer is, the problem changes depending on the precinct. But, more EOs help. If you have more election officials, you are more likely to be able to solve problems and keep lines moving. But I gave GAO about a five-page outline of all the reasons you can have a problem with polling places, and there really are that many.

Ms. LAMONE. And I second that. And it is money. Money is always an issue.

Senator WARNER. It is interesting. I would have thought perhaps it was more about machines, but you are saying it is more about process of getting registered and the quality and—not quality—the quality and knowledge of the election officials?

Ms. PATRICK. As I mentioned, the quantity of the machines is really only tied into the touch screen, the DRE voting equipment, with the exception of places like Florida where they had five- and

six-page ballots. For the first time I think in many places' history, there was congestion at the optical scan machine because every voter had to feed in five and six pages, and then there would be, you know, subsequent jams when they try and put them all in at the same time, that sort of thing.

So that was really an exception to the rule, and thankfully and hopefully an anomaly.

Senator WARNER. Recognizing that this has traditionally been a state function—although I would think that, you know, we did have Federal Motor Voter at one point that did have resources and others to incent states. I would, again, come back to Senator Coons and I are working on this notion of a competitive grant process that would not mandate the state does X, Y or Z, but if we could get the kind of best practices and then create some competition amongst states, I would like in your written answers, if you could give me some comments on that, and if you think it is dreadful, probably easier to say that in written comments versus in a hearing.

So without objection, and with apologies to the very good witnesses, and the fact that we got started late, and your professionalism and your approach, I am going to say without objection the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing for particularly our second panel of witnesses to answer.

I would say that, again, just editorially, the long lines we experienced in Virginia and across the country, that just should not be in America in the 21st Century. So I urge us to continue to press us and press your colleagues across the country to figure out a way to get this right.

With that, without any further objection, since there is nobody else here to object, the hearing is adjourned. Thank you all.

[The prepared statement of Senator Nelson was submitted for the record:]

[Whereupon, at 10:41 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

MARYLAND
STATE BOARD OF ELECTIONS
P.O. BOX 6486, ANNAPOLIS, MD 21401-0486 PHONE (410) 269-2840

Bobbie S. Mack, Chairman
David J. McManus, Jr., Vice Chairman
Rachel T. McGuckian
Charles E. Thomann

Linda H. Lamone
Administrator

Nikki Charlson
Deputy Administrator

TESTIMONY BEFORE THE UNITED STATES SENATE
Committee on Rules and Administration
March 12, 2014

Linda H. Lamone
State Administrator of Elections, Maryland

Thank you for the opportunity to testify on *Election Administration: Innovation, Administrative Improvements and Cost Savings.* Election officials strive to implement solutions – both technical and non-technical – to improve the voting experience and make election administration more efficient and effective, and I am honored to be asked to provide testimony on how the implementation of electronic pollbooks in Maryland has improved the election administration process.

Under State law, the State Board of Elections is required to "maximize the use of technology in election administration."[1] This statutory requirement led Maryland to integrate candidacy and ballot databases, implement a statewide touchscreen voting system and voter registration database, and offer online voter registration and campaign finance filing systems. It also led to technology at one of the most public parts of the voting process – the check-in process.

The check-in process has historically been a paper-driven process with pollworkers finding voters' names in large precinct lists, manually marking those voters who appeared to vote, and in Maryland, manually programming smart cards for the State's voting system[2]. Because of the manual check-in process, voter counts were manually tallied and reported. The introduction of electronic pollbooks not only streamlined the check-in process and provided automated voter counts but also provided real-time instructions for pollworkers and captured electronic data that previously was not available. For example, the electronic pollbooks capture data that help election officials track voting patterns (*e.g*, time of day) and pollworker performance (*e.g.*, time to check in a voter).

In 2006, Maryland implemented electronic pollbooks, and they were used statewide in the 2006 Primary Election and every subsequent election. The State currently has about 6,800 electronic pollbooks that will be used in 1,700 polling places and 63 early voting centers in the 2014 Primary Election.

---

[1] Election Law Article, §2-102(b)(7), *Annotated Code of Maryland*

[2] With touchscreen voting systems, a smart card is used to load the correct ballot style. Before the introduction of electronic pollbooks in Maryland, a pollworker would establish the identity of the voters, note in the precinct register that the voter appeared to vote, and use a device to program the smart card manually. Because it was a manual process, there was a risk in primary elections that election judges would program the wrong ballot information onto the smart card and the voter would receive the wrong ballot.

FAX (410) 974- 2019
MD Relay Service (800) 735-2258

Toll Free Phone Number (800) 222-8683
http://www.elections.maryland.gov

151 West Street Suite 200
Annapolis, Maryland 21401

Maryland uses the EP5000, previously manufactured by Diebold Election Systems Inc. and now supported by Election System and Software (ES&S). This model was selected because it works with the Maryland's statewide voting system, a Direct Recording Electronic touchscreen originally manufactured by Diebold. The electronic pollbook writes ballot data to a smart card, and the voter inserts the smart card into the voting unit to load the correct ballot style.

There is no comparison between electronic pollbooks and paper precinct registers. While the election day benefits of electronic pollbooks are significant, it would be impossible to conduct early voting with the same level of integrity as election day without electronic pollbooks.

1. A paper precinct register typically only lists voters of that particular precinct. In Maryland, data of all 3.8 million registered voters is loaded onto each electronic pollbook. This means that a pollworker can help a voter in the wrong precinct get to the right precinct if he or she prefers to vote in the right precinct. The pollworker uses the pollbook to provide the address and map of the correct precinct.

2. There is no longer a need to divide the check-in process by alphabet. Previously, the check-in stations were divided by alphabetical segments, and there could be a line for one alphabetical segment while the other alphabetical segments had no lines. With electronic pollbooks, voters can check in at any station and the associated frustration with being in the "slow line" has disappeared.

3. During early voting[3], election officials use a virtual private network to connect the electronic pollbooks. This means that all of the electronic pollbooks in the State are updated when a voter checks in to vote. The update takes only a couple minutes and prevents a voter from voting more than one regular ballot[4] during early voting. Using networked electronic pollbooks during early voting is critical to maintaining the integrity of an election. With paper precinct registers, election officials would eventually *detect* that a voter voted at multiple early voting centers, but it would be nearly impossible to *prevent* a voter from doing this.

4. Electronic pollbooks make the check in process in early voting centers more efficient. In Maryland's largest jurisdiction, election officials would have to provide the complete list of all 625,000 registered voters to each of the county's nine early voter centers, and a pollworker would have to find a voter's name and information among the thousands of pages of the printed precinct register. With an electronic pollbook, the pollworker can find the voter's information in a few seconds.

---

[3] Maryland implemented early voting in 2010. Each county has at least one early voting center, and voters in a county can vote at any early voting center in the county. For the 2014 elections, there will be eight days of early voting and 63 early voting centers around the State.

[4] A "regular ballot" is a ballot cast on the State's touchscreen voting system during early voting or on election day. Once a regular ballot is cast, it cannot be retrieved and rejected. A regular ballot is not a provisional ballot or an absentee ballot.

5. As noted above, the electronic pollbooks write ballot data to the smart card used with the voting system. As jurisdictions in Maryland can have over 100 ballot styles at each early voting center, the automated programming process offered by the electronic pollbooks ensures that a voter receives the correct ballot style. Without the pollbooks, there is a risk that a pollworker may improperly program the smart card and the voter will receive the wrong ballot.

6. On election night and the day after, data from the 6,000 electronic pollbooks is uploaded to the State's central server. This means that voter history for voters who voted on Election Day is updated quickly, a process that took some local election officials weeks to complete with paper precinct registers. This data can also be used when reviewing absentee and provisional ballots to ensure that a voter only voted once and conducting post-election audits. In Maryland, election officials compare the number of voters who checked in to vote against the number of ballots cast. This is a simple but very effective audit that could not be reasonably or timely performed with the paper precinct registers.

7. Because of the statewide network, voter turnout data during early voting is available in near real-time for every early voting center. After each day of early voting, election officials provide requesting candidates and political parties with lists of voters who voted during early voting.

As jurisdictions consider other technologies and expanded voting opportunities, electronic pollbooks can work with these technologies and make the opportunities possible. For example, Maryland is moving to a statewide paper-based voting system in 2016. Because of the challenges associated with paper ballots during early voting, election officials in Maryland have identified ballot on demand printers as a way to mitigate these challenges. When connected to a ballot on demand printer, electronic pollbooks can send the printer the voter's correct ballot. This means that election officials print only the number of ballots that are needed, as opposed to pre-printing ballots based on the expected turnout, and there is no risk that the pollworker will give the voter the wrong ballot. Maryland conducted tests with the electronic pollbooks and ballot on demand printers and intends to implement this structure for the 2016 elections.

In 2016, Maryland will also be implementing same day registration and address changes during early voting. We intend to use the electronic pollbooks to register individuals who are not yet registered to vote or process address changes and use the ballot on demand printer to print the correct ballot.

Like any technical solution, there are costs associated with electronic pollbooks. In 2006, the State paid $3,000 for each electronic pollbook, printer, and carrying case, but the costs have since dropped by 50%. For jurisdictions that do not need the electronic pollbooks to program smart cards for a voting system, electronic pollbooks are now available in commercial off-the-shelf hardware (e.g., Apple iPads). Several companies have developed software for use with this hardware, and there is no reason why a State or county could not develop its own software.

Before implementing electronic pollbooks in Maryland, State and local election officials were concerned about whether pollworkers would easily adapt to the new technology. With hands-on training, thorough pollworker training materials, and election day support, this concern quickly disappeared. Electronic pollbooks have been almost universally accepted by election officials, pollworkers, election observers, and most importantly, the voters of Maryland.

LINDA H. LAMONE

Linda H. Lamone was appointed by the Governor to be the State Administrator of Elections on July 1, 1997. Ms. Lamone has a Juris Doctorate with high honors from the University of Maryland, School of Law. She has served as an Assistant Attorney General for several Maryland State Agencies, as Special Counsel to the Lt. Governor of Maryland and was in private practice of law.

As the State Election Administrator, Ms. Lamone, by statute, was charged with maximizing the use of technology in election administration including the development and implementation of various statewide systems. These include a statewide voter registration system, a uniform voting system and candidate filing, election management and campaign finance systems. Recently, Ms. Lamone led Maryland in its implementation of on-line voter registration for the 2012 General Election.

Ms. Lamone serves on the U.S. Election Assistance Commission's Advisory Board and Technical Guidelines Development Committee and the Executive Committee of the National Association of State Election Directors. She is also Chairman of the Attorney Grievance Commission of Maryland and Chair of the Character Committee for the Fifth Appellate Circuit.

Testimony before the United States Senate Rules Committee

March 12th, 2014

Mr. Chairman, Ranking Member, and Members of the Committee,

It is an honor to be here today to share with you information and my thoughts regarding voter registration modernization in this country. Since 2003 I have worked in the Maricopa County Elections Department in Phoenix, Arizona—the last nine of those years as the Federal Compliance Officer. Arizona was the first state to implement online voter registration in 2002, followed by Washington State in 2005. In 2007 Maricopa County worked with the Pew Center on the States and the Brennan Center on studies of online registration: its costs, efficiencies, and quality. The result of that collaboration is the oft cited $.80 processing cost savings for every online registration form that we receive—and we average 325,000 each year in our county alone. This savings does not reflect the additional 85% reduction in the cost of the printing of paper forms due to the vast majority of our registrations coming in electronically (in odd years our online registrations average around 85% while in even-numbered years the percentage dips to the low 70s). I was honored last year to be appointed by the President to the Presidential Commission on Election Administration, and in January we issued our Report on Recommendations to improve the voting experience in America. I mention this because in our report we recommend the implementation of online voter registration, but we also speak to the need for sound data collection and analysis in the field to inform decision making. After the aforementioned reports were published I spoke to election officials and state legislators around the country about the Arizona system. I have included in my written testimony a PowerPoint presentation that I gave to the National Conference of State Legislators at their National Conference in 2012.

There are a couple of points I would like to highlight from that presentation. In addition to the cost savings inherent in online voter registration system's data intake, there are the benefits of access, accuracy, and improved security of the registration. Paper-based registration requires, well, paper. The ability to appear in person at either a local registrar's office or one of the National Voter Registration Act (NVRA) agencies necessitates the applicant more than likely deviating from the course of their daily activities in order to register. Online registration, particularly for those states who ensured that their system is mobile

ready, is now available anytime, anywhere for voters. Election administrators lament when voters do not keep their information current, but it is incumbent upon us to reduce every possible barrier to the voters doing just that. With the saturation of internet connectivity that smart devices have brought to much of the socio-economic strata, this channel of voter registration is no longer isolated to a small segment of our population.

There are additional quality benefits to the voters themselves entering in the information. First, no more interpretation of illegible handwriting. This is particularly important due to the increasing practice of removing handwriting from curriculums in our schools. Secondly, should a keying error occur, a voter is more likely to notice that their information has been entered incorrectly. In the presentation are the results of a 2009 analysis of registration applications in Maricopa County's suspense file —the file where an application resides that has some error of omission precluding us from correctly identifying the voter, or the address where they are attempting to register. What we found is that although the online registrations comprise a much higher number of overall applications, the suspense file majority come from the paper forms. (There are additional costs to the processing of suspended records in mailings and staff time with phone calls and research.)

In a paper-based registration system applicants complete a form replete with personal information: signature, date of birth, address, either full or last-four digits of their social security number, and by the hundreds of thousands hand that over to complete strangers in front of libraries, grocery stores, and at the county fair. The registration of voters is a noble task, and the majority of those who do it have the best of intentions in engaging their fellow citizens. I do not mean to denigrate in any manner, nor imply that registration drives should be curtailed. However, we need to improve that process to more effectively capitalize on these efforts by ensuring completion of the forms and timely submittal of the completed forms. Across the country there is a tsunami of paper forms turned in on the final deadline for voter registration. In 2008 I did an analysis of a large batch of forms received on the final day for the upcoming General Election. Many of the forms were more than 6 months old. I reviewed each of those voters to see if any of them had appeared to vote in any elections after they had registered. I found one gentleman who had registered in the spring when he had moved from Chicago to Phoenix. He had voted in the Primary Election but it was a provisional

ballot that did not count: because he was not registered, because his form was not turned in. If that registration drive had used laptops to allow the applicant to submit his information directly, his ballot would have counted.

Which brings me to my final point on the benefits of online systems and that is the ease of expansion. I mentioned earlier that the State of Washington was the second state to implement an online voter registration system. They have improved upon the basic system interface with the Department of Motor Vehicles to allow for all NVRA agencies, registration drives, campaigns, etc. to get their own exclusive vanity URL extension that allows for data to flow directly into the online system but still have the origin source tracked. This encourages use of the more efficient system while providing the users with the information that they want—who did they register—without also providing the voter's more sensitive information and signature. This system has allowed the Secretary of State's Office to expand their footprint with innovative partnerships with Rock the Vote and Facebook. Improving the data flow, particularly with DMV, is crucial to success. Even in states like Minnesota where they have Election Day registration they have found that of those applicants, the vast majority of the voters had updated information with DMV. Regardless of your system then, streamlining these governmental data-sharing relationships is a benefit to the voter.

Increasing the ability to easily track registration forms cannot be under-rated. Twenty years after NVRA was passed we still have issues with the enforcement of the law and participation. In San Diego County, CA they saw this first-hand when they implemented a more robust tracking mechanism that allowed them to identify the volume of registrations coming from each distinct NVRA office. This tracking, along with training, auditing, and site visits resulted in a marked improvement—going from less than 1,000 forms a year to over 10,000 in 2012. Online systems aid in the ability to effectively track applications and ensure compliance.

One of the most critical aspects of the expansion of the online system is that it can also be used to reach our military and overseas voters with partnerships with the Federal Voter Assistance Program (FVAP) and the Overseas Vote Foundation (OVF). The UOCAVA voter not only benefits from online services, but is more reliant on them then voters who are stateside or even present in the home jurisdiction. With minor additions the fields present in the Federal Post Card Application (FPCA) that are not on the standard registration form can be added

(such as the type of voter they are and the oath that needs to be completed in order to obtain coverage under the law). This could create a legal quandary for some states however who do not consider our UOCAVA voters to be full, actively registered voters—they do not accrue a voting history, they are not taken into consideration in the turnout calculations, and their voter registrations—not just their absentee ballot applications-- are cancelled at the end of the FPCA time period. Those states will have to decide if the online application is an FPCA and relegate the voter to this second-class status, or will they fully register the voter as most states do.

The real question then is, why haven't all of the states implemented online registration? Why is it that we are only now nearing the tipping point of half of the country having this access? It is my belief that this service is being withheld out of fear that it may benefit the other side of the aisle. However, there are blue states and red states that have implemented, and when you look at the information on who is using online registration the political composition of the voter reflects that of the registered voter population as a whole.

Lastly, we see that the use of online systems are most often used to keep registrations current, not just as the entry portal to the electoral system—the very behavior we ask of our voters.

With that, I am happy to answer any questions you may have.

Tammy Patrick
Federal Compliance Officer
Maricopa County, Arizona

STATEMENT OF

CAMERON P. QUINN

GENERAL REGISTRAR

FAIRFAX COUNTY, VIRGINIA

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON RULES AND ADMINISTRATION

HEARING ON

ELECTION ADMINISTRATION:

INNOVATION, ADMINISTRATIVE IMPROVEMENTS AND COST SAVINGS

MARCH 12, 2013

Thank you, Senator Warner, for your kind introduction. Chairman Schumer, Ranking Member Roberts, I very much appreciate this opportunity to share my thoughts on the subject of improving election administration.

These observations are based on my experiences in election administration for the better part of the last two decades – in my current position as General Registrar for Fairfax County, the largest jurisdiction in Virginia with more than 700,000 registered voters; as Secretary of the Virginia State Board of Elections (SBE) for four years (1999-2003), including the first year of then Governor Mark Warner's term; and in various state, national and international capacities advising on elections and election reform.

The issues of concern during the 2012 presidential election are well known and widespread. On a national level, they were the impetus for President Obama appointing the Presidential Commission on Election Administration ("PCEA") last March. They are also recurrent problems; I personally waited close to six hours to vote in my first presidential election.

Locally in Fairfax County, citizen complaints about long lines during the November 2012 election led to the creation of a Bipartisan Election Process Improvement Commission ("BPEPIC"or "Commission") by the Board of Supervisors. The BPEPIC's final report (found at www.fairfaxcounty.gov/electioncommission) was approved unanimously in March 2013. Because of pending litigation, the Fairfax County Office of Elections ("Office") was not able to speak directly or publicly to the Commission, so a few of the recommendations had already been at least partially implemented even before the Commission completed its work. Over the past year, in addition to three scheduled elections, a statewide recount and a subsequent special election, the Fairfax County Electoral Board and the Office have been reviewing, and trying to implement, the recommendations in the BPEPIC report.

It is significant to note that, when we looked across our county, and even across the country, there was no single factor responsible for the long lines the voters experienced. Instead, even at a precinct-by-precinct county level, we found a combination of factors (often different factors in different precincts) combined to create problems – such things as personnel, training, equipment, busloads of voters, language issues, building logistics, precinct size, and traffic patterns.

The only things close to identified patterns in Virginia – and neither was the case uniformly – were 1) where localities had high numbers of local bonds/referenda, in addition to two state constitutional amendments, and where such precincts also had above-average percentages of either transient voters, or voters who may have had language or literacy problems, and 2) some precincts with large numbers of voters. But even these patterns had exceptions; seven of the county's twelve largest precincts were

among some of the fastest to close election night, including one that closed in eleven minutes!

The simple fact is this: **There is no macro fix, no magic bullet that will single-handedly make the lines go away. Instead, issues need to be addressed at a micro level by county election officials, with support by local and state governments.** A lot of seemingly little things can be done, however, that will go a long way toward improving the experience for voters at the polls on election day.

To underscore there are not simple fixes, please realize that BPEPIC's report includes over 50 recommendations, and the PCEA report includes 19 recommendations most of which are additive. Some recommendations are as simple as not scheduling teacher conferences on election day. Approximately two-thirds of our schools in Fairfax County serve as polling places, and the competing event creates major parking issues each November at some schools, particularly during a presidential election. Other recommendations involve major purchases, such as voting equipment, or electronic pollbooks, that will require significant investments at a time most localities are still in, or just moving beyond, a long period of economic stress. What is significant, however, is that we, at the local level, already are responding, and looking for the most appropriate ways to improve elections in our jurisdictions. And what I would ask is that you **let the improvement process continue to be driven at the state and local level**. Let us innovate; let us experiment. That is how things improve.

Let me offer a few examples of prior state/local improvements. During my tenure at the Virginia State Board of Election, our agency received a 2002 Grace Hopper Government Technology Leadership Award for its early adoption of online voter services. We were the first state to offer election night results through personal digital assistants (PDAs), and, along with the City of Chicago, the first place to electronically provide blank absentee ballots to members of the military serving overseas.

And just after the 2000 election, I heard about Oklahoma's statewide directives for how to count ballots for (then) punch card ballots, optical scan ballots and "true" paper ballots. We were able to borrow the idea and improve upon their work, adapting it to Virginia's needs based on local input to the SBE. This preparation paid off. I am personally convinced, as are others, that these guidelines are a big reason Virginia's two recent statewide recounts were concluded in a timely and orderly fashion without becoming national spectacles. The ballot-counting guidelines developed in 2001 and updated several times, along with code provisions that set clear parameters for recounts and put statewide standards in place, helped to forestall some of the problems that have been experienced in other states grappling with recounts.

Virginia continues to be leader in technology innovation in election administration, as in other fields - this past summer, the State Board of Elections launched an on-line voter registration (OVR) service, accessed through www.vote.virginia.gov. Using this web-based portal, Virginia residents are able to register to vote or update their voter information at their convenience. One hurdle to OVR is obtaining the signature required to validate an application. The SBE solved this problem by working with the Department of Motor Vehicles (DMV). By accessing the portal using a driver's license number, the applicant's application is linked to their signature on file at the DMV. Those without driver's licenses can print out the completed application, sign it and mail it in. **Technology can play a significant role in improving elections for 2016.**

Advantages to OVR include that completed OVR applications are available within minutes of submission, rather than relying on U.S. Post Office or in-person delivery. And because the OVR system will not allow someone to submit an incomplete application, the frequent problem of incomplete applications is solved. Further, by eliminating the guesswork involved with deciphering hand-written applications, we have found that on-line registration both speeds processing and helps ensure more accurate voting rolls. This latter benefit in turn reduces the likelihood that lines will be slowed on election day while an election officer searches for a name that may have been entered incorrectly by staff due to challenges interpreting the voter's handwriting on the application form. From the launch of OVR in Virginia in July 2013 through the end of February 2013 (six and one-half months), over 5,000 applications have been submitted on-line for processing in Fairfax County.

A particularly telling statistic speaks to how technology can improve both voter access and election administration at a most critical time. On the closing day of registration before Virginia's 2013 elections almost 3,000 applied online, nearly one-third of whom were in Fairfax County. As a result, probably more than 600 man hours were saved statewide during the busiest time of year for an election office. The 200 man hours saved in Fairfax alone would have required three seasonal staff members doing nothing else for the two weeks before the last voter cards needed to be mailed in order to ensure they were received before election day – and it is not like we had extra staff hanging around with nothing to do at that time! In my opinion, by election day 2016 OVR alone is going to have a huge positive impact for voters. And while OVR will not actually "save" staffing for that period of time, it will mean that staff will be more able to answer more voter calls, which traditionally spike in fall elections, and spike by many multiples in presidential fall elections. Voter emails, too, are likely to substantially increase by 2016; we will be able to shift the staff from data entry to provide more prompt voter assistance.

There are several other ways that the Fairfax County Office of Elections has been taking advantage of technology to improve the voter experience. I will elaborate on a few.

In 2012, Fairfax County became the first jurisdiction in Virginia to develop a mobile application ("app") to make vital information available to voters on and before election day. The app allows voters to a) confirm they are registered to vote and b) confirm their polling place, with address and directions to get there. Not only did the app help voters to find their correct home precinct easily, *before* they arrived, but for those showing up at the wrong precinct, the mobile app provided driving directions to their correct voting precinct from their current location. As a side note, my favorite story from the 2012 elections involving this app was when a student at Norfolk State University called mid-afternoon election day having just found out he could not vote in Norfolk, since he was registered to vote in Fairfax. I spoke with him as he tried to find out how he could "vote absentee" on election day. I had to tell him he had missed this opportunity. It was apparent he was not sure where he would go to vote if he came back to the county; when asked, he of course responded positively to my question of whether he had a smart phone. I was pleased to be able to tell him that if he put in his information, he could actually get driving directions from Norfolk all the way to his Fairfax County polling place! After a distinct pause, he then asked if he could just vote using his smart phone. While I had to tell him this was not possible yet, once the security concerns surrounding internet voting are resolved, that day may soon arrive.

Technology can provide multiple means to deliver information to voters. Getting voters to the correct precinct is critical to making sure their votes will count. Indeed, "where do I vote" is perhaps the most frequent question we receive from the public (or at least tied with "am I registered to vote"). In addition to the mobile app, easy links that allow a voter to look up his or her own information are available on both the Fairfax County Office of Elections and the State Board of Elections websites. And anticipating the huge surge in phone calls asking these questions during the fall of 2016, the Office also installed interactive voice recognition ("IVR") phone software in 2013 that already has proven to be answering voter needs so satisfactorily that the number of phone calls handled by staff were slightly reduced in the fall of 2013! During the week preceding the election, 689 calls came into the IVR line with only 15 percent transferring to a live operator for assistance.

My last point is important to underscore - voters without smart phones, tablets, or computers, such as my mother who is legally blind, also need to be able to easily confirm their registration status and find the location of their polling place. Even without having access to technological innovations, such voters still can benefit from technology that is now able, at reasonable cost and effort by elections offices, to provide such information 24/7/365. In Fairfax County our IVR system links to the SBE

voter registration database (VERIS) and gives county voters without access to their own technology access to key information over the telephone in both English and Spanish. In addition to the personal information about an individual voter's registration status and polling place, the system also is set up to provide general answers to a number of the most frequently asked questions. As mentioned, thanks to the IVR system, Fairfax County saw a marked difference in call volumes handled by staff during the 2013 election. Use of this tool, like the mobile app and OVR, will only increase over the elections between now and fall 2016.

The same technology may not be appropriate, however, in every locality, based on different populations. This is a system that works for Fairfax County, where we have a large, diverse, technologically-oriented population; would it make sense for Dinwiddie or Highland County with much smaller populations and less technologically-oriented voters? I cannot say, but I do know that this should be a decision made locally, not in Washington. I worked at the U.S. Department of Justice (DOJ) enforcing voting laws for a couple of years - I have tremendous respect for my colleagues there. I also observed, however, that very few of them had any experience administering elections, and did not always recognize that one size (in solutions) does not fit all.

With the pace at which new technologies are being adapted and adopted, there is a real danger that top-down federal solutions may stifle innovation when it is most needed. In my view we going to get more and better innovation when state and local election administrators have the flexibility to experiment. I often get great ideas I tweak from other election officials; with thousands of us, someone is always working on a new idea to assist voters based on the latest in new technology.

Should Congress determine it is in the national interest to make further changes in federal election law, sooner is *much* better than later. For those of us in election administration, every change, whether a federal or state law change, or new equipment, even things as simple as introducing the IVR system, means going back and rethinking not just how to implement it, but also how the change affects other processes that are integral to the voter experience. In the zeal to reform over the last 12 years, so many changes have been made that our election systems and administrators have not had a chance to fully integrate the new processes and have, on occasion, made some things worse while trying to fix a different problem.

There needs to be a pause point in changes before presidential elections to avoid creating more problems than are solved. By the time a presidential year begins, the pace is such that local election administrators do not have time to properly execute changes. All the equipment needs to be purchased, processes worked through, and key people in place well in advance. Funding considerations for localities must be taken into account as well.

We are fast approaching the point where it is too late to be changing federal or state policies for 2016. Local elections administrators need the test run in a fall election, which for a lot of states is this fall, 2014. Whatever changes Congress thinks it needs to make, it needs to make them now, or wait until immediately after the 2016 elections. Otherwise, as has been the case in the past, some hard-working election officials will fail to smoothly transition the changes. During my tenure at DOJ, to illustrate, we were doing the first enforcement of the Help America Vote Act (HAVA). HAVA was enacted late in 2002 (and not really funded until late 2003), with the significant deadlines hitting three years later. As we tried to make appropriate enforcement decisions, we saw a number of state and local election officials trying to do the right thing as quickly as they could, but struggling with issues outside their control that were making compliance difficult.

Since we are now within a similar three-year window before the next presidential election, I can say with certainty that any new federal legislation passed at this point would be setting up a number of very hardworking and well intentioned elections administrators for the possibility of failure. Most election officials who had long lines in 2012 already have been working to improve the process over the past 17 months. Those who have not largely fall into two groups. In most cases, you will find they are the same election officials who are not complying with other federal requirements and, in all probability, already can be subject to DOJ enforcement action. Most others are in localities that are not providing sufficient resources for elections. Enforcement actions in those situations would only exacerbate the resources equation at a time many local governments are still trying to dig themselves out of the economic challenges of the past few years.

I would like to offer a cautionary note about one frequently discussed "solution" - electronic pollbooks (EPBs) are not a panacea. They are helpful in some respects, but add new potential problems in others. Like other changes, they need to be made before 2016, or may create more problems than they solve. To start, they are very expensive when compared to paper pollbooks. Some of our county staff was so frustrated with the transitional costs (not just the equipment and process changes, but the slow learning curve for staff and, particularly, some precinct election officials) that they were strongly advocating returning solely to paper pollbooks. Please remember that when Florida implemented new voting equipment during the 2002 primaries, it created a significant problem statewide, irrespective of the type of equipment. With changes, and especially changes in technology, it takes time for election officials, both office staff and precinct officials, to become comfortable – at best, they only have two or three times in a year, with months in between, to remember and use again the new equipment or procedures.

Further, while EPBs can improve certain parts of the process, they do not universally do so. EPBs do improve most voters' precinct check-in: there are no more complaints, as I had once at SBE from the same precinct in Arlington County the same day that the A-L, or M-Z, line is disproportionally longer than the other. Errors, such as name misspellings in the voter registration system, or polling place officials who just miss the name as they look through the pollbook, might no longer occur, but are replaced by new issues.

Our experience in Fairfax County again can help illustrate. The Office of Elections began deploying EPBs as limited pilot programs in 2010 elections. Because there were a number of hardware or software issues, they were not used in the November 2011 elections. After some improvements to the software and re-imaging of all the EPB laptop computers, EPBs were again piloted during the March 2012 presidential primaries in 24 of Fairfax County's 239 precincts, and again there were issues. Because May town elections are so limited, staff felt confident they could mitigate any risk, so EPBs were used two months later in three precincts, but even then, there were software issues. While the software had improved sufficiently to consider use in the November 2012 election, EPBs were not deployed countywide because the Office did not have enough money to purchase all the EPBs needed for an expected presidential election turnout. The decision was made to deploy them to the larger precincts in sufficient numbers to ensure each precinct had what it needed (at least two, and in some cases up to five based on the number of voters), rather than spreading them too thinly across Fairfax County. With strong support for EPBs in the Bipartisan Election Process Improvement Commission's report, the Board of Supervisors provided additional funding sufficient for the Office to acquire adequate EPBs to deploy them countywide in the November 2013 general election. While Fairfax County is finally using EPBs countywide and many issues have been resolved, even in the November 2013 election and the most recent special election in January 2014, we continued to have hardware and/or software issues.

By taking a gradual approach, our Office was able to learn from the early experiences and make appropriate adjustments before jumping in during a presidential election. Staff's skills improved, as did those of our election officials. We learned how to retrieve the export data from the hard drives of the electronic poll books if thumb drives are not available (and that chief judges needed better training to ensure the data was transferred to the USB). We learned to do more color-coding of what peripherals plug in where, so our election officials were more comfortable putting the EPBs together election morning. We were able to plan for appropriate, additional technical support staff at the command center on election day. Learning of the failure rate, even for new laptop computers used as electronic pollbooks, we had backup machines available with each of the 15-plus rovers who cover designated territory on election day (Fairfax County currently has 238 voting precincts spread over 395 square miles). Despite three

years and several elections in which we have deployed electronic pollbooks, in each new election we continue to have errors we have not seen before, as well as some we now know how to resolve quickly. Moreover, because of the razor-thin statewide recount in December, we discovered a couple issues that we had not been aware of on election day that we are now trying to research and solve or determine how to mitigate.

So, there are practical limitations on implementing technological solutions quickly. This is true not only for EPBs, but, more urgently, for voting equipment. The pace of technology is far outpacing the pace of adaption for new voting equipment.

At the same time, it is important to allow technological changes in a timely fashion, which does not always occur with a federal solution. Case in point, as PCEA indicated, the standard-setting process for the federal Voluntary Voting Systems Guidelines (VVSG), has broken down and will impact negatively the 2016 elections.

Fairfax County and other local election offices looking to purchase new election equipment in time for the 2016 presidential elections are at a significant disadvantage due to the broken federal certification process. First there are only four vendors nationwide. Second, the current voting equipment vendor community does not have the capacity to build and support dozens of different models, so they have reverted to the lowest common denominator, which is basically the 2005 VVSG standards, as that is all that the testing labs currently will test to meet. Virginia state law that prohibits direct recording electronic (DRE) equipment further restricts the choices to no more than five or six versions of optical scan equipment, depending on whether you want to only count everything already having completed the VVSG certification process.

So after a year of reviewing the options, Fairfax is this week trying to decide between three choices, none of which is perfect, all of which are only certified to standards that are almost a decade old, and among which, when surveyed, those county residents who came and tested them had no clear opinion. Statistically the survey indicated a virtual tie among the three. We cannot wait any longer to get new equipment, however, if we want to use it in the 2016 elections. We need test runs and some time for tweaking procedures and voter education in earlier elections in order to "get it right" for fall 2016.

Even without getting into the issue of web-based smart phone voting like my young college student desired in 2012, the vendors are reluctant to innovate beyond the 2007 draft VVSG guidelines as they have no idea in what direction future VVSG guidelines might go. As a result, innovations such as tablet-style devices using significant commercial off-the-shelf (COTS) software are rare or non-existent and vendors are unable to innovate with newer technological features that might improve the voting experience of voters who are members of the disability community. The situation has

become so frustrating that both Los Angeles County and Austin, Texas, have separate efforts underway to develop their own voting equipment.

I do not necessarily mean to indicate that the solution here is to reinvigorate the U.S. Election Assistance Commission. While that is one possible solution, having watched what has been happening over the past 15-plus years, I have observed that part of the problem is that this process became federalized, even if only in a voluntary fashion. And whatever is federalized becomes bureaucratized and ossified.

The good news about the federal challenges in voting equipment certification is that it is pushing states back to working together again to solve the problem, which may obviate the need for the EAC to restart certification, assuming it ever gets a quorum again. Prior to the establishment of the federal VVSGs, one of the election officials' associations, the National Association of State Election Directors (NASED), developed the initial voting systems standards. While not perfect, as might be expected from an association of under-resourced public officials at a time that pre-dated the post-2000 election scrutiny, the NASED standards had gone a long way to improving voting equipment options. And unlike a federal process, the association had the flexibility to innovate much more quickly. As importantly to me, the NASED standards did the job at a reasonable cost. It is my understanding that the current cost of getting new equipment certified is probably well over 10 times the cost prior to the creation of the federal process. Guess who then picks up these increased costs – ultimately, taxpaying voters. And, again based on my 15-plus years of experience, the equipment has not improved, nor has inflation increased, to an extent that justifies these increased costs.

Another urgent topic of concern regarding improvements for the 2016 elections is the critical need to expand the pool of precinct election officials!

For almost every election in Fairfax County, and many other, larger counties and urban areas nationwide, election administrators struggle up until election day to get enough people to commit early, get trained, and show up on time election morning. This was a problem when I first began focusing on election administration in 1998, and it is only getting worse. Last year, I was fortunate enough to be offered a team of students from the University of Southern California's ("USC") online Masters in Public Administration program to research a project of my choosing. This terrific team of students conducted a national survey of appropriate research journals and found so little written on the topic of election officer recruitment that they had to revise their project. They added interviews with some large innovator counties in election administration to determine if they could find some suggestions for our efforts to improve precinct election official recruitment. What they found in their interviews was that there did not appear to be any one silver bullet to increasing the numbers of precinct election officials that worked

consistently. Each innovator was still struggling with this challenge, and what worked well in one jurisdiction did not typically work in another.

A related issue is that many of the current election officers serving are not going to be able to continue to serve much longer. In Fairfax County, despite renewed emphasis on recruitment of precinct election officials over the past two years, as of last fall fully thirty percent of our election officers were over 70 years of age, and only fifteen percent under the age of 50. We are blessed that so many long-serving officers are still with us and grateful for their commitment, at times to the detriment of their health! The WW II generation has always been about service, and it shows in our precinct ranks; subsequent generations have not, yet at least, shown themselves to have the same commitment to volunteer service, as many organizations and institutions have discovered over the past three decades. At the same time, there needs to be recognition that, increasingly, technology is demanding different skill sets of election officers, even as eyesight and hearing of many seasoned officers also are fading.

Innovation is needed in recruiting these folks at state and national levels. Again, while the EAC might provide national prodding, this can be done by others able to command national attention, and nothing prevents such efforts with or without a functioning EAC. Affirmative measures are needed to recruit a cadre of election officers who are comfortable with the technology that is rapidly becoming integral to the process, as well as election officers who are bilingual. Administering elections is basic to American democracy, and even American culture, and we expect it to be done essentially by volunteers. And recruiting volunteers is a much more challenging process than it used to be. Hopefully a technological solution will come soon, but in the meantime meeting this challenge means, generally speaking, one-on-one conversations —mass advertisement or email recruitment efforts do not work, as is apparent by the woeful response to the question on the Virginia voter registration application.

There is some positive innovation occurring in election administration – the practice is becoming more professionalized. Given the rising expectations by partisans, candidates, the media and voters, this is important. The job is dramatically growing in complexity and election officials are struggling to keep up with what is being demanded of them. There are a handful of state and national programs to improve professionalization of current state and local election officials who are paid staff. I applaud the PCEA's recommendation that there needs to be an integration of election administration in university curriculums of public administration. MPA programs, law school specialties and even undergraduate programs would be helpful. The demand is already growing. I have observed this first-hand from my own experience teaching a course on election law at George Mason University School of Law since 2006. There are younger people out there on whom the 2000 presidential and subsequent elections had a significant impact;

they want to make elections administration a career. We need to make the educational and professional opportunities available to encourage them.

The complexity and increased demands of voters, et al., since 2000 gets us back to the "long lines" problem that suddenly became an issue in 2012. As I indicated earlier, long lines in presidential election have been around for decades. And election officials have always been frustrated in their efforts to deal with the phenomenon, usually due to the dramatic increase in cost that is hard to explain to local budget and elected officials.

Many observers know that election turnout is cyclical and fluctuates dramatically from year to year, peaking during presidential years such as 2012, when 80.5 percent of eligible voters cast their ballots in Fairfax County. The 536,701 voters who showed up in 2012 was 2-1/2 times the number who showed up for the November general election a year earlier. Turnout drops even more sharply in primary and town elections – just 9.2 percent participated in Vienna Town Council election in 2013, while turnout for the Democratic primary with two statewide offices to determine (lieutenant governor and attorney general) was only 3.5 percent.

Most observers do not, however, understand the dramatic impact of the increased participation in a presidential year. It is not just the larger turnout on election day, but the *significant* increased need for assistance for those voters who do not regularly participate. Those voters who show up only every four, eight or even twelve-plus years to vote, whom I refer to as the "cicada voters," pay virtually NO attention to anything elections-related, and are stunned to discover that things have changed since they last participated in an election. For example, despite sending new voter cards any time there is a voter change, such as a precinct relocation, regularly some less engaged voters will bring a voter card that has been superseded at least 3-4 times, and they have no recollection of receiving the subsequent 3-4 cards! These are the voters who cause a 300-500% increase in phone calls in presidential years, when there is only a 30% increase in voter turnout.

And most observers cannot timely predict when and how these unengaged voters will decide to engage. As a result, **less engaged voters tend to overwhelm the technology and resources when they do decide to engage.** In 1996 Fairfax County's entire phone system crashed due to the volume of voter calls election day. Despite significant improvements intended to prevent this from happening again, in 2000 the problem repeated – there was that much more last minute voter engagement! Similarly, slowdown in response time continues to occur with election night results at the SBE website. Even if one knows voter engagement will increase in a presidential year is hard to predict by how much, affecting which option(s) and to predict with enough warning to ensure sufficient resources every time. Out of 23,000 online voter registration applications submitted during approximately 90 days between July and October of 2013

in Virginia, 3,000 applications, or over 10% were submitted just on deadline day. While I am sure online voter registrations will continue to increase each year at deadline day, it is difficult to even guess by what multiplier they will increase.

Some may suggest "more" as an answer, but such a response is simplistic at its core, and likely to be wrong regularly. In 2012, based on dramatic increases in 2008 among absentee voters, more of the Office's limited resources were committed to in person and by mail absentee voting, yet absentee turnout declined by almost 15,000 voters! Even if local governments wanted to do so, it is hardly reasonable to commit the resources necessary to make sure voters do not have to wait at all to cast a ballot, especially in the case of exceptional and highly unpredictable turnout. Doing so would be the equivalent of putting 27 lanes on I-95 to prevent a backup on the Wednesday before Thanksgiving, or when the federal government dismisses all employees at the same time during a blizzard. **While local governments need to increase resources that can be reasonably predicted for presidential elections, there needs to be recognition that local government resources are not limitless, and local election officials are not psychics.** If officials could correctly predict things such as voter turnout 18-24 months prior to an election when determining the budget, they would certainly choose to do so.

Despite the challenge to predict voter decisions on how and when to engage, election officials do, have a responsibility to *try* to get it right. And they have an obligation to try to find new ways to engage and inform voters to meet the ever-changing needs and expectations.

Let me close by offering the following observation: **not every choice for trying to make our election process better needs to be a stark choice between improving access and improving integrity. There are choices we can make that improve both.** An excellent example is on-line voter registration, which in our experience has made it easier for citizens to register and improved the quality of our voter rolls.

As this committee moves forward, I would respectfully urge you to try to ratchet away from partisan divide. Traditionally, elections officials almost universally agree on the topics upon which I have touched, despite many being attracted to and selected for election jobs due in part to their partisan experience. As my Deputy Secretary, Jean Jensen, who succeeded me as Secretary during then Governor Warner's administration, used to say: election officials "park their donkeys and elephants at the door."

Democracy, in the end, depends on trusting those involved with the democratic process. While I strongly contend that we need partisans involved with elections – the "all the foxes guarding the henhouse" model – we also need for the partisans to work together both at the local level of election administration and at the state and national legislative levels. While I served at SBE, my SBE Vice Chairman, Michael Brown, representing the

Democratic Party, had preceded me as Secretary of SBE by a few years, and I much appreciated his insight and assistance during my tenure. Early on, he helped me understand that while most voters paid little attention to elections, it was important for them when they did so to see that both sides of the partisan divide were working together on elections issues. He not only counseled me on the importance of, in SBE's case, a 3-0 vote, but would take the lead at times to work with me and our other SBE colleague to find a solution to a thorny problem that, while perhaps not perfect, was able to command the comity and unity of a 3-0 vote.

I encourage you all as the Senators most responsible for election administration issues to try, as Senators Schumer and Cornyn have done with the MOVE Act and the SENTRI Act, **to support solutions where there is true bipartisan cooperation**, and look only to those federal solutions in elections that increase both access and integrity and can be passed with overwhelming support by both sides of the aisle.

Thank you for this opportunity to address you.

Cameron P. Quinn
General Registrar, Fairfax County, VA

Ms. Cameron P. Quinn is a national and international expert on election law, election administration and reform. She currently serves as General Registrar for Fairfax County, Virginia. In this position, she is the agency head for the Office of Elections and responsible for approximately 2-3000 election officials each November election serving over 700,000 voters. During her 30 month tenure as General Registrar, the Office has been directly responsible for 10 elections, and a statewide recount. In 2013 the Office was recognized by the National Association of County Recorders, Election Officials and Clerks (NACRC) with its annual Elections Administration Best Practices Award for the county's 2012 Election Day Emergency Preparedness Plan.

After years in public and private practice as an attorney, Ms. Quinn's elections experience really began when she served as Virginia's Secretary of the State Board of Elections (1999-2003) under then Governors Jim Gilmore and Mark Warner. During her tenure, the agency was awarded, among other recognition, a 2002 Grace Hopper Government Technology Leadership Award for its early adoption of online voter services. Ms. Quinn served for three years as the U.S. Elections Advisor for IFES (the International Foundation for Election Systems), working with several states and territories on transitional compliance with the Help America Vote Act (HAVA). Subsequently, as Special Counsel for Voting Matters at the U.S. Department of Justice, Civil Rights Division Ms. Quinn was the senior elections advisor to the Assistant Attorney General on all matters nationwide pertaining to voting and elections, including initial enforcement of HAVA. Ms. Quinn took an eighteen month break from elections work to serve as Director of Domestic Programs at the U.S. Peace Corps, where she managed 5 disparate programs that broadly involved outreach and support to educators, the general public and returning Volunteers. Most recently, she was Senior Policy Advisor for the Federal Voting Assistance Program (FVAP) at the US Department of Defense, which assists US military and overseas voters in compliance with the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). At various times Ms. Quinn has worked with NGOs and state and national governments at home and abroad on a variety of election reforms.

Ms. Quinn has participated in several state and national US efforts to improve elections, voting and voter accessibility. Ms. Quinn is the chapter author of "Conduct on Election Day" in the American Bar Association's 2008 publication on "International Election Principles: Democracy and the Rule of Law." Ms. Quinn is also an adjunct professor, teaching election law, at George Mason University School of Law where she previously served as Assistant Dean. Ms. Quinn earned her B.S.B.A. at the University of Florida. In addition to her law degree, she earned a masters degree in accounting from the University of Virginia.

Senator Bill Nelson
Statement for the Record
Committee on Rules and Administration
Hearing: *"Election Administration: Innovation, Administrative Improvements and Cost Savings"*
March 12, 2014

Chairman Schumer and Ranking Member Roberts,

I want to thank the Rules Committee for holding this important hearing today on ways to improve the election administration process. I am glad that we are focusing on best practices that can make voting easier for all Americans.

The LINE Act matters to every citizen. Long voting lines have serious consequences. In 2012 in my State of Florida, we saw people standing in line for hours at a time, just to exercise their basic right to vote. We shouldn't make a young mother hire a babysitter for hours, or the person that works a shift all day spend hours away from their family just to exercise their most basic Constitutional right. This is just wrong. That is why Senator Boxer and I introduced the LINE Act. It's a simple bill – it states that it should not take longer than 30 minutes for someone to vote in a federal election.

A study on the length of waiting times during the 2012 General Election, sponsored by the Advancement Project and conducted by election administration experts Daniel Smith and Michael Herron, showed that many Florida counties had lengthy wait times after polls had closed. In Miami-Dade County, for example, an average of 73 minutes passed before the final voter in line was able to cast a ballot after the scheduled 7:00 p.m. closing of the polling location. The data also showed that Miami-Dade County had at least one precinct that processed its last voter seven hours after the polling station was closed.

Furthermore, the study showed that African-American and Latino voters across the state of Florida, as well as young voters, faced longer wait times than other voters.

This was a broad study that included data from 5,196 of the roughly 6,100 precincts (85%) that were in use in Florida for the 2012 General Election, and I would like to submit the complete study and its findings for the record.[1]

---

[1] Congestion at the Polls: A Study of Florida Precincts in the 2012 Presidential Election (released May 24, 2013), available at http://b.3cdn.net/advancement/f5d1203189ce2aabfc_14m6vzttt.pdf

This study shows the urgent need for continued improvement in our nation's election process. The LINE Act is a simple, common-sense approach to dealing with long lines that deter many voters from casting ballots, and I urge my colleagues to support this measure.

Thank you again Mr. Chairman for hosting a hearing on this critical issue.

March 16, 2014

Senator Warner,

It was an honor to testify before the Senate Rules Committee on March 12th regarding "Election Administration: Innovation, Administrative Improvements and Cost Savings". At the end of the hearing you asked about legislation that would create an incentive structure to aid in the funding of electoral advances and modernization. The critical question will be what is used to measure success? I would like to highlight one case study to consider, the sound data behind a marked improvement in election administration:

- In the 2012 Presidential Election there was a jurisdiction which implemented a technological solution to the processing of ballots. A program was created that was a combination of scanning and a barcode regime which improved the efficacy of ballot processing and error mitigation of early and provisional ballots.
- Due to a major increase in voters on a Permanent Early Voting List who went to the polls to vote, rather than vote the ballots mailed to them, this jurisdiction saw an increase of 20% in provisional ballot volume, more than 122,000 (72,000 from that early voter list).
- Voters dropped off more than 170,000 early ballots at the polls on Election Day and mailed back another 300,000 over the weekend through election Tuesday.
- This jurisdiction had more than half a million ballots to process at the close of the polls.
- In light of this, in spite of this, the jurisdiction actually completed their processing and tabulation of all ballots one day sooner than they had in 2008 as a result of their improved administrative processes.

Would such a jurisdiction qualify as being a success? Not from what I heard at the hearing. This jurisdiction is in Arizona--Maricopa County actually--where there was no "*delay* in counting ballots" but a *deluge* of ballots being counted. Ballot processing occurs in most states after Election Day and many states were still processing and tabulating ballots long after Arizona finished.

The FAST Act identifies the areas which would benefit from modernization, but the devil will be in the details of the metrics that comprise the performance measurements; it will be critical that they are grounded in data, and in data that is truly an indicator. The strength of the LINE Act is also contingent upon the final indices. Resources need to be allocated based on the estimated number of voters that may appear to vote, how long it takes to check a voter in, the time necessary to cast a ballot based on its complexity and content, and the historical data on exceptions that require more time: provisional ballots, voters in need of assistance, and election day registration (where applicable). Basing estimations on Census data is problematic for numerous reasons and election administrators need to utilize readily available and current information instead.

I am hopeful that this is of use in the ongoing improvement of the aforementioned bills. Should there be any way that I can be of further assistance, please do not hesitate to contact me.

Respectfully,

Tammy Patrick
Federal Compliance Officer, Maricopa County Elections
Member, Presidential Commission on Election Administration

Senator Pat Roberts
U.S. Senate Committee on Rules and Administration
Full Committee Hearing
"Election Administration: Innovation, Administrative Improvements and Cost Savings."
March 12, 2014
Questions for the Record – Linda Lamone

Question 1

One advantage of electronic poll books cited in your testimony is the ability to prevent people from voting at more than one location. As you stated, "With paper precinct registers, election officials would eventually *detect* that a voter voted at multiple early voting centers, but it would be nearly impossible to *prevent* a voter from doing this."

Please describe the process in Maryland by which these detections would have been made prior to the adoption of the electronic poll books. How many instances of multiple voting were detected in the last decade, and what action was taken against those who had done so?

Response:
Maryland did not implement early voting without electronic pollbooks. The State first used electronic pollbooks for the 2006 elections, and early voting became a voting option in the 2010 elections. As a result, I am unable to describe the requested process.

Prior to the use of electronic pollbooks, local election officials would update the voter registration list by manually entering voter history information or scanning a barcode printed on the precinct register. This process took place a few weeks after the election. If, during this process, a local election official identified a voter who voted more than once on election day, the voter was referred the individual to the Office of the State Prosecutor but the voter's votes would have already been counted.

Number of instances of multiple voting has been detected?

Response:
In each election, there are voters who are identified as having cast more than one ballot. These voters are typically voters who request and vote absentee ballots because they do not think that they will be able to vote in person, but their plans change and they vote in person by provisional ballot. Similarly, voters who move often go to the polling place for their prior address and the polling place for their new address.

State election officials use data from the electronic pollbooks and the statewide voter registration database to generate reports showing voters with multiple voting history for the same election.

The local election officials receive and process these reports before they count ballots and do not count ballots from voters who vote more than once.

In the 2012 General Election, the Office of the State Prosecutor brought a criminal action against a voter who voted twice – once in her name and the second time in her deceased mother's name.

Question 2

Would the electronic poll books currently in use be able to detect or prevent those attempting to vote in multiple locations through the use of different names?

Response:
Maryland's election processes and the electronic pollbooks may detect or prevent voters who try to vote multiple locations using different names. Before being issued a ballot, a voter must state his or her name, date of birth, and address. If this voter's information is not in the electronic pollbook or the electronic pollbook shows that the voter has already voted, the voter can only vote a provisional ballot. When local election officials review the provisional ballot application, they will determine whether the individual is a registered voter and if there is information that the individual has voted more than once, determine whether the individual voted both ballots. An electronic pollbook will not prevent a person fraudulently claiming to be someone else.

Question 3

In 2012, a candidate in Maryland's 1st Congressional District ended her campaign when it was revealed she had voted in both Maryland and Florida.

a) How was the fact she had voted in two states discovered?

Response:
We recall that the candidate reported the violation.

b) What steps, if any, has Maryland taken to determine if others have done the same thing? Please describe any procedures in place to detect or prevent voting in more than one state.

Response:
SBE and the State's Office of the State Prosecutor has compared Maryland's voting history files from the 2012 General Election against voter history files from the District of Columbia, Florida, and Virginia. The investigation is ongoing.

Maryland is a founding member of the Electronic Registration Information Center (ERIC). Member states share and compare State voter registration and driver license records and the Social Security death file. Election officials use the resulting reports to update voter registration records and identify voters who are no longer eligible to register and vote in the state. The reports also identify individuals who are registered in more than one state and the state that is the owner of the most current record. This limits the

ability of an individual to vote in multiple jurisdictions. Currently eight states and the District of Columbia participate in ERIC.

c) Has Maryland identified others as having voted in more than one state in the past decade? If so, please provide the number who have done so and what action, if any, was taken against them.

Response:
Maryland began comparing voter history files from other states after the 2012 General Election. This investigation is on-going.

Question 4

a) How would you describe Maryland's experience with direct recording electronic voting machines (DRE's)?

Response: While there was controversy when Maryland implemented DREs in 2002, the voters in Maryland have overwhelming endorsed the voting system. A 2006 survey conducted by the University of Maryland, Baltimore County showed that 99% of the voters in Maryland found the system easy to use, 88% were comfortable using the touchscreen voting system, 84% thought the voting system made voting quicker and 82% thought their votes were recorded and counted accurately.

b) How much did the DRE system currently in use cost and how long has it been in place?

Response: The system was introduced in Maryland in three phases. The first phase, involving Allegany, Dorchester, Montgomery and Prince Georges Counties, was in 2002. All other jurisdictions, with the exception of Baltimore City, implemented the system in 2004, as phase 2. The third phase – Baltimore City – occurred in 2006. The hardware cost $52.1 million.

c) How much federal money, through Help America Vote Act requirements payments or any other federal source, was used to purchase and deploy the current voting system in Maryland?

Response: The State used $31.5 million of Help America Vote Act requirements payments to purchase the current voting system. Approximately $3 million in federal funds were used to assist with the deployment and educate voters and pollworkers on the new equipment.

d) What motivated the decision adopt a paper based system for the 2016 election? Why did the legislature decide to adopt a new voting system and how much is it expected to cost?

Response: There was a coalition of individuals and organizations advocating for a paper-based voting system. This coalition was successful in getting the Maryland General Assembly to approve this legislation.

In 2010, RTI International conducted a study on the cost of implementing a new paper-based optical scan voting system. The estimated the cost of the new system – adjusted to reflect the State Board of Elections' estimated equipment needs – is $47,750,000.

Later this spring, the State will issue a Request for Proposals for voting system hardware. Once proposals are received and reviewed, the State Board will know the cost of the new system.

HEARING—ELECTION ADMINISTRATION: MAKING VOTER ROLLS MORE COMPLETE AND MORE ACCURATE

WEDNESDAY, APRIL 9, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:08 a.m., in Room SR–301, Russell Senate Office Building, Hon. John Walsh, presiding.

Present: Senators Walsh and Roberts.

Staff Present: Jean Bordewich, Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Assistant; Jeff Johnson, Clerk; Benjamin Grazda, Staff Assistant; Julia Richardson, Senior Counsel; Mary Suit Jones, Republican Staff Director; Paul Vinovich, Republican Chief Counsel; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

Senator WALSH. We will now proceed to our hearing schedule for this morning.

This hearing is the committee's third in a planned series on improving the administration of elections. Today's hearing focuses on making the voter rolls more complete and more accurate.

Chairman Schumer wanted to be here today, but was not able to attend due to other business. He has a statement that, without objection, will be entered into the record.

[The prepared statement of Chairman Schumer was submitted for the record:]

OPENING STATEMENT OF SENATOR WALSH

Senator WALSH. I would like to now make a few opening remarks.

Montanans are very proud of their election system. Our country's democratic tradition is something that should make all Americans very proud. At the core of this tradition is the fundamental right to vote. Of course, Americans' ability to exercise their right to vote is only as good as our system of election administration. We must work to make sure voter registration is accessible and accurate. That is why this series of hearings is so needed and why I am pleased to be here today to discuss these very important issues.

This bipartisan Presidential Commission on Election Administration identified common sense State and local innovations that are improving how elections are run. These are not partisan proposals. They are simply matters of good governance that will make voting easier while saving taxpayers dollars. Registering to vote and voting should be as accessible as possible, regardless of where voters live.

At the hearing held by this committee last month, we heard from State and local administrators about their implementation of online

voter registration and electronic poll books. We heard how these reforms have the potential to save States money and free up local government.

I support these proposals. These common sense innovations, like online registration, would have an enormous impact in rural States like Montana, where distance can be a barrier to voting and voter registration for seniors, voters with disabilities, veterans, farmers and ranchers, and Native Americans.

Today, the Rules Committee is holding a third hearing on the Presidential Commission's recommendations. Today's focus is on innovations that help Americans get registered to vote or ensure their registration is current, while also making sure their voter rolls are as accurate as possible.

The committee is fortunate to have a panel of current and former State elected officials who are working every day to improve how elections are run in their States. The reforms they will talk about focus on the voter registration process. As we learned from the Presidential Commission report and from Commissioner Tammy Patrick's testimony at the March hearing, many of the issues that occur on election day can be prevented by making improvements early in the registration process. Making registration easier and more accurate will reduce lines, expand access, and save money. Solving issues before they become problems is the type of common sense solution that we should be providing to our constituents.

Also during the March hearing, Senator Coons highlighted the efforts of one of our witnesses, Elaine Manlove, the State Election Commissioner from Delaware. I am interested in learning more about the e-Signature program that Delaware has used to streamline the voter registration process at motor vehicle offices.

We also have witnesses here today to tell us about a multi-State effort known as the Electronic Registration Information Center, or ERIC. This program, which aims to improve the accuracy of voter rolls, is making a difference for the member States. So, I look forward to learning more about the ERIC program and how it is helping to engage voters, improve the quality of the voter list, and improve election administration.

I would like to thank all of our witnesses, and I look forward to your testimony.

With that, Senator Roberts, do you wish to make any opening remarks.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman, for agreeing to chair this hearing. It is my pleasure to welcome you to the committee, sir.

We have a good panel of witnesses here today. I look forward to hearing their testimony. I will have some questions following the testimony, but at this point have no further statement at this time to expedite the hearing.

Thank you, sir.

Senator WALSH. It does not look like we have any other members who are going to make any comments today. Do we have any members that have submitted anything to be added to the record?

Okay. We will now hear from our panel of witnesses. First, Ms. Elaine Manlove, the State Election Commissioner of Delaware.

STATEMENT OF ELAINE MANLOVE, DELAWARE STATE ELECTION COMMISSIONER, DOVER, DELAWARE

Ms. MANLOVE. Good morning, and thank you for inviting me to discuss Delaware's e-Signature program.

Let me start with a little background. I began working in the Department of Elections for Newcastle County in 1999, so my first big election was in the 2000 general election. While the country focused on Florida, I was concerned about the 50 court orders that we had requested for voters who came to their polling place assuming they were registered voters but were not on the poll list. Sometimes, this was a husband and wife. Only one would be on our rolls, while they were both certain they had registered at DMV. Our Election Offices could check DMV records and see that they had been there, but we had no application or declination.

Our process was paper, and if we did not get the paper, the voter did not get registered. There were too many reasons for this—there were many reasons for this, but at the end of the day, the voter was the loser. Some of the problems with the paper process were DMV would be out of applications in the printer, the printer would jam, the voter would leave without signing.

Every day, we picked up the applications from DMV and matched them with the electronic list of the applications we should have received. They were then mailed new applications to those citizens whose applications we did not receive. About half of those came back to Elections.

I knew there had to be a better way to do this. As is always the case, every idea we had cost money and there just was none. Then came HAVA. Since Delaware's voting machines were fairly new and we had already met the Statewide database mandate, we decided to focus on the use of technology to improve all of our services. Our Department of Technology and Information hired two HAVA-paid programmers to focus on what we called the Elections Wish List—all the projects that we knew would improve our services, but were too large in scope to be handled by the programmers assigned to Elections by DTI.

I thought the struggle was behind us until we started meeting with DMV. No one said, no, this cannot be done. However, our meetings never seemed to move forward. DMV worried that our solution would slow their lines. Then, on the election side, when we were in election mode, we would have to move our focus back to that.

In 2007, a new DMV Director was appointed and this project moved forward quickly. Early in 2009, e-Signature went live. It was a success from day one. I want to emphasize that this was not rocket science, just a common sense solution to an ongoing problem.

The DMV clerks work from a script that is in front of them on their computer screen. They can tell if their customer is a new registrant or is already registered to vote. That fact determines which screen comes up in front of them and the questions they ask. They

collect name, address, Social Security numbers, and date of birth, as well as any additional information for DMV use.

The customer verifies their voter information on the screen of the credit card device on the counter. If their information is correct, they are asked if they want to register to vote or update their information with the Department of Elections. On the next screen, the voter affirms their citizenship, chooses their political party, and signs. All of this is captured and transmitted to Elections in real time.

Customers can go to any DMV in the State. Their voter registration application will be sent to a queue in the Election Office in their home county. The Elections Office will determine if this is a duplicate, run a felon check, and process their polling place card. All voter registration decisions are made in the Election Office, removing that onus from DMV.

My goal when we started this project was just to ensure that we received every application. What I did not anticipate were the unintended consequences. We had no paper, no paper to pick up at DMV, no paper to file, no paper to verify, no paper at all. This saved us space in all three county offices. Rows of filing cabinets were eventually eliminated. Time, no paper to file, and no files to go through on election day when we needed to prove that a voter was registered, and money at both DMV and Elections. Elections eliminated five vacant positions for a $200,000 annual savings.

Once phase one was complete, we changed the process for mail applications. We began scanning in any paper applications that came into our offices, Federal mail applications, et cetera. Our clerks still have to do data entry on those applications, but they electronically link that entry with the paper application containing the signature. The paper application can then be shredded.

Our next phase was to take this technology to Delaware's Health and Social Service Agencies as well as our Department of Labor, the other two agencies in Delaware that do voter registration. We began first at Health and Social Services and provided computers and credit card signature devices. However, the numbers have not increased as much as we had hoped. In today's economy, both agencies are being encouraged to offer online applications for their customers. Our solution is in the works. We will very soon link our online voter registration process to their online system for both of those agencies.

In closing, the initial cost for DMV project was $600,000. With newer technology today, it would be less. It has paid for itself by savings to both DMV as well as Elections. It has also saved time. DMV's initial concern was that we would slow their lines, because they allocated 90 seconds for the elections piece of each customer transaction. It is now 30 seconds.

Delaware has shared our solution with many States. It is an easy solution that works well for both agencies and could work well for other States.

Thank you.

[The prepared statement of Ms. Manlove was submitted for the record:]

Senator WALSH. Thank you, Ms. Manlove, for your testimony.

Second, Mr. John Lindback, the Executive Director of the Electronic Registration Information Center. Mr. Lindback.

STATEMENT OF JOHN LINDBACK, EXECUTIVE DIRECTOR, ELECTRONIC REGISTRATION INFORMATION CENTER, WASHINGTON, D.C.

Mr. LINDBACK. Thank you, Mr. Chairman.

ERIC, as you said, stands for the Electronic Registration Information Center. The mission of ERIC is to assist States to improve the accuracy of voter rolls, reduce costs, and improve the efficiency for State and local election offices. ERIC does that by using state-of-the-art sophisticated data matching technology to match voter registration records against motor vehicle licensing records in its member States. It also matches those records against databases such as the Social Security Death Index and the National Change of Address Information from the U.S. Postal Service.

ERIC was initially formed with the generous financial and technical support of the Pew Charitable Trusts, but it is now fully operational, self-governing, self-supporting, and an independent organization governed by the States. The current members are Colorado, Delaware, Maryland, Nevada, Utah, Virginia, and Washington. Those are the seven States that originally formed ERIC. Since that time, the District of Columbia, Oregon, and Connecticut have joined.

The organization is State run. It is governed by membership agreements and a set of bylaws. There are two full-time employees. The States are now receiving routine uploads and reports and we are recruiting new members.

The reports that the States receive after the matching of all that data is they get information about people who have moved—people on their voter registration lists who have moved within their State, people on their voter registration list who have moved across State lines to other ERIC States, people on their lists who have died. They get information on in-State duplicate registrations, in case you have a registration for the same person in more than one county, for example. And, they get a report on potentially eligible but unregistered individuals that reside in their State.

The numbers so far, and these are from the seven original States that formed ERIC that have reported back to them, is that there is a total of about 1.6 million records that have been reported back to the States. That includes almost 1.3 million people who have moved within their State and they had a more recent address on file with their DMV. It includes about just shy of 230,000 people who have moved across State lines within the ERIC States, about 47,000 people who were on the rolls and were deceased, almost 30,000 duplicate registrations within those State voter registration databases. In addition, ERIC has reported to them the names of about 6.1 million people who are on their DMV list but are not registered to vote, spread out among all those States.

The benefits to the States are numerous of ERIC. There are financial benefits. When you have a more accurate list, you get financial benefits, for example, because there is less returned mail. There are savings by joint purchases of Death Index data and

NCOA data that the States are now individually purchasing on their own, but ERIC now purchases as a group.

On election day, cleaner rolls mean savings at election time because there will be fewer problems at the polls. Pre-election day, it means a reduced spike in registration activity at election time. It is uncanny, if you look at registration activity in the States. It is fairly even until you get to a Presidential election. Then, there is a huge spike in virtually every State that you look at, and that presents an administrative issue. You have to bring in extra people to hand-input all those registrations, et cetera. If you can even out that activity and get those updates taken care of earlier in time, you can reduce that spike of activity.

Also, additional benefits include a proactive approach by the ERIC States. It discourages election-eve matching by interest groups who are sometimes fond of doing that match very close to an election and then claiming that the voter rolls are full of people who are deceased or are otherwise inaccurate. It also demonstrates for the ERIC States that they are doing everything they can to keep their rolls clean and up to date.

And I will wrap up my testimony there, Mr. Chairman, and remain open to questions.

[The prepared statement of Mr. Lindback was submitted for the record:]

Senator WALSH. All right. Thank you, Mr. Lindback.

Next, we have Dr. Judd Choate.

STATEMENT OF JUDD CHOATE, DIRECTOR OF ELECTIONS, COLORADO SECRETARY OF STATE'S OFFICE, DENVER, COLORADO

Mr. CHOATE. Good. Thanks. My name is Judd Choate. I am the Election Director for the State of Colorado and Chairman of the Board for ERIC, the organization that John just described.

Under the leadership of Secretary of State Scott Gessler, Colorado has implemented mobile optimized voter registration, worked with the Federal Government to identify non-citizen voters, and actively participates in the ERIC project, making Colorado a national leader in voter initiatives. For instance, during the 2012 Presidential election, Colorado helped lead the way with some of the highest voter turnout levels in the country. I am happy to be here today to share our experiences and best practices.

Let me tell you about Colorado's experience as an initial ERIC State. Colorado joined ERIC in July of 2012, along with the six States that John just listed. Two months later, in September of 2012, we sent postcards to 723,000 people, encouraging them to register to vote prior to the 29-day registration deadline for the Presidential election. Just over ten percent of those contacted, 74,528, registered to vote prior to the deadline. Of those, 32,000, or about 44 percent, voted in the 2012 election.

ERIC also provided Colorado with data to clean their voter rolls. ERIC has the unique ability to link files in various formats, using minimum matching criteria. This process marries data to find electors that have moved. ERIC provides the States four kinds of data to clean their rolls, matching data to indicate a move within a State, a move from one State to another State, matching data indi-

cating that two files are actually the same person, and matching data indicating that a person on the State's voter rolls died outside of the State and is listed on the Social Security Administration Death List.

Colorado's most recent Clean Report, which is the report we receive from ERIC, covered the months of January and February of 2014. So, for only those two months, we received from ERIC 26,320 in-State movers, 1,181 people who have moved out of State—and just to clarify, that is only out of State with those States that are participating; if we had all 50 States in, we would receive a lot larger number—112 voters who have more than one registration—the reason why that number is so low is because we have used ERIC over the last several months and that number has been reduced because of our participation in ERIC—and 2,180 dead voters who died outside of the State of Colorado in only those two months.

Colorado developed and rolled out online voter registration in 2010. By using online voter registration both in the mailing to voters encouraging them to register and in mailing to people who have moved out of State, encouraging them to cancel their voter registration, Colorado has maximized the integrity of their voter rolls. Online voter registration makes it easy and straightforward for people to register, update their registration, or cancel registration when that voter moves to another State.

ERIC is the future of elections. It cleans rolls. It finds possible new voters. It allows jurisdictions to proactively work with their voters, our customers, instead of reacting to bad mailing addresses 12 months after that voter has moved. And, as more States join, the system will work better because there will be more data to match.

Another program lauded by the Presidential Commission and important to Colorado's efforts to improve list maintenance is the Kansas Cross-Check. The Cross-Check is also a data matching program where 28 States send their voter files to Kansas following the general election. Since 2008, Colorado has identified approximately 15 people who very likely voted in Colorado and another State in the same election. Several of these suspected double-voters received a visit from the FBI, and a handful were charged with double-voting in our partner States of Arizona and Kansas.

Colorado's experience in ERIC and the Kansas Cross-Check has been very positive. We have registered new voters at an impressive rate. Our voter registration database is improving all the time. And, we protect the database from fraud and double-voting.

Thank you for the opportunity to speak, and I will take any questions you might have.

[The prepared statement of Mr. Choate was submitted for the record:]

Senator WALSH. Thank you, Mr. Choate.

And, fourth, Mr. Chris Thomas, the Director of Elections in the Michigan Department of State and a member of the Presidential Commission on Election Administration.

STATEMENT OF CHRISTOPHER THOMAS, DIRECTOR OF ELECTIONS, MICHIGAN DEPARTMENT OF STATE—BUREAU OF ELECTIONS, LANSING, MICHIGAN

Mr. THOMAS. Good morning, Mr. Chairman and Senator Roberts. I thank you for the opportunity to testify today. It is a pleasure to be here to talk about the Presidential Commission on Election Administration's recommendations about the Motor/Voter Program instituted by the National Voter Registration Act of 1993.

I know of no other voter registration program that has the scope or diversity as motor voter. No other program offers the level of potential improvement to the election system of this country.

I began my career in election administration in 1974 here in Washington and have served as Michigan's Elections Director since 1981. I am pleased to see the Pew Report on Election Performance again showed Michigan as a high-performing State.

In 1975, Secretary of State Richard Austin came up with the idea of Motor/Voter. In Michigan, the Department of Motor Vehicles (DMV) and the elections are controlled by the Secretary of State, and he thought it was a great idea that if people are standing there to get a license, that they ought to be asked to register to vote. Our Motor/Voter system is totally integrated with the DMV data. For example, our law requires that people use the same address for both voting and driving, and all of the electronic data that comes from the DMV gets sent to the local clerks, which means they do not have to reenter that data. Over 80 percent of our annual voter registration transactions come through the DMV.

I was honored to be on the Commission and to serve there. We did not have a legislative agenda, so I am not here advocating any legislation today.

We found that the DMVs come up short in terms of implementing the Motor/Voter law, which is over 20 years old. We used the U.S. Election Assistance Commission (EAC) data and testimony as the basis for this conclusion. In addition to Michigan and Delaware, represented by my colleague who is here today, are the only two States that are fully compliant, in my view. Seven other States have made a concerted effort. In my view, if a State receives less than 50% of its total transactions, from the DMV, the DMV is not doing its job.

The Commission took a strong position on this because the negative consequences of a bad administration in DMV are reflected on election day. So, I would like to make the following points about DMVs and Motor/Voter.

First of all, DMVs have an extremely complex mission. They have a huge workload. In many States, they have aging legacy computer systems, and many of them are undergoing modernization now.

The beauty of Motor/Voter is it cuts across all political and socioeconomic strata. For example, in Michigan, 75 percent of those receiving public assistance who are registered voters registered to vote with the DMV, not in a public assistance agency. An inaccurate list will increase the cost of mailings. About 75 percent of all transactions are change of address transactions, which are critical to keeping the lists accurate.

When the lists are not accurate, you end up with increased provisional ballots. Provisional ballots mean you have longer wait times, some voters have a bad election day experience, there is extra work. Our neighbors to the south of us, Ohio, had over 200,000 provisional ballots. In Michigan, we had 2,600 provisional ballots. Only 14 percent of Ohio's voter registration transactions come from the DMV. I will note they have made some efforts since 2012 to improve that. A good DMV would eliminate most of those provisional ballots.

And it is important to remember that every voter registration application that comes through a DMV is from a person who has had a face-to-face transaction at some point, who has had their identity and their legal presence verified. So, that also increases the integrity of the voter file.

The Commission highlighted Delaware because the state was able to design a system that did not integrate voter registration data with the DMV, which is a costly and lengthy process. Their e-Signature interface basically sends the driver license data directly to the voter registration system. They have created a lower cost solution without integrating their voter registration data into the DMV, which can be much more quickly accomplished.

Twenty States, the Commission has noted, have also gone to online voter registration, and these systems at some point, will become portals for DMVs that are not in compliance.

In conclusion, I would say that a better Motor/Voter performance through full compliance will substantially improve the accuracy of voter registration files and improve the election day experience of many voters. With lower-cost options available, DMVs now have a clearer, less expensive path to fulfill the letter and the spirit of the NVRA.

Thank you very much.

[The prepared statement of Mr. Thomas was submitted for the record:]

Senator WALSH. Thank you, Mr. Thomas, and thank you to all of our individuals for speaking today.

We are going to open it up for questions now, and my first question is for Ms. Manlove. I have two quick questions. First is, in discussing this e-Signature program with election officials from other States, have you heard any good reasons that this would not work in other States? And, second, because Delaware is also an ERIC State, I wanted to give you a minute to discuss your experience participating in that program, as well.

Ms. MANLOVE. Now, I have met with other States. We have had several States come to Delaware. And if I have been in a conference in their State, I have gone to meet their DMV. I have not had a reason why this would not work. It is such a simple solution, I am actually always surprised that we get so much good press out of it. For us, it was just a way to solve the problem at the end of the day.

And ERIC has been wonderful for us, and it has even shown our in-State—I think all the States show that. But, even our in-State addresses are not always as accurate as we would like, and we have a great DMV process. We have removed voters who are deceased that were deceased in the State, and we went back and

checked with our Vital Statistics and found out it was a time when they were having some change-over and we did not get good records. So, we have cleaned up a lot of our records. We mailed out, I think, 26,500 postcards to eligible but unregistered voters and about 4,000 of those registered to vote before election day.

Senator WALSH. Thank you.

Next is for Mr. Lindback. I want to ask you how ERIC protects privacy of voters. Montanans value their privacy, and you mentioned the privacy protocols that govern the ERIC program. Can you elaborate on how ERIC protects the privacy of voters?

Mr. LINDBACK. Absolutely. Thank you, Mr. Chairman. ERIC uses a technique called anonymization to anonymize data that would be considered confidential within an ERIC State. So, they can—and in virtually all of the States, that would include data such as date of birth or the last four digits of their Social Security number.

The anonymization process is also called one-way hashing, and this is done to the data before it leaves State control. And so the States are issued the anonymization program by ERIC. They run their date of birth information and the last four digits of the Social Security number, as examples, through the anonymizer. It translates that into an indecipherable string of, like, 40 letters and numbers. Then when that data reaches ERIC, it is anonymized a second time. It is run through the data matching process, and so ERIC is matching anonymized data against anonymized data from other States.

When the States receive their reports back, they are told, for example, that the date of birth matches in the other State, but they are not told what the date of birth actually is because that data has been anonymized. They do not need to know that. They only need to know it is a match.

And so that data is anonymized before it leaves State control. The data center itself, of course, follows all the security protocols.

When ERIC was created, we ran the plan through the Center for Democracy and Technology, one of the leading privacy and advocacy organizations in the United States. They were impressed with the plan. They issued a report that is on the ERIC Web site issuing recommendations on how ERIC should minimize risk to security and privacy, and ERIC is following each of those recommendations. So, I think it is fair to say that we are doing everything possible to minimize risk of disclosure of that data.

Senator WALSH. Thank you very much.

I would now like to open it to the Ranking Member, Mr. Roberts, to ask any questions that you may have. Senator Roberts.

Senator ROBERTS. Well, thank you, Mr. Chairman.

Ms. Manlove, your statement references your use of the Help America Vote Act, i.e., Federal money, to build your system, and you also talk about the savings that it has generated. I think I read your statement to the effect that $600,000 enabled you to get up and running——

Ms. MANLOVE. Yes.

Senator ROBERTS [continuing]. And that you were able to achieve $200,000 savings. Within your oral statement, you indicated that came from letting five people go. Is that correct?

Ms. MANLOVE. We did not let five people go. We had vacant positions——

Senator ROBERTS. Oh, I see.

Ms. MANLOVE. At that point in time, there was a hiring freeze in the State——

Senator ROBERTS. I cannot imagine anybody in government letting anybody go.

Ms. MANLOVE. No. We did not let anyone go.

Senator ROBERTS. All right. But, do we need Federal incentives to get States to adopt reforms that will save them money? I think it is obvious. I mean, you have stated it very clearly that once you explain it to States—I guess my question is, why do we need the Federal start-up money when States know they are going to save themselves money?

Ms. MANLOVE. I do not know. We would not have been able to do it without the HAVA money. It just was a project that was, in scope for Delaware, too big at that point in time.

Senator ROBERTS. Right.

Ms. MANLOVE. We really did not look at it as a money saving process. We looked at it—it started as just a way to get everything. We were——

Senator ROBERTS. But now, you are——

Ms. MANLOVE. In hindsight, yes, we did save funds.

Senator ROBERTS. Yes. All right. Okay. You are the proof of the pudding. In other words, you did not know you could have the pudding until you made it, and then after you made it, you saved money. And so I guess my message to other States is that you do not have to ask us, and we have very limited help because of the budget and all of that.

Are other States starting to realize they can quickly recoup any initial cost by the savings when you talk with them?

Ms. MANLOVE. Well, I explain that with every presentation I give. I use practically the same presentation every time I talk about e-Signature. But, we have continued on using our HAVA funds to do other projects that otherwise would not have been able to happen.

Senator ROBERTS. Pardon my lack of experience here, but how do you use the e-Signature? Is it compared to anything, or is it just e-Signature?

Ms. MANLOVE. Well, it comes to us in real time, was the biggest issue. What was happening with the paper process is, we just were not getting the actual application and we needed that signature to process the voter registration application. So now, rather than picking up paper and physically bringing the paper, everything comes to us electronically in real time. So, none of the issues of losing applications happen.

Senator ROBERTS. I understand that, but is it legible? I mean——

Ms. MANLOVE. Oh, yes, it is.

Senator ROBERTS. It is legible?

Ms. MANLOVE. Yes.

Senator ROBERTS. So, it is not like my signature when I am trying to sign on a credit card screen——

Ms. MANLOVE. It is the same credit card screen, but it is——

Senator ROBERTS [continuing]. It looks like some child who is three years old.

Ms. MANLOVE. I think it is pretty stable, and because everyone at DMV is signing on that, so they are secured to the countertop, and we are getting really pretty good signatures.

Senator ROBERTS. Is it compared to a signature on paper?

Ms. MANLOVE. No, because in a lot of cases, we do not have another signature. That is the only signature we have.

Senator ROBERTS. No, I mean just in terms of legibility. You think it is roughly the same?

Ms. MANLOVE. Yes.

Senator ROBERTS. I see. Thank you.

Mr. Lindback, you mentioned the National Voter Registration Act, or motor voter requirements for the removal of registrants. My question is, how do States participating in your program that receive death notices remove voters? Is that immediately or after going through the NVRA process? And, I would add, it is my understanding that that process requires the voter be mailed a notice. They are only removed if they do not respond to the notice and then fail to vote in two subsequent Federal general elections, is that correct?

Mr. LINDBACK. Thank you, Mr. Chairman. I think there may be a difference between—maybe my other panel members can confirm for me, but I think there may be a difference between what the NVRA requires for confirmation of death notices and confirmation of voters who have moved. But, there are processes in place by the NVRA. There is nothing about membership in ERIC that changes any of those requirements. The only thing that changes for the States is that they are getting information about voters who have moved and voters who have died sooner than they otherwise would receive it.

Senator ROBERTS. Okay. That is what I was trying to get at. My next question was, and you have just answered it, does ERIC speed up that process?

Mr. LINDBACK. Yes.

Senator ROBERTS. And that answer is yes.

Mr. Lindback, Mr. Thomas mentioned a House bill to require States to remove registrants who have moved to another State and declared that State as their voting residence. How do States in the ERIC program remove voters when they receive a change of address notification? Do they still go through the NVRA process or are they removed immediately?

Mr. LINDBACK. Thank you, Mr. Chairman. The States go through the NVRA process, and the bylaws are specific that the NVRA mandated mailings must be followed by the States.

Senator ROBERTS. Mr. Chairman, my time has expired. I would like to ask permission for another, oh, two minutes so I may conclude.

Senator WALSH. Permission granted.

Senator ROBERTS. Thank you, Mr. Chairman.

Last week, there was an ABC report about a couple in California that received a registration application with their party affiliation premarked. They were already registered Republicans, but they were mailed a registration application with the Democrat box

premarked. They received an application because they had signed up for health care through an Obamacare exchange run by the State of California.

Apparently, some groups have been arguing that the States are obligated to offer registration services through the Obamacare exchange and then find out that their party affiliation has already been premarked. Just a question for the panel. What is your view of that and how is your State handling this issue, or are you even aware of it?

Mr. CHOATE. So, the State of Colorado has determined, based on our interpretation of both State and Federal law, that our exchange is not obligated to give the opportunity to register to vote because our exchange is not technically operated by the State of Colorado. However, under the NVRA, if the exchange or health care provider, the provider of that service, is operated by the State, then I think under the NVRA, they would have to provide an opportunity to register.

Senator ROBERTS. So, you have both the DMV and the State exchange operating together?

Mr. CHOATE. So, the DMV has to do it. That is one section of the NVRA. But then, also, the agencies that provide social services have to provide an opportunity to register to vote, as well, under a different section.

Senator ROBERTS. Where you get hunting licenses, is that also——

Mr. CHOATE. That would not be a social service that would be covered by the NVRA.

Senator ROBERTS. I was part of that voting determination in the House 23 years ago. I am not going to go into that, but at any rate——

Well, I think it was you, Mr. Choate, that said that there were 15 votes that were double-counted in Kansas and Colorado.

Mr. CHOATE. Yes. So, Kansas——

Senator ROBERTS. Do you realize you just cost me 15 votes during that check?

[Laughter.]

Mr. CHOATE. Well, they were not all in Kansas, but some of them were in Kansas. I think——

Senator ROBERTS. Do you know how hard it is to find the State line in Western Kansas and Eastern Colorado?

[Laughter.]

Mr. CHOATE. I do, actually. I am from Hays, so that is—I am a little familiar with Kansas.

Senator ROBERTS. Hays City, America?

Mr. CHOATE. I am from Hays City, America. That is right.

Senator ROBERTS. How about that. Have you climbed Mount Sunflower?

Mr. CHOATE. I have climbed Mount Sunflower. I am one of the many.

[Laughter.]

Senator ROBERTS. Yes. The trick is not to climb it. The trick is to find it.

Mr. CHOATE. Exactly.

[Laughter.]

Mr. CHOATE. Well, there is a big post there identifying it.

Senator ROBERTS. I know that, but you drive to Colorado first and then somebody tells you, whoops, you are in Colorado. Go back.

Mr. CHOATE. That is usually the way it works.

Senator ROBERTS. I have a feeling that is where those 15 votes came from.

[Laughter.]

Mr. CHOATE. That is certainly possible.

Senator ROBERTS. All right. I have obviously overstayed my time, Mr. Chairman. Thank you all. Thanks to the panel.

Senator WALSH. Thank you, Senator Roberts.

Dr. Choate, as an election administrator from a State that participates in both the ERIC program and the Interstate Voter Registration Cross-Check program, can you highlight the differences between the two, focusing on costs and potential savings?

Mr. CHOATE. I would be happy to. So, the Kansas Cross-Check, which is the second of the two that you just described, and ERIC are actually very different programs that sort of get you to a similar spot. So, the way that the Kansas project works is that 28 States send their data after a major election, after a Presidential election, to Kansas. Then Kansas checks all of those, compares all of those to identify who may be on multiple lists, so, whether a voter is potentially listed as a registrant on a list in, say, Colorado or in Kansas. Then we, as a staff, then go through that and figure out if that data was correct and if those voters voted, and then drill down to whether, in fact, we have people who have voted across State lines. That is a pretty labor intensive process, so the cross-check requires quite a bit of labor on the back end.

ERIC, by contrast, does not actually involve all that much work on the back end. It is much more labor intensive on the front end. So, once you have collected the data and sent that data to ERIC, ERIC gives you a report and you then distribute that report to your jurisdictions. So, in our case, that would be the counties, and the counties use that information to process their voters. So, it is actually very seamless.

Kansas is much more labor intensive. So, one costs money, so ERIC costs money to be in, to be a member, but you save money because you are not using that for personnel costs that you would have to use for the Kansas project. So, they both have expenses. They both have time obligations. But, the ERIC one is much more front-loaded and Kansas is sort of on the back end.

And in our particular circumstance, we use ERIC for a much broader kind of analysis. So, we use ERIC to analyze who our voters are and to help clean the data and to identify potential new voters. We only use the Kansas project to identify people who have potentially double-voted.

Senator WALSH. Thank you very much.

On behalf of the Rules Committee, I would like to thank all of our witnesses today for your important testimony and appreciate the work that you have put into this project. This concludes the panel for today's hearing.

Without objection, the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing for our witnesses to answer.

Again, I want to thank my colleagues for participating in this hearing and sharing their thoughts and comments on this important topic.

This hearing is now adjourned.

[Whereupon, at 10:50 a.m., the committee proceeded to other business.]

APPENDIX MATERIAL SUBMITTED

United States Senate Committee on Rules and Administration

Hearing – "Election Administration: *Making Voter Rolls More Complete and More Accurate*"

Statement of Senator Charles E. Schumer

April 9, 2014

Today the Rules Committee is holding the third hearing in a series on the Presidential Commission on Election Administration's "best practice" recommendations. Earlier we heard an overview of the Commission's reports from bipartisan co-chairs Bob Bauer and Ben Ginsberg. Last month we heard about the innovations of online voter registration and electronic pollbooks from state and local election administrators who have successfully implemented these reforms.

At today's hearing we will continue looking at specific recommendations made by the Presidential Commission. Today's hearing focuses on reforms that both increase the number of Americans that are registered to vote and ensure that the voter rolls are as accurate as possible. These issues, as much as any we have discussed, are integral to fulfilling the promise of our democracy.

Every Election Day, there are too many stories of American citizens who are not able to cast a ballot that counts because either they are not registered to vote or their registration information is not current.

Even more common is the number of Americans that must spend additional time at the polling place because so many registrations must be updated on Election Day. This can be very time consuming for individuals who need to update their information, poll workers, and even voters whose information is updated, but who must still wait in line for others to provide correct information. Fortunately, in many instances there is still an opportunity for individuals who have moved within the jurisdiction to update their information and still cast a ballot.

Today's hearing is focused on ways to prevent these problems instead of trying to fix them at the polls. The solutions that our witnesses will testify about today will help all Americans, not just the voters who need to be registered or update their registration information. In addition to increasing the speed at which voters can be checked-in on Election Day, more accurate voter rolls save money and time, which are precious resources for local election officials.

We are fortunate today to hear from current and former state election officials who have already applied innovative solutions to improve the way they handle elections. At our last hearing, my colleague Senator Coons mentioned that his state of Delaware has developed a program that seamlessly integrates the voter registration process into the routine process of obtaining or

updating a driver's license. This program, known as "eSignature," is helping to fulfill the promise of the 1993 National Voter Registration Act in Delaware. Today, Delaware's State Election Commissioner Elaine Manlove will tell us about this program, which she has championed and turned into a national example of good governance.

We will also hear about the Electronic Registration Information Center or ERIC. This program, started by the Pew Center on the States, is now owned and governed by its member states. ERIC allows partner states to share resources, compare lists for potential duplicates and identify potentially eligible citizens who are not registered. While still in its early stages, the ERIC program has already proven that it improves the quality of the registration rolls and helps states to identify citizens who might want to register and vote. I look forward to learning more about the ERIC program from the testimony of our witnesses.

I am pleased that we have another outstanding panel to discuss the important topic of improving election administration. Our witnesses have worked at the cutting edge of their field to improve how our elections are conducted. I am hopeful that their success in their states can be spread throughout the country.

I would like to thank all of our witnesses for being here today, and I look forward to their testimony.

Delaware E-Signature Project
Testimony to U S Senate Rules Committee
April 9, 2014

- **Elaine Manlove**
State Election Commissioner
Delaware

Good Morning and thank you for inviting me to discuss Delaware's e-signature project. Let me start with a little background. I began working in the Dept. of Elections for New Castle County in 1999, so my first big election was the 2000 General Election. While the country focused on Florida, I was concerned about the 50 court orders that we had requested for voters who came to their polling place assuming they were registered voters but were not on the poll list. Sometimes this was a husband and wife. Only one would be on our rolls while they were both certain they had registered at DMV. Our Elections offices could check DMV records and see that they had been there, but we had no application or declination. Our process was paper and if we didn't get the paper, the voter did not get registered. There were many reasons for this, but, at the end of the day, the voter was the loser.

Some of the problems with the paper process were:

- DMV would be out of applications in the printer
- The printer would jam
- The voter would leave without signing

Every day we picked up the applications from DMV and matched them with the electronic list of who applications we should have received. Then we mailed new applications to those citizens whose application we did not receive. About half came back to Elections.

I knew there had to be a better way to do this. As is always the case, every idea we had cost money and there just was none. Then came HAVA. Since Delaware's voting machines were fairly new and we had already met the statewide database mandate, we decided to focus on the use of technology to improve all of our services. Our Dept. of Technology and Information hired two HAVA-paid programmers to focus on what we called "the Elections wish-list" – all the projects that we knew would improve our services but were too large in scope to be handled by the programmers assigned to Elections by DTI.

I thought the struggle was behind us until we started meeting with DMV! No one said "no, this can't be done", however, our meetings never seemed to move forward. DMV worried that our

solution would slow their lines. Then, on the Elections side, when we were in "election mode", we would have to move our focus back to that.

In 2007, a new DMV Director was appointed and this project moved forward quickly. Early in 2009, e-Signature went live. It was a success from day 1.

I want to emphasize that this was not rocket science, just a common sense solution to an ongoing problem. The DMV clerks work from a script that is in front of them on their computer screen. They can tell if their customer is a new registrant or is already registered to vote. That fact determines what screen comes up in front of them and the questions they ask. They collect name, address, social security number and date of birth as well as any additional information for DMV use. The customer verifies their voter information on the screen of the credit card device on the counter. If their information is correct, they are asked if they want to register to vote or update their information with the Department of Elections. On the next screen, the voter affirms their citizenship, chooses their political party and signs. All of this is captured and transmitted to Elections in real time.

Customers can go to any DMV in the state. Their voter registration application will be sent to a cue in the Elections office of their home county. The Elections office will determine if this is a duplicate, run a felon check and process their polling place card. All Voter Registration decisions are made in the Elections Office removing that onus from DMV.

My goal when we started this project was just to insure that we received every application. What I didn't anticipate were the unintended consequences. We had no paper - no paper to pick up at DMV, no paper to file, no paper to verify – no paper at all!! This saved us:

- Space in all three county offices – rows of filing cabinets were eventually eliminated
- Time – no paper to file and no files to go through on Election Day when we needed to prove that a voter was registered
- Money – at both DMV and Elections – Elections eliminated 5 vacant positions for a $200,000 annual savings.

Once Phase 1 was complete, we changed the process for mail applications. We began scanning in any paper applications that came into our offices: Federal Mail Applications, etc. Our clerks still have to do data entry on those applications, but then they electronically link that entry with the paper application containing the signature. The paper application can then be shredded.

Our next phase was to take this technology to Delaware's Health and Social Service agencies as well as our Dept. of Labor. We began first at Health and Social Services and provided computers and credit card signature devices, however, the numbers have not increased as much as we had hoped. In today's economy, both agencies are being encouraged to offer online applications for their customers.

Our solution is in the works. We will very soon link our online voter registration process to the online systems of both of these agencies.

In closing, the initial cost for the DMV project was $600,000. With newer technology, today it would be less. It has paid for itself by savings to both DMV as well as Elections.

It has also saved time. DMV's original concern was that we would slow their lines because they allocated 90 second for the Elections piece of each customer transaction. It's now 30 seconds!

With advances in technology, this project would cost less today. Delaware has shared our solution with many states. It's an easy solution that works well for both agencies and could work as well for other states.

Delaware E-Signature Project
Testimony to U S Senate Rules Committee
Summary
April 9, 2014

- **Elaine Manlove**
State Election Commissioner
Delaware

Delaware's E-Signature Project is an electronic, real-time connection between DMV and our Election offices for the purpose of voter registration.

It is a common sense approach that saves time money and paper. It has worked well for Delaware and we have shared this technology with other states.

Delaware is currently working with other agencies mandated to conduct voter registration to enable them to use this same technology. It makes it easier for their agencies to do voter registration and keeps them compliant with NVRA.

Elaine Manlove
State Election Commissioner
905 S. Governor's Avenue
Dover, Delaware 19904
302.739.4277
elaine.manlove@state.de.us

Elaine Manlove has been employed by the State of Delaware as Election Commissioner since 2007 following eight years as Director of the Department of Elections for New Castle County. She was formerly employed by New Castle County Government as an Executive Assistant.

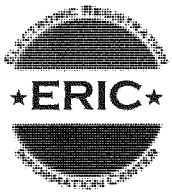
In both Elections positions, she has seen many changes from both sides of the election process – local and state perspective. She has overseen Delaware's electronic signature project to allow voters to have their registration information transmitted in real-time from the Division of Motor Vehicles to the Departments of Election in each county. As Commissioner, she is responsible for the Help America Vote Act funds, the statewide voter registration system, campaign finance and the Parent/Student Mock Election.

Under Elaine, Delaware was the second state to join ERIC (Electronic Registration Information Center). This project has allowed Delaware to share information with other member states in an effort to make our voter rolls more accurate as well as give us the ability to reach those eligible to vote, but not registered.

Elaine is a graduate of The Election Center's Certified Election Registration Administrator (CERA) program and is member of NASED (National Association of State Election Directors).

A native Delawarean, born and raised in the City of Wilmington, she graduated from St. Elizabeth's High School and Goldey Beacom College. She lived in Hockessin for many years with her husband and three sons. Now that her sons are grown, Elaine and her husband reside at the Delaware beach.

ERIC, Inc
Electronic Registration Information Center
1155 F Street NW Suite 1050
Washington DC 20004
www.ericstates.org



Statement of

John W. Lindback

Executive Director

Electronic Registration Information Center (ERIC)

Before the U.S. Senate

Committee on Rules and Administration

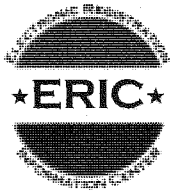
Hearing on

Election Administration:

Making Voter Rolls More Complete and More Accurate

April 9, 2014

ERIC, Inc
Electronic Registration Information Center
1155 F Street NW Suite 1050
Washington DC 20004
www.ericstates.org



Executive Summary

Statement of John W. Lindback, Electronic Registration Information Center (ERIC)
Before the U.S. Senate Committee on Rules and Administration
Hearing on Election Administration: Making Voter Rolls More Complete and More Accurate
April 9, 2014

The Electronic Registration Information Center (ERIC) is a non-profit consortium of state election agencies that launched operations in 2012. Nine states and the District of Columbia are currently members. The organization is self-supporting and self-governing. Each member state appoints a representative to the ERIC Board of Directors.

The mission of the organization is to improve the accuracy of voter registration records and improve access to voter registration for all US citizens. Research shows that one in eight voter registration records are inaccurate or out of date, usually because the voter has moved and failed to update his voter registration. Out-of-date and inaccurate records result in voters showing up at the wrong polling place, the necessity of using provisional ballots for some of those voters, and longer lines at the polls.

ERIC seeks to rectify these issues through the use of a sophisticated data-matching tool that compares voter registration records with a state's driver's license data base, Social Security death records, and change-of-address data from the U.S. Postal Service. ERIC is the only organization in the country providing comprehensive data matching for continuous and sustained maintenance of voter registration rolls. Privacy protocols govern the system, with all sensitive data anonymized to protect individual records.

On behalf of the seven states who were members in 2013, ERIC sent reports that identified about 1.6 million voters had moved from their address on file or had died or who had a duplicate registration within the same state. The states were able to contact the voters who had moved to encourage them to update their registrations.

ERiC was initially created and financed with contributions from the Pew Charitable Trusts. Its funding now consists only of member dues and the initial fee each state pays to join. The current annual budget is approximately $500,000.

ERIC, Inc
Electronic Registration Information Center
1155 F Street NW Suite 1050
Washington DC 20004
www.ericstates.org

Introduction

Thank you for the opportunity to testify today on behalf of the Electronic Registration Information Center (ERIC). I am the Executive Director of ERIC, which was incorporated in May, 2012, as a non-profit consortium of elections agencies from seven states – Colorado, Delaware, Maryland, Nevada, Utah, Virginia, and Washington. The District of Columbia and Oregon joined ERIC at the beginning of 2014. Connecticut signed the membership agreement last week.

ERIC was formed with generous technical, financial, and organizational support from the Pew Charitable Trusts. It now stands as an independent, self-governing, and self-supporting organization. ERIC is governed by a board of directors with members representing each participating state. ERIC's bylaws and membership agreement are available on its website: www.ericstates.org

What does ERIC do?

It uses a sophisticated, data-matching tool that helps participating states identify voter registration records that are out-of-date or otherwise inaccurate. It also identifies individuals residing in a state who are not yet registered to vote, which enables elections officials to contact them with information on how to register.

States were moved to form ERIC when evidence continued to mount that one in eight voter registration records are inaccurate or out of date and that one in four Americans are not registered to vote. The most common reason that a voter registration becomes out of date is that the voter moves and fails to update his/her registration.

Inaccurate records contribute to bad experiences on election day: longer lines at the polls, voters showing up in the wrong polling place, provisional ballots, dissatisfied voters and frustrated elections officials. Pioneering leaders from seven states formed ERIC to clean up their records, improve access to voter registration, and improve the election-day experience.

The Presidential Commission on Election Administration recently endorsed state participation in ERIC to "ensure that voters are correctly registered at one location, that registration lists are more accurate and not a source of polling place congestion, and that these more accurate lists can assist in identifying individuals who are eligible to vote, but are not registered." The commission stressed that an accurate voter registration list provides the foundation for any well-run election.

ERIC, Inc
Electronic Registration Information Center
1155 F Street NW Suite 1050
Washington DC 20004
www.ericstates.org

ERIC's Data Matching Process

ERIC uses sophisticated data-matching technology to match records from each participating state's voter registration and driver licensing databases. It also matches the data against Social Security Administration death records and has checked data using National Change of Address information from the U.S. Postal Service. The technology is able to catch simple transpositions of numbers and name variations between different data bases, such as a person who uses the name "Robert" in one database and "Bob" in another.

Sensitive data are anonymized before leaving a participating state's control, thus protecting the privacy of citizens.

ERIC's Reports to the States

ERIC matches all the data submitted and sends reports back to the states that identify individuals who have moved within a state, individuals who have moved across state lines, duplicate registrations within a state, deceased individuals still on the voter rolls, and individuals who are potentially eligible to vote but not yet registered. State officials then contact those who have moved and encourage them to update their registrations (in-state movers) or permit cancellation of their registrations in their previous state. When deceased voters are identified, states can begin the process of removal from the rolls. All the states are required, of course, to follow voter inactivation and record cancellation procedures as mandated by the National Voter Registration Act (NVRA).

The numbers so far are both encouraging and impressive. The following chart shows the total number of inaccurate or out-of-date voter registration records identified to the seven original participating states, as of February, 2014:

List maintenance report type	Records sent to states
In-state movers (More recent activity in DMV record)	1,295,405
Cross-state movers (More recent registration or license in other state)	227,596
Deceased (Appears on Social Security Death Index records)	47,263
Duplicates (Duplicate voter records in the same state)	28,986
Total	**1,599,250**

In addition, ERIC has identified for participating states the names and addresses of 6.1 million individuals who were not registered to vote. That list is derived from matching each state's voter registration list against its DMV list and reporting back the names and addresses of individuals who have a driver's license or state-issued ID but are not on the voter registration list. Participating states contacted these individuals with information on how to register.

ERIC, Inc
Electronic Registration Information Center
1155 F Street NW Suite 1050
Washington DC 20004
www.ericstates.org

ERIC's costs and cost-savings:

Each participating state pays a one-time, $25,000, initiation fee to join and annual dues to support a budget of approximately $500,000. The annual dues formula, adopted by the Board of Directors, currently includes as factors the size of each state's voting-eligible population, and the number of ERIC members (10). Thus, large states pay a bit more than small states.

ERIC states enjoy cost savings that help offset the dues. ERIC, for example, purchases Social Security Death Index data and NCOA data on behalf of all its members while non-ERIC states pay for it individually. Also, more accurate voter registration lists result in less wasted postage on returned mail, less waste when sending out sample ballots or other voting information, fewer provisional ballots, and other election-day savings that help reduce costs.

Success stories

ERIC states are required by the membership agreement to help document results of ERIC's work. Early results reveal significant progress. Judd Choate, the Director of Elections from Colorado, is here today to talk about his state. Lori Augino, the Director of Elections in Washington, reported to her fellow ERIC states last week that her staff has successfully updated 53,000 voter registration records since they first received ERIC list maintenance reports last year. Previous to joining ERIC the Washington Secretary of State's Office had been routinely matching its voter registration list against the Social Security Death Index. Because ERIC's matching software is more powerful and sophisticated in catching name variations and number variations, ERIC identified 834 deceased individuals on Washington voter rolls that the state's more rudimentary matching had missed.

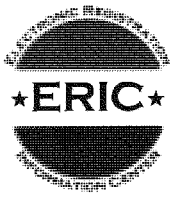
Research Triangle Institute researchers studied the results of voter outreach mailings sent to individuals who were identified by ERIC in 2012 as not yet registered to vote. The study's findings included the following:

- Total voter registration: ERIC states showed a net improvement in voter registration of 1.23 percentage points over non-ERIC states.
- New voter registration: ERIC states showed a net improvement in new registration of 0.87 percentage points over non-ERIC states.
- Voter turnout: ERIC states showed a net increase in voter turnout of 2.36 percentage points over non-ERIC states.
- Voter file errors: State officials found that the data ERIC makes available enable them to make valuable corrections to birthdates and other fields in voter files.

The full results of the RTI study: http://www.rti.org/publications/abstract.cfm?pubid=21769

★ ★ ★

ERIC, Inc
Electronic Registration Information Center
1155 F Street NW Suite 1050
Washington DC 20004
www.ericstates.org



ERIC's next stages:

The ERIC states, with the assistance of the Pew Charitable Trusts and others who specialize in research, will continue to document results and cost savings that result from ERIC membership. We continue also to actively recruit more states to join. States such as North Carolina, South Carolina, Arizona and Ohio have all adopted legislation that enables them to share data and join ERIC. Other states are pursuing legislation now, including Louisiana, Minnesota, and Illinois. We field phone calls and emails regularly from states seeking information on requirements, benefits and costs of membership.

Thank you very much, Mr. Chairman for the opportunity to talk to you today about our organization and the positive contribution it's making to better elections in America. I look forward to continuing to work with your committee on issues related to voter registration in the states. I am happy to answer questions about ERIC.

ERIC, Inc
Electronic Registration Information Center
1155 F Street NW Suite 1050
Washington DC 20004
www.ericstates.org

Bio
John Lindback
Executive Director

John Lindback is the Executive Director of the Electronic Registration Information Center (ERIC), a consortium of states using state-of-the-art technology to improve the accuracy of their voter registration rolls and improve access to voter registration for US citizens. He is the first executive director of ERIC, which was formed in May, 2012 by seven pioneering states.

Much of his 20-history in the field of elections administration has been dedicated to making voter registration work better for both voters and elections officials.

Prior to joining ERIC, Lindback served as a senior officer for Election Initiatives at the Pew Charitable Trusts, providing key leadership on Pew's portfolio of work in election administration, including research and reform efforts to improve military and overseas voting; assess election performance through better data; use of technology to provide voters with information they need to cast a ballot; and upgrading voter registration systems. As a lead on Pew's work to upgrade voter registration, Lindback successfully encouraged state and local elections officials to join the Pew team and other stakeholders in identifying solutions to the problems of inaccuracy, inefficiency and high costs of voter registration in the states. He met with elections officials throughout the nation to provide results of key research, explain the solutions and urge state and local action.

Prior to joining Pew, Lindback worked for 14 years in state elections administration. He served for eight years as director of elections in Oregon, which made him the chief administrator for the conduct of all elections in Oregon, the state's campaign finance system and Oregon's ubiquitous and contentious initiative and referendum process. During his tenure with the Oregon Secretary of State he was elected president in 2008 of the National Association of State Elections Directors. He was also elected to serve on the executive board of the U.S. Elections Assistance Commission's Standards Advisory Board. Prior to his work in Oregon, John worked as chief of staff to the lieutenant governor of Alaska for six years, which included administrative oversight of the Alaska Division of Elections. In addition, he served on a National Academy of Sciences panel that studied state voter registration databases. Since 2006, John has volunteered as an advisor to Design for Democracy, an organization that assists elections officials with designing voter-friendly ballots and other elections materials.

Lindback holds a B.A. degree in journalism (1976) from the University of Arizona.

Testimony of Judd Choate
Director of Elections, Colorado Secretary of State's Office
Chairman, ERIC Board of Directors

U.S. Senate Rules Committee
Washington, D.C.
April 9, 2014

My name is Judd Choate. I am the State Election Director for Colorado and Chairman of the Board of ERIC.

Under the leadership of Secretary of State Scott Gessler, Colorado implemented mobile-optimized online voter registration, worked with the Federal Government to identify non-citizen voters, and actively participates in the ERIC project, making Colorado a national leader in voter initiatives. For instance, during the 2012 presidential election Colorado helped lead the way with some of the highest voter turnout levels in the country. I'm happy to be here today to share our experiences and best practices.

Let me tell you about Colorado's experience as an initial "ERIC State."

The Electronic Registration Information Center – ERIC – is a nonprofit organization created by the states, with the funding and assistance of the Pew Charitable Trusts, to improve state voter registration rolls. ERIC was established in 2012 by seven initial states: Colorado, Delaware, Maryland, Nevada, Utah, Virginia, and Washington. Since then, Oregon, Connecticut and the District of Columbia have joined. Several other states appear close to joining as well.

Using a sophisticated IBM algorithm, ERIC combines data from participating state voter files, motor vehicle records, change of address notifications, and death records. The states receive reports they use to contact eligible voters and clean voter rolls as part of list maintenance activities, consistent with the National Voter Registration Act (NVRA).

Colorado joined ERIC on July 1, 2012 along with the other six states. Two months later, in September of 2012, we sent postcards to 723,000 people encouraging them to register prior to the 29-day registration deadline for the presidential election. Just over 10% of those contacted, 74,528, registered to vote prior to the deadline. Of those, 32,430, or 43.5%, voted in the 2012 General Election.

ERIC also provides Colorado with data to clean the voter rolls. ERIC has a unique ability to link files in various formats using minimum matching criteria. This process marries data to find electors that have moved.

ERIC provides states with four kinds of data to clean the rolls...matching data indicating:

1. a move within the state or
2. a move from one state to another state
3. Matching data indicating that two files are actually the same person
4. Matching data indicating that a person on the state's voter rolls died outside of the state and is listed in the Social Security Administration Death List.

Colorado's most recent "Clean" report from ERIC, covering the months of January and February 2014, found the following:

1. 26,320 in-state movers
2. 1,181 out-of-state movers
3. 112 voters with more than one registration
4. 2,180 dead voters who died outside the state of Colorado

Colorado developed and rolled-out online voter registration in 2010. By using online voter registration both in the mailing to voters – encouraging them to register – and in the mailing to people who have moved out-of-state – encouraging them to cancel their registration online – Colorado has maximized the integrity of our voter rolls. Online Voter Registration makes it easy and straightforward for people to register, update a registration, or cancel a registration when that voter moves to another state.

ERIC is the future of elections. It cleans the rolls. It finds possible new voters. It allows jurisdictions to proactively work with their voters – our customers – instead of reacting to a bad mailing address 12 months after the voter has moved. And as more states join, the system will work better because it will have more data to match.

Another program lauded by the presidential commission and important to Colorado's efforts to improve list maintenance is the Kansas Cross-Check. The cross-check is also a data-matching program, where 28 states send their voter files to Kansas following a General Election. Since 2008, Colorado has identified approximately 15 people who very likely voted in Colorado and another state in the same election. Several of these suspected double voters received a visit from the FBI and a handful were charged with double voting in our partner states of Arizona and Kansas.

Colorado's experience in ERIC and in the Kansas Cross-Check has been very positive. We have registered new voters at an impressive rate, our voter registration database is improving all the time, and we protect that database from fraud and double-voting.

Thank you for the opportunity to speak to you today. I am happy to take questions.

Dr. Judd Choate is the state elections director for Colorado, Chairman on the Board for the Electronic Registration Information Center (ERIC), and is in line to be the 2017 President of the National Association of State Election Directors (NASED). Judd has a J.D. from the University of Colorado Law School and both a Ph.D. and M.A. in political science from Purdue University. Prior to joining the Colorado Department of State, Judd practiced election law at the Denver firm of Kelly Garnsey Hubbell + Lass. He also served as a law clerk for Colorado Supreme Court Justice Alex J. Martinez and as a summer clerk for Judge Timothy Tymkovich of the 10th Circuit Court of Appeals. For several years prior to law school, Judd was a professor of political science at the University of Nebraska, where he taught courses on campaigns and elections. Judd is the author of a book and several peer-reviewed articles on political behavior. In a previous life, Judd was a scout for the Kansas City Royals.

The State of Colorado has benefitted greatly from its participation in ERIC – the Electronic Registration Information Center. ERIC matches up records from different state databases to increase the number of old, out-of-date voter files that can be cleaned, consistent with the National Voter Registration Act. Further, ERIC provides a list of those Coloradans in the DMV database who appear eligible to register. Then the state sends postcards inviting them to register to vote. Over 10% of those contacted in 2012 registered to vote and over 40% of those who registered voted in that election. Colorado is one of nine member states and jurisdictions in ERIC, with several other states poised to join. ERIC is a great program that will only improve as more states join.

Testimony of Christopher M. Thomas, Michigan Director of Elections, before the U.S. Senate Committee on Rules and Administration on April 9, 2014.

The Honorable Charles E. Schumer
Chairman, Committee on Rules and Administration
Washington, D.C. 20510

Dear Chairman Schumer:

Thank you for the opportunity to testify before the Committee on Rules and Administration concerning the Report issued by the Presidential Commission on Election Administration (PCEA). Specifically, I have been asked to comment on the sections of the Report addressing the impact of the motor/voter provision of the National Voter Registration Act (NVRA), being Sec. 1973gg-3 Simultaneous application for voter registration and application for motor vehicle driver's license.

My career in election administration began in 1974, and I have served as Michigan's Director of Elections since 1981. I currently work for Secretary of State Ruth Johnson, who sends her regards to the members of the Committee. Today the PEW Charitable Trust will release its third Elections Performance Report showing Michigan as a high-performing state. Our success is due in large part to a high-functioning motor/voter program. Michigan has a highly decentralized election system with over 1,500 voter registration jurisdictions.

I come from one of two states that have fully implemented the motor/voter provisions of the NVRA, the other state being Delaware. I am fortunate to be on the same panel today with Ms. Elaine Manlove, Delaware State Election Commissioner, who will provide you with details of their excellent program.

In 1975, Michigan enacted the first in the nation motor/voter program. Secretary of State Richard H. Austin proposed this program to provide the citizens of Michigan with a more effective way to register to vote. Michigan voters and drivers are by and large the very same people. Secretary Austin thought it made imminent sense to offer our citizens the opportunity to submit a voter registration application at the same time they were applying for or updating their driver licenses. Consistently more than 80% of the total registration transactions each year are handled in Michigan by the motor/voter program administered by the secretary of state. The success of Michigan's program was, in part, responsible for the motor/voter provisions of the NVRA.

I had the honor of serving as a commissioner on the PCEA under the leadership of two outstanding co-chairs, Mr. Robert Bauer and Mr. Benjamin Ginsberg. The Commission was not charged with developing a legislative agenda; consequently we did not offer one. Our findings and recommendations were unanimous and generally have been well-received. I am not advocating for any legislative initiatives coming from the recommendations of the "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration" (PCEA Report). However, I am recommending for your consideration H.R. 2115, sponsored by the Honorable Candice Miller, Chair of the Committee on House Administration,

which addresses a needed enhancement to the NVRA, but was not commented on by the PCEA.

One of the topics considered and addressed by the PCEA was the performance of departments of motor vehicles (DMV) in the execution of their responsibilities under the NVRA. Our conclusion that the DMVs have not fully implemented the motor/voter provisions is based on data published in the U.S. Election Assistance Commission's 2012 Election Administration and Voting Survey (EVAS) and testimony received at public hearings. The Report concludes

> "DMVs, which are supposed to play the most important registration role in the statute, are the weakest link in the system. Some DMVs appear to disregard the law. Others erect impediments to the seamless transfer of registration data to election offices managing statewide registration lists. This noncompliance leads to preventable inaccuracies in the voter registration lists. Voters who think they registered or updated their address at the DMV show up at polling locations only to find out they are not registered or are in the wrong polling location." (PCEA Report, page 17)

I have attached the PCEA Report findings and recommendations concerning administration of the motor/voter programs as Attachment #1.

The PCEA's conclusions are based on data reported by the U.S. Election Assistance Commission (EAC) in the 2012 Election and Voting Survey and testimony presented at public hearings. The data for 2012 demonstrates that two states have fully implemented motor/voter and only 7 have made adequate progress toward full implementation; DC, GA, KY, NY, PA, RI, & UT: See Attachment #2: "Total Forms Received – Motor Vehicle Offices." This chart shows 1) the number of voter registration transactions from DMVs and 2) the percent DMV transactions represent of total voter registration transactions in each state. My conclusion is that states with less than 50% of their total transactions generated by DMVs have not fully implemented the motor/voter provisions of the NVRA.

The PCEA Report takes a strong position on this topic because when motor/voter is not properly administered there are negative consequences to the election day experience of voters. Likewise when there is a well-functioning motor/voter program the integrity of the voter registration file is enhanced and voters experience fewer problems on election day. I offer the following considerations for a well-functioning motor/voter program:

- The beauty of motor/voter is that it cuts across all political and socio-economic strata. There is no other voter registration program that serves such a large and diverse segment of the population. Motor/voter programs offer voter registration to both driver license applicants and state personal identification card applicants. For example 75% of voters who are recipients of public assistance in Michigan registered to vote through the motor/voter program administered by the Secretary of State.

- Every voter registration application coming through a DMV is from a person who has had a face-to-face transaction where both identification and legal presence are verified. This is a built-in verification that benefits the integrity of the election process.

- Because approximately 75% of annual motor/voter registration transactions are changes of address, each transaction is both a registration in a new location and a cancellation in the former location of residence. The voter registration file accurately reflects where the voters currently reside. When the file inaccurately reflects voter actual residence, mail lists are likewise inaccurate causing a huge waste of money by those using the lists to send campaign literature and other materials.

- When voter registration files do not reflect the current residence, the number of provisional ballots cast on election day increases. Provisional ballots cause longer wait times to vote, create a bad election day experience for voters and cause extra work for election officials on election day and the days immediately following an election. When motor/voter is properly working, the number of provisional ballots dramatically decreases. For example, Ohio had over 200,000 provisional ballots in 2012, most of which were cast because of address updates were not made prior to the election. By comparison, Michigan had 2,675 provisional ballots. If the Ohio motor/voter program, which only generated 14% of the total transactions in 2012, was fully implemented the vast majority of their provisional ballots would disappear.

Delaware rather than Michigan is highlighted in the Report because Delaware's elections and motor vehicle programs are administered by two different agencies and the motor/voter solution does not require integration into the motor vehicle computer system. One advantage Michigan has is that the Secretary of State is both the chief election officer and motor vehicle administrator, which makes implementation of motor/voter much less complicated. There is no question that DMVs have demanding missions and huge workloads that are supported by complex computer systems. Further, many of these complex computer systems are currently involved in 'modernization' projects. Integrating motor/voter into existing computer systems is difficult. Delaware has sidestepped the difficulty of integrating systems by transmitting voter registration data from the e-signature interface (credit card-style signature device) directly to the state voter registration database, which requires very little integration with their DMV system. Delaware has paved the way for any state where elections and motor vehicle administration are managed by two different agencies (nearly every other state) to implement the NVRA mandate at a lower cost and in a shorter time period after work begins.

Twenty states have adopted online voter registration programs as another avenue for voters to become registered and update their records. As the PCEA Report notes, there is potential for states to use online voter registration programs to implement NVRA motor/voter mandates. Similar to the Delaware process, online voter registration offers an easier and lower cost solution over full scale integration into DMV legacy software.

On March 27 and 28, 2014, the PEW Charitable Trust, Election Initiative Program hosted a discussion with the election directors and motor vehicle directors from more than 30 states. The topic of the conference was increasing the participation by DMVs in the voter registration process. There was a good exchange of challenges involved in moving to full compliance and excellent presentations on possible avenues that minimize the difficulties. The American Association Motor Vehicle Administrators and the National Association State Election Directors will continue to work together with the PEW Charitable Trust on takeaways from the conference.

In conclusion, I believe better motor/voter performance through full compliance with the NVRA will substantially enhance the accuracy of voter registration files and improve the election day experience for many voters. With lower cost implementation strategies it may be more feasible for DMVs to fulfill both the letter and spirit of the NVRA. I know that state election officials across the country stand ready to assist in this objective.

Finally, I would be remiss if I did not recommend your consideration of H.R. 2115, which seeks to keep registration files more accurate by removing voters from the state voter registration file when they move to a new state. When a driver moves to another state, the DMV in the new state of residence makes sure the former state of residence is notified that the driver is now licensed in the new state. H.R. 2115 would require the DMV of the new state to ask the driver/voter whether the new state will be the state of residence for voting purposes. If the driver answers 'Yes' that information would be transmitted to the former state and the older voter registration would be canceled. Approximately 100,000 Michigan residents move to another state each year and are issued a driver license in their new state of residence. Under the NVRA it can take from 3 to 5 years before these old registrations can be removed from the file. H.R. 2115 offers an opportunity to keep the voter registration file current based on information provided by the voter. See Attachment #3: Testimony of Christopher M. Thomas before the Committee on House Administration on June 4, 2013.

Thank you for the opportunity to testify on the Report of the Presidential Commission on Election Administration.

ATTACHMENT 1

Excerpts from the Presidential Commission on Election Administration Report "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration"

Excerpts from the Presidential Commission on Election Administration Report "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration" (Endnotes omitted.)

However, the election statute most often ignored, according to testimony the Commission received, is the National Voter Registration Act (NVRA or "Motor Voter"). Designed to assist prospective voters by facilitating registration, the statute requires Departments of Motor Vehicles (DMVs) and public assistance agencies to provide registration materials and to ensure that their customers have the opportunity to register to vote. By all accounts, states vary considerably in the degree to which such agencies register voters and transfer registration data to election administrators. (Also, as evidenced by the biennial NVRA report issued by the EAC, several states are unable to account for the source for many, if not most, of their new registrations.)

DMVs, which are supposed to play the most important registration role in the statute, are the weakest link in the system. Some DMVs appear to disregard the law. Others erect impediments to the seamless transfer of registration data to election offices managing statewide registration lists. This noncompliance leads to preventable inaccuracies in the voter registration lists. Voters who think they registered or updated their address at the DMV show up at polling locations only to find out they are not registered or are in the wrong polling location.

The DMVs do not shoulder all of the blame; the other public assistance agencies required by the NVRA to register voters also often fail to comply with the law. Disability rights groups identified the lack of voting assistance available at state offices for the disabled. Military advocates offer similar criticisms of recruitment centers. As assistance agencies shift their client services to online channels, compliance with the NVRA often drops further because voter registration is left out of the online portals and website designs of these agencies.

When the NVRA was passed two decades ago, the revolution in data sharing and integration was just beginning. Now, Americans experience every day a world in which data-sharing is commonplace and expected. Indeed, the challenge of data-sharing envisioned and required by the NVRA — principally, exchanging names and addresses between agencies — pales in comparison to most modern-day data integration challenges. However, by all accounts, the root of many registration difficulties occurs at the point where one agency receiving a registration form or updated address fails to transmit that information accurately and seamlessly with the voter registration database held by the election authority.

PCEA Report, pp. 17-18.

Recommendation: States should seamlessly integrate voter data acquired through Departments of Motor Vehicles with their statewide voter registration lists.

The Department of Motor Vehicles (DMV), known in each state as the agency issuing driver's licenses and state personal identification cards, plays a pivotal role in the registration of America's voters. As a critical actor in the creation and maintenance of each state's voter registration file, the DMV can also contribute to the degree of orderliness and efficiency of operation in each community's polling places on Election Day. The NVRA, enacted more than 20 years ago, mandates that each state's DMV offer an opportunity to register to vote for every

citizen applying for a driver's license or state personal identification card or changing an address on one of those documents. If there is any identification document that citizens will keep current, it is the state-issued driver's license or personal identification card. Universally, this NVRA program, commonly known as "Motor Voter," is embraced across political party lines because such a wide swath of the American electorate frequents these offices on a regular basis.

Yet the data compiled biennially by the EAC reflect poorly on the efficacy of Motor Voter. Significantly less than one-third of new registrations are processed through motor vehicle departments. Only seven states and the District of Columbia report total motor vehicle department registrations accounting for more than 50 percent of the total registrations received in the 2011-2012 election cycle. The low level of participation by DMVs leaves no doubt that Motor Voter is not working as intended.

Delaware and Michigan have designed systems that seamlessly integrate the Motor Voter transaction into the DMV driver's license application program in such a manner as to keep a large number of voter records current and to save the DMV money in reduced staff time committed to this program. The Delaware DMV Director and the Election Commissioner together developed an interface called "e-signature." It began because of the number of voters who appeared at polling places believing they had registered at the DMV, but were not on the voter rolls. When citizens go to the DMV for driver's license services, they provide their information to the DMV clerk. By following a script on their computer screen, the DMV clerks now ask citizens if they would like to register to vote or update their information if they are already registered. They view their information on a screen that is also a credit card-style signature device. On that screen, voters certify that they are citizens, select their party affiliations and sign the forms. All of this information is then transmitted in real-time to the Department of Elections for the voter's county. The election office no longer processes registration applications from the DMV by hand. All information is now entered and transmitted electronically, saving time every day and especially on Election Days.

An improperly functioning DMV can naturally lead to Election Day confusion. Voters who appear at their polling place after moving can find that their voter registration records have not been updated to conform to their new driver's license addresses. As a result, a greater number of provisional ballots are cast, leading to congestion in the polling place and unnecessary post-election verification work for county and local election officials. In other states, the voters are directed to their old polling places to vote, which may be located in another jurisdiction within the state. *The Commission strongly recommends that states follow the Delaware model and adopt procedures that lead to the seamless integration of data between DMVs and election offices.*

The Commission notes that the adoption of online registration will provide DMVs with a ready-made portal to facilitate seamless transmission of voter registration data to the election office. An online registration portal can open at a specific point during the driver's license transaction, thus providing the convenient opportunity to register contemplated by the NVRA. Indeed, with online voter registration, a registration widget or portal can be placed on any state website to facilitate registration either by a voter or an administrator who is filling in a voter's information for other purposes.

PCEA Report, pp. 30-31.

ATTACHMENT 2

Total Forms Received – Motor Vehicle Offices

NVRA Election Administration and Voting Survey

Summary - Table 2a. Application Sources: Total Forms Received - Motor Vehicle Offices

	2012 Totals		
State	Total	Cases	Pct.
Alabama	22,023	60	1.4
Alaska	82,224	1	32.9
Arizona	394,446	15	20.3
Arkansas	179,919	75	31.6
California	703,751	57	13.8
Colorado	469,786	64	22.8
Connecticut	20,537	169	4.8
Delaware	[illegible]	3	[illegible]
District of Columbia	93,174	1	63.9
Florida	681,185	67	42.4
Georgia	431,759	159	54.1
Hawaii	74,411	4	40.3
Idaho		0	0.0
Illinois	808,272	109	39.1
Indiana	694,386	92	33.3
Iowa	113,525	99	4.5
Kansas	273,224	105	44.4
Kentucky	647,063	120	54.7
Louisiana	576,577	64	46.3
Maine	27,820	500	11.0
Maryland	925,948	24	34.6
Massachusetts	293,432	351	18.8
Michigan	[illegible]	[illegible]	[illegible]
Minnesota	98,651	87	7.7
Mississippi	19,239	53	7.0
Missouri	268,191	116	20.9
Montana	36,534	56	14.8
Nebraska	162,286	93	35.9

	2012 Totals		
State	Total	Cases	Pct.
Nevada	138,368	17	28.2
New Hampshire	0	320	0.0
New Jersey	520,206	21	43.0
New Mexico	24,572	15	5.9
New York	638,065	62	62.6
North Carolina	616,206	100	23.2
North Dakota		0	
Ohio	447,946	88	14.1
Oklahoma	144,183	77	25.6
Oregon	244,283	36	30.5
Pennsylvania	2,187,386	67	67.4
Rhode Island	67,099	39	56.2
South Carolina	555,496	46	38.9
South Dakota	40,389	66	37.3
Tennessee	300,432	94	35.6
Texas	1,547,626	254	
Utah	591,119	29	49.4
Vermont	12,440	204	19.0
Virginia	1,206,659	134	40.0
Washington	352,290	39	31.2
West Virginia		0	0.0
Wisconsin		0	0.0
Wyoming		0	0.0
American Samoa		0	0.0
Guam		0	0.0
Puerto Rico		0	0.0
Virgin Islands		0	0.0

ATTACHMENT 3

June 4, 2013 Testimony of Christopher M. Thomas, Michigan Director of Elections, before Committee on House Administration, Washington, D.C. on H.R. 2115 – Election Administration: Making Voter Rolls More Complete and More Accurate.

STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

Testimony of Christopher M. Thomas, Michigan Director of Elections, before Committee on House Administration, Washington, D.C. on H.R. 2115 – Election Administration: Making Voter Rolls More Complete and More Accurate

It is a pleasure to appear before the Committee on House Administration particularly with Chairman Miller at the helm. I extend Secretary Ruth Johnson's greetings to Chairman Miller and members of the Committee. We very much appreciate the introduction of and hearing on this important legislation.

I had the distinct honor of working for Chairman Miller for the eight years she served as Michigan's Secretary of State. Not only was she Michigan's chief election officer, but she was also the state's chief motor vehicle administrator. This legislation combines both elections and driver license administration.

In Michigan, we recently observed 38 years of Motor/Voter as the first State to implement this uniform and nondiscriminatory service to Michigan citizens. The National Voter Registration Act (NVRA), now 20 years old, has substantially improved our election process. However, there are improvements that can be made to the NVRA to further increase efficiencies and integrity and reduce costs of voter registration for state and local election officials.

THE PROBLEM

The problem addressed by the legislation is the unnecessary retention of voter registration records of individuals who have left the State and applied for a driver's license in their new State of residence. The vast majority of voters who move from one State to another have no intention of remaining a resident in their former State for voting purposes. Each year Michigan is notified by other States that tens of thousands of voters have moved and applied for a driver license in the new State. In FY 2012 more than 73,000 individuals were reported to Michigan as having moved to another State. Under current practices, these individuals must remain on our Qualified Voter File for two November Federal elections after a cancellation notice is sent to them. These records can remain on the file for as long as four years after the notice is sent.

To be clear, there are rare instances where an individual who makes a temporary move to another State is required to apply for a driver license, even though the individual is not relinquishing residence in the former State.

Both the NVRA and Help America Vote Act (HAVA) have as their purpose the improvement of the accuracy and integrity of voter registration files used in Federal elections. Retaining tens of thousands of non-residents on our voter registration file does not further the purpose of either Federal law. How can the relationship established by the NVRA and HAVA between election officials and motor vehicle administrators be leveraged to ensure that those who have established a residence in another State for voting purposes can be removed from the voter registration files of their former State of residence?

BUREAU OF ELECTIONS
RICHARD H. AUSTIN BUILDING • 1ST FLOOR • 430 W. ALLEGAN • LANSING, MICHIGAN 48918
www.Michigan.gov/sos • (517) 373-2540

THE BACKGROUND

This legislation was requested as the result of litigation in 2008 (United States Student Association Foundation (USSAF) v Terri Lynn Land, 585 F. Supp. 2nd 925 (E.D. Mich. 2008)) challenging the cancellation policy of Michigan under the NVRA with regard to voters who moved to another state and surrendered their Michigan driver license when applying for a driver license in the new State. Based on written advice received by Michigan election officials in 1996 from the Office of Election Administration at the Federal Election Commission, we sent cancellation notices to voters who surrendered their Michigan license in another State and cancelled them after 30 days if no response was received.

The U.S. District Court concluded that:

> "[T]here is no reason to believe that the kind of "residence" that any given state requires in order to issue a driver's license is identical to "residence" for voting purposes....
>
> "[T]he appearance of an out-of-state address on a driver's license application simply does not establish that the applicant is no longer an eligible Michigan voter."

Id. at 941. Essentially, the Court concluded that an individual can be a resident of one State for driving purposes and a resident of a different State for voting purposes. An application for a driver license in the new State does not satisfy the requirement that the individual indicate whether the residence is for voting purposes. An affirmative statement from the individual that the new State is the residence for voting purposes was a necessary requirement under the Court's reasoning.

In light of the Court's decision, we now send cancellation notices provided by section 8(d)(2) of the NVRA resulting in the retention of voter registration records of persons who moved out-of-state for two November Federal elections – up to 4 years.

Secretary Johnson successfully sought legislation in 2012 transferring the cancellation notice requirement for these voters from local election officials to the State Bureau of Elections to spare them from the costs involved. The new legislation was recently implemented with a mailing to 26,000 voters who have moved out of state and surrendered their Michigan driver license. This mailing cost approximately $13,000.00 in addition to the costs of maintaining these records in our statewide Qualified Voter File.

We live in a very mobile society with millions of people moving from one state to another every year. The Departments of Motor Vehicles (DMV) have worked diligently over the years to manage this migration, ensuring that citizens are not carrying multiple driver licenses in their wallets and purses. The American Association of Motor Vehicle Administrators (AAMVA) has adopted a common sense policy: one license/one driver control record. Their policy states:

> "A person shall have one license and one driver control record (DCR). The jurisdiction that issued the last license shall be designated as the jurisdiction of record, shall maintain the DCR of the individual and shall follow procedures as outlined in Appendix G. The DCR shall be the record on which licensing and withdrawal decisions are made. [Adopted 1995]."

Michigan has implemented this policy through the Michigan Vehicle Code, MCL 257.301(2):

> "A person shall not receive a license to operate a motor vehicle until that person surrenders to the secretary of state all valid licenses to operate a motor vehicle issued to that person by this or any state or certifies that he or she does not possess a valid license. The secretary of state shall notify the issuing state that the licensee is now licensed in this state."

This policy is implemented in each state at the point of application for a driver license or personal identification card. A person moving from one State to another will typically apply for a driver license or state personal identification card in the new State of residence. The DMV will require the applicant to surrender the driver license issued by the former State of residence and will then notify the former State of residence that the applicant has been issued a license or personal identification card in the new State of residence. This enables the former State to cancel the license or personal identification card of the former resident. See Attachment #1, a sample of notification received from Minnesota and Attachment #2, a Michigan driver license record showing the former state of residence of the driver.

Additionally, recent federal legislation and interstate driver license compacts/agreements all have similar requirements in regards to residency, one license, and one record. The Federal REAL ID Act of 2005 prohibits a REAL ID driver license applicant from holding more than one REAL ID card or driver license. The Commercial Motor Vehicle Safety Act of 1986 made it illegal for commercial driver license (CDL) holders to possess more than one license. The Driver License Compact and Driver License Agreement require the one license, one record concept.

THE SOLUTION

H.R. 2115 requires a driver license applicant to answer two questions:

1. Did the individual reside in another State prior to applying for the license? (If so, identify the State);
2. Does the individual intend for the new State to serve as the individual's residence for voter registration purposes?

The first question is already being asked within the current driver license application process, leaving the second question as the only additional information to be obtained from the applicant.

Under the amendment the DMV will attach an indicator to the list of those who have surrendered their license that is already being sent to the former State of residence. The indicator could be as simple as a "YES" or "NO" under the column heading: Resident for Voting Purposes Where Now Licensed. The residence information will then be transmitted by the DMV to the State election official, thus providing the confirmation from the applicant necessary to retain or cancel the voter registration.

This amendment is a common sense adjustment to the NVRA that protects voters who are only making temporary moves to another State while enabling States to more efficiently manage the voter registration file for the vast majority of applicants who are making a permanent move to a new State.

I thank the Committee for the opportunity to testify on this amendment and personally thank Chairman Miller for introducing this legislation.

Testimony of Christopher M. Thomas
Executive Summary

- Michigan enacted the first motor/voter program in the nation in 1975. More than 80% of the total voter registration transactions in Michigan each year are done through the motor/voter program. The success of Michigan's program is, in part, responsible for the motor/voter provisions of the NVRA.

- The Presidential Commission on Election Administration Report concludes that some states' departments of motor vehicles are the weakest link in the voter registration system. When states are not compliant with the law, it leads to preventable inaccuracies in the voter registration lists.

- Each voter registration applicant has had a face-to-face transaction with DMV staff where identification and legal presence are verified.

- Motor/voter cuts across all political and socio-economic strata. No other voter registration program serves such a large and diverse segment of the population.

- When motor/voter is not properly administered there are negative consequences to the election day experience of voters.

    - The number of provisional ballots cast increases, causing longer wait times for voters and extra work for election officials.

    - Voters arrive at their polling place only to find out they are in the wrong polling place or not registered.

- When motor/voter programs are properly administered the vast majority of provisional ballot may be eliminated.

- Delaware has successfully implemented an automated motor/voter system requiring no intricate integration with the motor vehicle administration computer system at a reasonably lower cost.

- With assistance from the PEW Charitable Trust election directors and motor vehicle administrators have begun a positive dialogue on fully implementing the NVRA mandates.

- H.R. 2115 will further increase the accuracy and integrity of each state's voter registration file.

Christopher M. Thomas
Biography
(5/31/13)

Christopher M. Thomas is employed by the Michigan Secretary of State as the Director of Elections and has served in this capacity since 1981. He administers the Michigan election law, campaign finance act and lobbyist disclosure law. He began his election administration career in 1974 in Washington, D.C. with the U.S. House of Representatives and the Federal Election Commission.

Chris earned a Bachelor of Arts Degree in Political Science from Michigan State University, received his Masters Degree in Urban Affairs from St. Louis University in St. Louis, MO, and graduated from Thomas Cooley Law School in Lansing. He is currently a member of the Michigan State Bar Association. Chris has been an Adjunct Professor at Thomas M. Cooley Law School since 2001 teaching election law.

Chris is a founding member of the National Association of State Election Directors (NASED) and was elected NASED's President in 1997. At the NASED Conference in January 2013, he became NASED's President for the second time. He served as Chair of the Board of Advisors to the U.S. Election Assistance Commission from 2006-2008. This Board was created by the Help America Vote Act to review guidelines and studies before they are issued by the Election Assistance Commission.

At the NASED Summer Conference in 2012 he was honored to receive NASED's Distinguished Service Award.

On May 21, 2013, he was appointed by President Obama to the Presidential Commission on Election Administration.

BUSINESS MEETING—TO CONSIDER THE NOMINATIONS OF THOMAS HICKS AND MYRNA PÉREZ TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION AND S. 1728, S. 1937, S. 1947, AND S. 2197

WEDNESDAY, APRIL 9, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 10:50 a.m., in Room SR–301, Russell Senate Office Building, Hon. John Walsh, presiding.

Present: Senator Walsh.

Staff Present: Jean Bordewich, Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Assistant; Jeff Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Paul Vinovich, Republican Chief Counsel; Rachel Creviston, Republican Senior Professional Staff; Trish Kent, Republican Senior Professional Staff.

OPENING STATEMENT OF SENATOR WALSH

Senator WALSH. Now, I would like to gavel in for the Executive Session. Good morning. The committee will now come to order for the business meeting noticed for this morning.

Unfortunately, we do not have a quorum of ten members present, and thus, we cannot proceed to vote on the two nominations and four pieces of legislation on this announced agenda for this business meeting.

Since a quorum is not present, the committee will recess, subject to the call of the Chair, and take up these matters when we obtain a quorum. The Chairman intends to convene another meeting at 11:15 a.m. in Senate 219, Second Floor, Capitol, immediately following the 11:00 a.m. roll call vote on the floor.

The committee stands in recess until the call of the Chairman.

[Whereupon, at 10:51 a.m., the committee was adjourned.]

The committee reconvened, at 11:19 a.m., April 9, 2014, in Room S–219, United States Capitol Building, Hon. Charles E. Schumer, chairman of the committee, presiding.

Present: Senators Schumer, Feinstein, Durbin, Pryor, Udall, Warner, Leahy, King, Walsh, Roberts, Cochran.

Staff Present: Jean Bordewich, Staff Director; Stacy Ettinger, Chief Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Assistant; Jeff Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Rachel Creviston, Republican Senior Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Thank you all for coming. We now have a quorum of 10 Members to continue our markup. We will consider the two EAC nominations individually, followed by consideration of four bills. As usual, we will make these voice votes. However, if the Ranking member requests a recorded vote, I will ask the clerk to call the roll. Is there any debate on the nominations of Thomas Hicks and Myrna Pérez to be Commissioners of the EAC?

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Mr. Chairman—as you know I have called for the elimination of this agency as I believe it has outlived its usefulness. I have also said, however, that if it is going to exist it should be bi-partisan as the statute that created it stated.

I cannot support moving these nominations forward without any Republican nominees to join them. It is my understanding the White House is currently in the process of reviewing potential Republican nominees. Hopefully we will have those nominations before the nominees we consider today reach the Floor so they can all be considered together by the full Senate.

I cannot, however, support moving these nominations without Republican counterparts and accordingly will vote no. I am not calling for a recorded vote.

Chairman SCHUMER. Thank you, Ranking Member Roberts. As soon as we get republican nominations I give you my word, we will move them expeditiously. The nominations just haven't been submitted yet but I appreciate your comments.

Chairman SCHUMER. The question is on reporting the nominations favorably to the Senate. Unless there is a request for a roll call vote this will be a voice vote.

First, Mr. Thomas Hicks. Is there a second?

Senator LEAHY. Second.

Chairman SCHUMER. All those in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. All those opposed, say no.

[Nays.]

Chairman SCHUMER. The ayes have it. The nomination of Thomas Hicks is ordered favorably reported to the Senate with recommendation the nomination be confirmed.

Next up, Ms. Myrna Pérez. Is there a second?

Senator UDALL. Second.

Chairman SCHUMER. Is there a demand for a recorded vote?

[Pause.]

Chairman SCHUMER. Then let us have a voice vote.

All those in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. All those opposed, say no.

[Nays.]

Chairman SCHUMER. The ayes have it. The nomination of Ms. Myrna Pérez is ordered favorably reported to the Senate with recommendation the nominee be confirmed.

The next item for consideration is S. 1728 the SENTRI Act. We have a pending amendment from Senator Roberts and a Chairman's Mark.

Senator Roberts, would you like to offer your amendment for consideration?

Senator ROBERTS. Mr. Chairman, I know ours staffs met and agreed to some very good changes to this bill so I thank you for including me, pardon me, for including those in your Mark. I do have concerns about one remaining section of the bill though and will offer an amendment to strike it. Specifically, I seek to delete Section 101, which would require States and every county official, and Aunt Mildred out in Hamilton County, Kansas, to provide reports to the Department of Justice on the status of their ballot transmissions. I understand the Department of Justice has sought to impose a requirement of this nature, but I cannot support it.

I fear this section will impose an onerous reporting obligation on thousands of jurisdictions that are fully compliant with the law. We do not need to require every jurisdiction to compile these reports just to get at the few that may be out of compliance.

As you know, election administrators operate under tight timeframes with limited resources. Their time and resources should be dedicated to serving our voting population, not to filling out reports for the Department of Justice.

Furthermore, the timeframes in the bill are unrealistic. The timeframes are likely to result in incomplete reports. States are given a mere three days to produce these reports which are immediately made public. When those reports do not contain all of the required information, as they inevitably will not with the limited time provided to gather the information, the false impression will be created that jurisdictions are failing to deliver ballots when in reality they have failed only to report having done so.

If we want our election officials to serve military and overseas voters, we should allow them to do it. If the choice is between sending ballots to soldiers or reports to Washington, I choose the former and I want election officials to be able to do the same.

I therefore offer this amendment to strike Section 101 and would ask for a recorded vote and urge Members to vote in favor of it.

Chairman SCHUMER. I recommend a vote against this amendment. The reporting provisions strengthen protection of voting rights of military voters by providing the Department of Defense and the Department of Justice with critical information on whether absentee ballots were timely transmitted to our service men and women.

The question is on the adoption of the amendment. And now we will ask the Clerk to call the roll.

The CLERK. Ms. Feinstein.

Senator FEINSTEIN. No.

The CLERK. Mr. Durbin.

Senator DURBIN. No.

The CLERK. Mr. Pryor.

Senator PRYOR. No.

The CLERK. Mr. Udall.

Senator UDALL. No.

The CLERK. Mr. Warner.

Senator WARNER. No.

The CLERK. Mr. Leahy.

Senator LEAHY. No.

The CLERK. Ms. Klobuchar.
[Pause.]
The CLERK. Mr. King.
Senator KING. Aye.
The CLERK. Mr. Walsh.
Senator WALSH. No.
The CLERK. Mr. Roberts.
Senator ROBERTS. Aye.
The CLERK. Mr. McConnell.
Senator MCCONNELL. [No response.]
The CLERK. Mr. Cochran.
Senator COCHRAN. Aye.
The CLERK. Mr. Chambliss.
Senator CHAMBLISS. [Aye by proxy.]
The CLERK. Mr. Alexander.
Senator ALEXANDER. [No response.]
The CLERK. Mr. Shelby.
Senator SHELBY. [No response.]
The CLERK. Mr. Blunt.
Senator BLUNT. [No response.]
The CLERK. Mr. Cruz.
Senator CRUZ. [No response.]
The CLERK. Chairman Schumer.
Chairman SCHUMER. No.

The CLERK. On this vote, the ayes are three (3). The nays are eight (8). The Amendment is not agreed to.

Chairman SCHUMER. Thank you. The no's have it, the amendment is not adopted.

Chairman SCHUMER. Next up is the Chairman's Mark. The question is on reporting the Chairman's mark—an amendment in the nature of a substitute—favorably to the Senate. Unless there is a request for a roll call vote, this will be a voice vote. Is there any further debate on the mark?

Senator ROBERTS. Thank you, Mr. Chairman for allowing a vote on my amendment.

In spite of my concerns about that section, which I may bring to the Floor, I believe on balance the bill is worth supporting and I will do so. I hope this legislation will improve the voting experience for our military and overseas voters, and am pleased to vote in favor of reporting it.

Chairman SCHUMER. Any request for a recorded vote?
[Pause.]
Chairman SCHUMER. All those in favor, say aye.
[Chorus of ayes.]
Chairman SCHUMER. All those opposed, say nay.
[Pause.]

Chairman SCHUMER. The ayes have it. The bill is reported to the Senate.

Chairman SCHUMER. The next item for consideration is S. 1937—The Elections Preparedness Requires Early Planning Act, known as the Elections PREP Act.

The question is on reporting the bill favorably to the Senate. Unless there is a request for a roll call vote, there will be a voice vote. Is there any further debate?

Senator ROBERTS. Mr. Chairman, I oppose this legislation and intend to vote no. The states are perfectly capable of developing disaster contingency plans without federal compulsion or assistance. The National Association of Secretaries of State just convened a task force to study this subject and issued a report with recommendations for how to deal with it. That report is available to states to formulate their contingency plans and federal legislation is not required to affect the goals of this legislation. Accordingly, I will vote no. I am not requesting a recorded vote.

Chairman SCHUMER. Any other debate? All in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. All those opposed, say nay.

[Nays.]

Chairman SCHUMER. The ayes have it. The bill is ordered reported to the Senate.

Chairman SCHUMER. The next item for consideration is S. 1947—The Government Publishing Office Act of 2014. Is there any debate?

Senator ROBERTS. Mr. Chairman, I support this legislation to more accurately reflect the modern mission and structure of the Government Printing Office and ask other Committee Members to do the same. We are changing printing to publishing. I guess it is all in the name. There is nothing in here about carbon paper.

Chairman SCHUMER. Is there any further debate? I think that settles it. Anyone want a recorded vote, if not we will do a voice vote.

Chairman SCHUMER. All in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. All those opposed, say nay.

[Pause.]

Chairman SCHUMER. The ayes have it. The bill is reported to the Senate.

Chairman SCHUMER. The final item for consideration is S. 2197—The Senate Stationery Bill. This question is on reporting the bill favorably to the Senate. Is there any debate?

Senator ROBERTS. Mr. Chairman, I am a co-sponsor of this bill and ask the other Members to support it. It eliminates an archaic requirement and will help the Senate procure the best products at the lowest cost. I will vote aye and I ask other Members to do the same.

Chairman SCHUMER. Any further debate? Any request for a recorded vote? We will do a voice vote.

Chairman SCHUMER. All in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. All those opposed, say nay.

[Pause.]

Chairman SCHUMER. The ayes have it. The bill is reported to the Senate. And I want to thank everyone for coming, I know you had busy schedules. We got a lot done. This was a record day for the Rules Committee. Senator Roberts, do you have any further remarks you might wish to make?

Senator ROBERTS. No, sir.

Chairman SCHUMER. Then the meeting is adjourned.

[Whereupon, at 11:29 a.m., the Committee was adjourned.]

HEARING—DOLLARS AND SENSE: HOW UNDISCLOSED MONEY AND POST-McCUTCHEON CAMPAIGN FINANCE WILL AFFECT THE 2014 ELECTION AND BEYOND

WEDNESDAY, APRIL 30, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 3:15 p.m., in Room SH–216, Hart Senate Office Building, Hon. Angus S. King, Jr. presiding.

Present: Senators Schumer, Udall, Klobuchar, King, Walsh, Roberts, and Cruz.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Julia Richardson, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Philip Rumsey, Legislative Correspondent; Jeff Johnson, Clerk; Matthew McGowan, Professional Staff; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Republican Communications Director; Trish Kent, Republican Senior Professional Staff; and Rachel Creviston, Republican Senior Professional Staff.

OPENING STATEMENT OF SENATOR KING

Senator KING. The Rules Committee will come to order. Good morning, everyone. The format that we are going to follow for the next few minutes will be that I will deliver an opening statement, then followed by Ranking Member Senator Roberts, and Chairman Schumer, and then we will hear from Justice Stevens, and following his testimony, we will have the panel, and if other Senators join us during the course, they will deliver their opening statements after Justice Stevens joins us.

I am deeply worried about the future of our democracy. For over 100 years, we have struggled with the issue of money and politics, always seeking to find the right balance between freedom of political expression and the corrosive influence of the unchecked flow of money to public officials.

We have had periodic scandals and periodic corrections. We have had new laws and new ways to evade those laws. But we have never before seen what is happening today. As we will learn this morning, a perfect storm of new forces—court opinions, clever political operatives, and the high stakes inherent in governmental decisions—have created a qualitatively new political landscape where candidates are compelled to raise more and more money, and yet, at the same time, have to contend with virtually unlimited spending by shadowy entities representing nameless donors.

What has occurred in the past five years represents revolutionary, not evolutionary, change in the way campaigns are financed in America. These are changes I view as a threat to undermine the fundamental principle of American democracy—one person, one vote. There are well-intentioned people, people who I respect, who believe that restrictions on who can give to campaigns and how much they can give trespass on cherished First Amendment freedom of speech protections.

Others, and I am among them, are worried that the recent decision's elimination of even modest limits on campaign contributions, combined with a Byzantine system that, in too many cases, masks disclosure of who is giving and allows a flood of so-called dark money into the process, has the very real potential to corrode the integrity of the system itself.

Historically, the flow of money has rested in and out of political campaigns on three pillars: Regulation of sources, regulation of amounts, and disclosure. Recent decisions have severely restricted our ability to control sources and amounts. But in those decisions—and I am referring, of course, to Citizens United and McCutcheon, the Court has explicitly invited Congress to utilize disclosure as the protection of the public interest in these situations.

Justice Kennedy and Justice Roberts, in their opinions, cite disclosure as the reason that the limitations do not have to be upheld. Unfortunately, the disclosure requirements that they mention in those opinions as the bulwark against abuse and corruption simply do not exist.

For example, according to a new study by the Center for Responsive Politics, total individual expenditures reported to the FEC by outside groups totals about $70 million to this point in 2014, nearly three times more than was spent at this point in 2010. That is the point I want to emphasize, is that this is not a gradual growth of a change of a few dollars here and there. What we have is an explosion of this kind of money, not only of outside expenditures, but also of expenditures where we do not know the source.

We have created a kind of parallel universe of campaign finance, the traditional candidate-based system with clear limits on sources and amounts and strict disclosure requirements and the independent system with no control of sources, no limits, and no disclosure.

Naturally, this troubling new world of campaign finance impacts how we as elected officials interact with the fund-raising process, quantitatively, in the amounts of money that elected officials need to be made. An average U.S. Senator—and of course, all Senators are above-average—but an average U.S. Senator running for reelection has to raise something on the order of $5,000 to $8,000 a day every day, 365 days a year for six years in order to accumulate the funds necessary to run for reelection. And I can tell you, at the rate of $5,000 to $6,000 a day, you very quickly run out of friends and family.

My concern here is the system. This is not a Democratic or a Republican issue, and the country does not benefit from an undisclosed contribution and an arm's race in contributions. Disclosure in this context is not an infringement on the First Amendment. But what we are allowing to happen before our eyes is already having

its inevitable effect, the erosion of confidence in our system and in us as stewards of our country's future.

The challenge here, the challenge before us is to find the balance between competing goods, the freedom to exercise our political voice on the one hand, and the public's interest in safeguarding the integrity of the political process on the other, to restore that balance in what feels like an increasingly unbalanced system.

I welcome our witnesses today and look forward to their contributions to these important deliberations. Senator Roberts.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman. I am pleased to be here today on this very important subject, and I brought my own chart. We in the minority do not have enough money for another display unit over there, so I would ask unanimous consent. We could put our chart up where you had your chart.

Senator KING. Without objection.

Senator ROBERTS. The chart bears the text of the First Amendment to the Constitution of the United States. And I believe that is what we are talking about today, the rights of citizens to express themselves, to make their views known on the issues that affect their daily lives and pocketbooks, or any other issue they wish to discuss.

The First Amendment protects those rights and it prevents the Government from restricting them. The exercise of those rights does not threaten our democracy. It is the attempt to restrict these rights that we must fear. We are living today with the consequences of the failed attempt to restrict them. This failure was not hard to perceive. It is not the fault of the courts or the Federal Election Commission.

It is the direct consequence of the poor decision Congress made when it passed the McCain-Feingold bill. I opposed that bill. I and others who voted against it did so because we knew it would restrict people's right to participate in the political process. It would not get money out of the system, but would simply divert it to other avenues.

Supporters of the bill, of course, denied it. They assured us it would not happen, that our system would be better. It should be clear now who was right and who was wrong. But rather than admit they were wrong, the proponents of speech regulation have just proposed new regulations. Because the courts have properly found much of their last efforts to be unconstitutional, they have proposed new regulatory schemes under the guise of disclosure.

No longer able to simply prohibit speech they do not like, they seek to prevent it by imposing onerous disclosure requirements on those who wish to speak. Now, respectfully, Mr. Chairman, as we consider suggestions for ways to improve the system, the last people we should be asking for advice at this hearing are those who helped write the law that created the problem in the first place.

Let us stop this fool's errand of speech regulation. Let us stop trying to prevent people from criticizing us. Let us stop demonizing citizens who exercise their First Amendment rights. Let us stop pretending more speech somehow threatens our democracy. We have nothing to fear from a free marketplace of ideas. We do, how-

ever, need to fear a Government empowered to investigate its own citizens for exercising their rights. The revelations of the Internal Revenue Service targeting of conservative groups and others have shown this to be a real danger.

We hear a lot about corruption when this issue is debated. I think for many people that the definition of corruption is the promotion of ideas with which they disagree. It is amazing how for years George Soros has been spending millions of dollars to promote liberal and progressive causes. None of my friends on the other side of the aisle seem to be concerned about it.

Now that the Koch family is spending money to promote free markets and private enterprise, we are supposed to believe that our democracy is at risk. That is absurd. Corporate spending is supposed to be a concern, but corporations have long exercised unfettered rights to express themselves, provided they were media corporations.

I am pleased to say that the Citizens United case changed that. The Supreme Court recognized the First Amendment does not allow this Congress to choose who gets to speak and properly ended this nonsensical distinction with the only consequence being that now more voices are heard. And I know, I know, there are some in this body who do not want those voices to be heard and they are doing everything they can to silence them.

Our majority leader, unfortunate, who has a fixation with the Koch family that can only be described as bizarre, takes to the floor on an almost daily basis to attack them. Why? I think it is because he fears they pose a threat to his hold on power, or the majority. He wants them to stop talking. Well, that is why the First Amendment begins, Congress shall make no law. The First Amendment does not allow us to silence those who oppose us. That applies to corporations, labor unions, Mr. Soros, and the Koch family. It applies to everyone.

Let us stop trying to do so, Mr. Chairman. Let us stop trying to impose regulations designed to deter and harass our opponents. Instead, let us just admit the mistake we made when we tried to regulate political speech in the first place. Let us remove those restrictions. Let us allow those who want to contribute and engage in our political system to give money where they want as long as they follow the law.

Everyone in this country has the right to express themselves, Mr. Chairman, even people who do not manage to get themselves invited to appear on television shows or to testify at Senate hearings. People, all people, individually and as groups, have every right to make their views known. Instead of trying to stop them, let us reinvigorate our system.

New restrictions and regulations are not going to improve the system. Getting rid of those we already have imposed will. That is the course we should take, Mr. Chairman. Simply, let us just do it. Thank you for your time.

Senator KING. Senator Schumer.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Thank you. First, let me thank you, Senator King, for suggesting this hearing and for your chairing the

hearing, as well as your invitation to Justice Stevens, who I look forward to hearing from.

Well, I think McCutcheon is a real turning point in our debate about money in politics. McCutcheon seemed to say that free speech absolutely defined, as McCutcheon does, allows anyone to spend any amount of money in any way in our political system. McCutcheon, carried to its logical extreme, will get rid of individual limits, will get rid of limits on corporations, will just allow money to totally, totally envelope our system.

It is frightening. It is frightening. And the reason we have this hearing is not because of some new ads—Koch Brothers have been doing ads for years and years—but because of the McCutcheon decision and its implications for our democracy. The bottom line is very simple. I respect my colleagues' fidelity to the First Amendment, but no amendment is absolute.

Most of my colleagues on the other side of the aisle support anti-pornography legislation. That is a limitation on the First Amendment. Most everyone here believes you cannot falsely scream fire in a crowded theater. That is a limitation on the First Amendment. We have many, many, many different laws that pose limits on the amendments because through 200-and-some-odd years of jurisprudence, the Founding Fathers and the Supreme Court have realized that no amendment, no amendment is absolute.

We have noise ordinances. Everyone accepts them. That is a limitation on the First Amendment. So if you impose a view that just when it comes to allowing one person to put the 7,112th ad on television that the First Amendment is absolute, but in so many other areas it is not, you have to ask why. You have to ask why.

And then, when many on the other side of the aisle do not support disclosure, which is actually an enhancement of the First Amendment, free debate, free knowledge, one wonders why. One wonders why. The First Amendment protection of free speech is part of what makes America great. So is the concept of one person, one vote. And when a small group of people, 700 in this case, who were affected by McCutcheon, have so much more power to influence the political process than everybody else, our democracy is at risk. That is the problem here.

There is a balancing test and there are many concepts in the Constitution, the concept of having a somewhat level playing field so that those who have overwhelming wealth and choose to spend it, whether they be on the left or the right, the laws we are proposing affect the Koch Brothers and George Soros, and should.

And so, because now legislation could bring disclosure, but could now will not stop the path McCutcheon is on, Senate Democrats are going to vote this year on my colleague, Tom Udall's constitutional amendment which once and for all would allow Congress to make laws to deal with the balance between equality, each vote is equal, each person is equal, and the First Amendment, a careful balance.

But not what the five members of the Supreme Court have said, no balance. We will bring that amendment to the floor shortly, and we will vote on it, and I will be working with Senator Udall and Majority Leader Reid, and hopefully every Republican who cares about honest elections, to bring it to the floor this year.

When the Supreme Court, or any of my colleagues, say that the Koch Brothers' First Amendment rights are being deprived, that they are not being heard, it defies common sense, it defies logic. And the same would apply to some very liberal person who put on 10,000 ads. The ability to be heard is different than the ability to drown out every other point of view using modern technology simply because you have a lot more money than somebody else who has an equally valid view.

So I hope that Senator Udall's amendment will track bipartisan support, but it will draw to a fine point where we are at, and that is that the First Amendment is sacred, but that the First Amendment is not absolute. And by making it absolute, you actually make it less sacred to most Americans.

We have to bring some balance to our political system. If people lose faith in this system, which they are rapidly doing, in large part, because they feel, correctly, that people with a lot of money have far more say in the actual political dialogue than they do, this great democracy could falter. We do not want it to happen. And the best way to stop it is to show the Supreme Court or limit the Supreme Court, show them that their absolutist view is wrong and support and amendment like Senator Udall's. Thank you, Mr. Chairman.

Senator KING. For the information of Senator Cruz, Senator Walsh, and Senator Udall who arrived after my introduction, the schedule we are going to follow is I am now going to invite Justice Stevens to speak, and then each of you will be asked to provide a statement, if you wish to do so. Justice Stevens, if you would join us at the table?

Justice John Paul Stevens is a retired Justice of the United States Supreme Court, was appointed to the Court in 1975 by President Gerald Ford, I think the third longest sitting Justice of the Supreme Court. Justice Stevens, I knew that you were a distinguished jurist, but my eye was caught by a headline in the paper over the weekend that says, Pope to Move John Paul for Sainthood. I realized later it was not the same John Paul.

In any case, we are delighted to have you here today. Thank you very much for joining us, Justice.

STATEMENT OF THE HONORABLE JOHN PAUL STEVENS, ASSOCIATE JUSTICE (RET.), UNITED STATES SUPREME COURT, WASHINGTON, D.C.

Justice STEVENS. Thank you very much, Senator. Senator King, Chairman Schumer, Ranking Member Roberts, and distinguished members of this Committee, I thank you for the opportunity to appear before you today to discuss the important issue of campaign finance.

When I last appeared before this body in December of 1975, my confirmation hearing stretched over three days. Today, I shall spend only a few minutes making five brief points. First, campaign finance is not a partisan issue. For years, the Court's campaign finance jurisprudence has been incorrectly predicated on the assumption that avoiding corruption or the appearance of corruption is the only justification for regulating campaign speech and the financing of political campaigns.

That is quite wrong. We can safely assume that all of our elected representatives and candidates for office are law-abiding citizens, and the laws against bribery provide an adequate protection against misconduct in office. It is fundamentally wrong to assume that preventing corruption is the only justification for laws limiting the First Amendment rights of candidates and their supporters.

Elections are contests between rival candidates for public office. Like rules that govern athletic contests or adversary litigation, those rules should create a level playing field. The interest in creating a level playing field justifies regulation of campaign speech that does not apply to speech about general issues that is not designed to affect the outcome of elections.

The rules should give rival candidates, irrespective of their party and incumbency status, an equal opportunity to persuade citizens to vote for them. Just as procedures in contested litigation regulates speech in order to give adversary parties a fair and equal opportunity to persuade the decision-maker to rule in their favors, rules regulating political campaigns should have the same objective.

In elections, the decision-makers are voters, not judges or jurors, but that does not change the imperative for the equality of opportunity.

Second, all elected officials would lead happier lives and be better able to perform their public responsibilities if they did not have to spend so much time raising money.

Third, rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions. An important recent opinion written by Judge Brett Kavanaugh of the D.C. Circuit, and summarily affirmed by the Supreme Court, Blumen against the Federal Election Commission, upheld the constitutionality of the Federal statute that prohibits foreign citizens from spending money to support or oppose candidates for Federal office.

While the Federal interest in preventing foreigners from taking part in elections in this country justified the financial regulation, it placed no limit on Canadians' freedom to speak about issues of general interest. During World War II, the reasoning behind the statute would have prohibited Japanese agents from spending money opposing the reelection of FDR, but would not have limited their ability to broadcast propaganda to our troops.

Similar reasoning would have justified the State of Michigan placing restrictions on campaign expenditures made by residents of Wisconsin or Indiana without curtailing their speech about general issues. Voters' fundamental right to participate in electing their own political leaders is far more compelling than the right of non-voters such as corporations and non-residents to support or oppose candidates for public office.

The Blumen case illustrates that the interest in protecting campaign speech by non-voters is less worthy of protection than the interest in protecting speech about general issues.

Fourth, while money is used to finance speech, money is not speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities

should not receive precisely the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries, actions that clearly were not protected by the First Amendment.

Fifth, and this perhaps is the most important thing I want to say, is the central error in the Court's campaign finance jurisprudence is the holding in the 1976 case of Buckley against Valeo that denies Congress the power to impose limitations on campaign expenditures. My friend, Justice Byron White, was the only member of the Court to dissent from that holding.

As an athlete and as a participant in Jack Kennedy's campaign for the Presidency, he was familiar with the importance of rules requiring a level playing field. I did not arrive at the Court in time to participate in the decision of the Buckley case, but I have always thought that Byron got it right.

After the decision was announced, Judge Skelly Wright, who was one of the Federal judiciary's most ardent supporter of a broad interpretation of the First Amendment, characterized its ruling on campaign expenditures as, quote, tragically misguided, unquote. Because that erroneous holding has been consistently followed ever since 1976, we need an amendment to the Constitution to correct that fundamental error.

I favor the adoption of this simple amendment, quote, Neither the First Amendment nor any provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office or their supporters may spend in election campaigns, unquote.

I think it wise to include the reasonable, the word reasonable, to ensure that legislatures do not proscribe limits that are so low that incumbents have an unfair advantage or that interfere with the freedom of the press. I have confidence that my former colleagues would not use that word to justify a continuation of the practice of treating any limitation as unreasonable.

Unlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who provide them with money than to the interests of the voters who elected them. That risk is unacceptable. Thank you.

[The prepared statement of Justice Stevens was submitted for the record:]

Senator KING. Mr. Justice, thank you very much for your considered remarks. We appreciate your willingness to share them with us here today. Thank you.

Justice STEVENS. Thank you very much.

Senator KING. You are excused.

In accordance with the process that we discussed at the beginning, I will now turn to Senator Cruz for an opening statement, if you choose to make one.

OPENING STATEMENT OF SENATOR CRUZ

Senator CRUZ. Thank you, Mr. Chairman, and I would like to thank Justice Stevens for being here and joining us. Prior to being in the Senate, I spent much of my professional career as an advo-

cate before the Court, and I must say it is a different position to be on this side of the dais rather than answering questions from Justice Stevens. And I will note that of all the Justices, Justice Stevens most often disagreed with the position of my clients.

And there was no Justice whose questions were more incisive, more friendly, and, frankly, more dangerous than Justice Stevens. Always with a twinkle in an eye, he would ask a question, "Counsel, would you not just agree with this small little thing?" And if you said yes, it would walk you down a road that would unravel the entire position in your case. So it is very nice to have the good Justice with us.

I want to thank all of the witnesses who are here for our second panel as well. This topic is a topic of great importance. Of the entire Bill of Rights, the First Amendment is the most important. It is the foundational right of every other right of citizens that is protected.

I will say that the issue of campaign finance reform, is perhaps the most misunderstood issue in all of politics, because campaign finance reform restrictions are always pitched as, "Let us prevent corruption, let us hold politicians accountable." And they do exactly the opposite. Every single restriction this body puts in place is designed to do one thing; protect incumbent politicians.

And it is powerfully good at that because, at the end of the day, there are three speakers in a political debate. There are politicians, there is the media, and there are the citizens. Campaign finance reform is all about silencing number three so that the politicians can speak unimpeded. And I will say there are colleagues of mine in both parties who will stand up and say, "These pesky citizen groups, they keep criticizing me."

Well, that is the nature of our democratic process. If you choose to run for public office, there are 300 million Americans who have a right to criticize you all day long and twice on Sundays. That is how our system was built. And I will tell you this, I am certainly one who will defend the rights of our citizens to speak out, whether I agree with their speech or not.

The Sierra Club has an absolute right to defend their views, as does the NRA. Planned Parenthood has an absolute right to defend its views, as does the National Right to Life. That is the way our system operates. And campaign finance reform is all about lower the limits, lower the limits, restrict the speech, restrict the speech.

And what happens is the only people who can win elections then are incumbent politicians, because incumbent politicians have armies of lobbyists and entrenched interests that raise the money and fund them, and any challenger that comes across has to raise the money. And if you do not have an army of thousands upon thousands of bundlers, you cannot effectively challenge an incumbent, and that is not the unintended effect of these laws. That is the intended effect.

Our current system makes no sense. Right now we have super PACs that are speaking on the sidelines. And you have politicians who play games. Since they cannot speak directly under the law, they simply will say, "Who will rid me of this troublesome cleric?" And a group springs up and speaks and if this group is supporting you, you kind of hope what they say bears some resemblance to

what you believe, but you are not allowed to talk to them. So if they happen to get it wrong, there is not a darn thing you can do.

A far better system would be to allow individuals unlimited contributions to candidates and require immediate disclosure. As John Stuart Mill said, let the marketplace of ideas operate, let more speech counter bad speech, rather than this silly game we play right now.

Now, I will note there are a series of canards that get discussed in this issue. The number one canard is money is not speech. We can restrict money because it has nothing to do with speech. That statement is categorically, objectively false. Money is and has always been used as a critical tool of speech, whether publishing books, or putting on events, or broadcasting over the airwaves.

And I would suggest to each of the witnesses and to everyone thinking about this issue, ask yourself one question. For every restriction that members of Congress or advocates put forth, ask yourself one question. Would you be willing to apply that same restriction to the New York Times? And let me know. The New York Times is a corporation, so anyone who says corporations have no rights, fine.

There are some who say, "Let us restrict political speech within 90 days of an election." Very well then. Would you be willing to say the New York Times may not speak about politics within 90 days of an election? McCutcheon said you cannot tell citizens they can only support nine candidates. If they want to support 10 or 11 or 12, they are entitled to do so.

If you think McCutcheon is wrong, would you be willing to tell the New York Times, "You may only speak about nine candidates, or only candidates in New York?" Look, those restrictions are all obviously and facially unconstitutional, and I would ask you, Why does a corporation like the New York Times or CBS or any other media corporation, in Congress's view, enjoy greater First Amendment rights than individual citizens?

Our democratic process is broken and corrupt right now because politicians in both parties hold onto incumbency. We need to empower the individual citizens, and I will say this in closing. I agree very much with Justice Hugo Black who famously said, with regard to the First Amendment, the words Congress shall make no law abridging the freedom of speech means exactly what it says.

No law means no law, and we should be vigorous protecting the rights of individual citizens to be engaged in the political process and hold every one of us on both sides of the aisle accountable. It is the only thing that keeps our democratic process working. Thank you, Mr. Chairman.

Senator KING. Senator Udall.

OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you very much, Chairman King, and good morning, and thank you for holding this very important hearing. I want to thank the witnesses that I know are going to be here later to discuss what I think is a very, very important topic.

Let me say to the Chairman of the Rules Committee, Chairman Schumer, I really appreciate your statement that we are going to have a vote this year on a constitutional amendment. I think it is

about time. We have had several votes. I think we had one in 1997, we had one in 2001, but these rulings by the Supreme Court have gone so far that we are really ripe for having a vote and trying to coalesce around something.

I know that Justice Stevens has left, but I want to say the words I had in my statement to him. I am sure it will get to him. As the author, Justice Stevens, of the dissent in Citizens United, you wrote that, "The Court's ruling threatens to undermine the integrity of elected institutions across the nation."

And I have found myself agreeing with Justice Stevens. Unfortunately, this is another of those times. Four years after Citizens United, the damage continues. The Court's decision this month in McCutcheon was one more step in dismantling our campaign finance system. It is now crystal clear an amendment to the Constitution is necessary to allow meaningful campaign finance rules.

And as I heard Chairman Schumer talk about the issue of it being absolute, that is what we are talking about, is allowing meaningful campaign finance rules, not in any way abridging the First Amendment.

Most Americans do not have unlimited dollars to spend on elections around the country. They only get their one vote. They can support one candidate, the one who represents their district or state, but for the wealthy and the super-wealthy, McCutcheon says they get so much more. That decision gave them a green light, full speed ahead to donate to an unlimited number of candidates.

Now a billionaire in one state gets to influence the elections in 49 other states. Under McCutcheon, one donor can dole out $3.6 million every two years, just like that. Consider this: An American citizen working full-time making minimum wage would have to work 239 years to make that kind of money, 239 years.

The Court has shown a willingness to strike down sensible regulations by a narrow majority and is returning our campaign finance system to Watergate-era rules, the same rules that foster corruption, outraged voters, and promoted campaign finance standards in the first place.

But our campaign finance system was in trouble long before. The Citizens United and McCutcheon decisions just picked up the pace. The Court laid the groundwork many years ago, and I know Justice Stevens mentioned this, in the case of Buckley versus Valeo. It goes all the way back to 1976.

The Court ruled that restricting independent campaign expenditures violates the First Amendment right to free speech. In effect, money and speech are the same thing. This is tortured logic and ignores the reality of political campaigns. The outcome is not surprising. Elections have become more about the quantity of cash and less about the quality of ideas, more about special interests and less about public service.

We have a broken system based on a deeply flawed premise. That is why I introduced SJ Res. 19 last June. It now has 35 cosponsors, and I think—I believe Senator King and Senator Schumer are both on it. It is similar to bipartisan resolutions in previous Congresses. Actually, it started with Senator Ted Stevens, I believe, back in 1983. So it has true bipartisan roots and is consistent with the amendment that Justice Stevens has proposed.

It would restore the authority of Congress stripped by the Court to regulate the raising and spending of money for Federal political campaigns. This would include independent expenditures and it would allow states to do the same at their level. It would not dictate any specific policies or regulations, but it would allow Congress to pass sensible campaign finance reform, reform that withstands constitutional challenges.

In the Federalist Paper Number 49, James Madison argued that the U.S. Constitution should be amended only—and he used this term—only in great and extraordinary occasions should we go with a constitutional amendment, and I agree with him. I also believe we have reached one of those occasions. Free and fair elections are a founding principle of our democracy. They should not be for sale to the highest bidder.

This effort started decades ago. There is a long, and I might add, bipartisan history here. Many of our predecessors from both parties understand the danger. They knew the corrosive effect money has had on our political system. They spent years championing the cause.

In 1983, the 98th Congress, Senator Ted Stevens, introduced an amendment to overturn Buckley, and in every Congress from the 99th to the 108th, Senator Fritz Hollings introduced bipartisan constitutional amendments similar to mine. Senator Schumer and Cochran continued the effort in the 109th Congress. And that was before the Citizens United and McCutcheon decisions, before things went from bad to worse.

The out of control spending after Citizens United has further poisoned our elections, but it has also ignited a broad movement to amend the Constitution. McCutcheon is the latest misguided decision, but it will not be the last. It is time for Congress to take back control and pass a constitutional amendment.

And again, Chairman King and Chairman Schumer, I thank you for holding this hearing and I think it is very, very timely on the heels of McCutcheon. Appreciate it.

Senator KING. Thank you, Senator.

OPENING STATEMENT OF SENATOR WALSH

Senator WALSH. Thank you Senator King, Chairman Schumer, and Ranking Member Roberts.

Citizens United unleashed a torrent of dark money into our elections, allowing wealthy donors and corporations to shuffle money among third party groups to evade disclosure laws and influence elections.

Last month, the Supreme Court again promoted the influence of the wealthy in our democracy by striking down a 40-year-old limit on how much the richest donors can give to candidates and parties.

As it is, less than one-percent of Americans provide over two-thirds of contributions. Small-dollar donors, the average American, are being made irrelevant by a campaign finance system that allows wealthy donors to secretly fund attack ads.

Concentrations of wealth and dark money have a big impact in Montana. Our airtime is cheap and our state contribution limits are relatively low. Montana's voters don't yet need to be able to write million dollar checks to get a candidate's attention, but this

ease of access makes Montana's elections a prime target for dark money.

Indeed, Montana has frequently been at the center of the campaign finance debate. Our state ban on corporate campaign expenditures and donations, passed by voter initiative in 1912 after William Clark used his mining wealth to buy a Senate seat, was struck down because of Citizens United. Since then, we've seen dark money groups like American Tradition Partnership ignore our disclosure laws and illegally coordinate with candidates to influence elections.

The role of average Americans in our democracy is in danger if wealthy donors and secretive groups can spend vast amounts of undisclosed money to influence elections.

We must act to strengthen our disclosure requirements, and we must find a way to empower small, individual donors. Otherwise, our elections will be controlled by the few Americans that can afford to write million-dollar checks. I want to thank the Chair and the witnesses, and I look forward to their testimony.

Senator KING. If our next panel could take their seats, I will introduce you. We are going to hear from this panel in alphabetical order. First is Mr. Donald F. McGahn, a partner with the law firm of Patton Boggs. Previously he was a Commissioner and Chairman of the FEC. He also served as the general counsel for the National Republican Congressional Committee for ten years.

Second is Norman Ornstein, Resident Scholar at the American Enterprise Institute, well-known columnist, and frequent commenter on campaign finance issues. Third is Mr. Trevor Potter, President and General Counsel for the Campaign Legal Center. Previously he was a Commissioner and Chair of the FEC and later served as general counsel to John McCain's 2008 presidential campaign.

Fourth, Ms. Ann Ravel, former Chair of the California Fair Political Practices Commission, currently Vice Chair of the Federal Election Commission. And finally, Neil P. Reiff, who is a founding member of the law firm of Sandler, Reiff, Young & Lamb, and a former deputy general counsel for the Democratic National Committee.

Thank you all for joining us today and I welcome your opening statements. If you have more lengthy statements, they can be submitted for the record, but we look forward to hearing from you and then we will discuss these issues. Mr. McGahn.

STATEMENT OF DONALD F. McGAHN, ESQ., PATTON BOGGS, LLP, WASHINGTON, D.C.

Mr. MCGAHN. Chairman King, Ranking Member Roberts, and members of the Committee, thank you for the opportunity to appear before you today. It is an honor and a privilege, particularly in light of the appearance of former Justice John Paul Stevens. Per the Committee's request, I submitted written testimony prior to the hearing, jointly filed with another panelist here today, Neil Reiff.

Mr. Reiff and I are practitioners in the area of campaign finance and our views are shaped by decades of experience in advising and representing real people who wish to participate in politics in a legally compliant manner.

Although we have similar clients, and are not here to represent the views of any of those clients, we differ in one significant way. One of us represents Republicans, conservatives, and Libertarians; while the other represents Democrats, liberals, and progressives. Such a partisan difference in the modern world would ordinarily preclude any notion of common ground, but not here.

Recently we co-authored an article that was published in Campaigns and Elections magazine that explained our views on the good, the bad, and the ugly of the current law, particularly the aspects imposed by the Bipartisan Campaign Reform Act of 2002, commonly called McCain-Feingold.

In our article which we have already submitted to the Committee, we explained that much of what many perceive to be the problems in the current system can be traced back to the underlying statute itself. As we predicted back in 2002, McCain-Feingold has become a warped version of itself, where heavily regulated candidates and party committees have taken a backseat in our current system.

We suggest a different approach, one that flows from a different premise firmly grounded in our shared First Amendment tradition, that in order for voters to be truly informed, they need to hear directly from the candidates themselves. Thus, the candidate's voice ought to be the central voice in American democracy. In our view, the parties are the best vehicles to assist with achieving that goal. In other words, political parties are uniquely situated to echo their candidate's message.

Critically, our views and suggestions are not designed to simply transfer relevancy back to the parties for relevancy's sake. Recall that the plaintiff in Buckley versus Valeo, Senator James Buckley of New York, was not nominated by either of the two major parties, and it was precisely that sort of candidate, one outside of that era's establishment, that felt the burdens of that wave of reform the most.

We care, first and foremost, about grassroots and local activity by ordinary citizens, and believe that McCain-Feingold in its effort to change the culture of Washington, D.C. has reached too far into state and local politics and contributed to pushing local activists outside the parties.

Unfortunately, current law has placed parties at a competitive disadvantage and has federalized virtually all state and local party programs, which brings us to the 2014 campaign landscape. Certainly direct contribution limits remain, albeit at artificially low levels that do not match the rate of inflation that has occurred since they were first instituted.

For example, the $10,000 state party limit in today's dollars ought to be, if adjusted for inflation, about $48,000. In addition to regular inflation, the cost of campaigning has skyrocketed, particularly due to the cost of television advertising. Other prophylactic measures imposed by the law have been struck by the courts, except those that limit the ability of political party committees to effectively assist their candidates.

Candidates are struggling to be heard over the din of single issue and other groups and the party committees who historically had been a candidate's natural ally has significantly diminished and es-

sentially been replaced by independent super-PACs and single-issue non-profits. So that just seems backwards and, ironically, is the opposite of the so-called reform.

Some claim more disclosure is the answer. Separate and apart from my work with Mr. Reiff, in my own view, this is not the answer. Certainly campaign disclosure has survived judicial review, albeit in a more limited form than that which was originally passed. But disclosure has had a mixed record in the courts, sometimes upheld, but often struck or limited.

Whether one looks to Talley versus California, Thomas v. Collins, NAACP versus Alabama, Buckley versus Valeo, or most recently, Davis versus FEC, disclosure has its limitations. As Justice John Paul Stevens himself said, writing for the Court's majority in McIntyre versus Ohio, quote, Anonymity is a shield from the tyranny of the majority. It exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular, unquote.

Justice Stevens also said, speaking for the Court, quote, the freedom to publish anonymously extends beyond the literary realm, unquote. Continuing, On occasion, quite apart from any threat or prosecution, an advocate may believe her ideas would be more persuasive if the readers are unaware of her identity. Anonymity, thereby, provides a way for a writer who may be personally unpopular to ensure that readers will not be prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric where the identity of the speaker is an important component of the many attempts to persuade, the most effective advocates have sometimes opted for anonymity, unquote.

And what of McCutcheon versus FEC? We anticipate that McCutcheon will help address the unfairness, the parties, and most candidates to some degree, but it did not strike limitations and prohibitions on direct contributions to candidates and party committees. What was struck was the so-called biennial limit, essentially an umbrella limit that prevented citizens from giving to more than a few handful of candidates and party committees.

Thus, the impact of McCutcheon. More candidates, including challengers and those that are not seen as safe bets, will have access to additional financial support. Hopefully, direct contributions will no longer be the province of a select few well ensconced within the ruling class.

Similarly, the upstart challenge of candidates' natural ally, the political party, will no longer have to compete with each other for resources to the degree caused by McCain-Feingold. But this sort of change is not enough to fix what ails our system of privately funded campaign finance. McCain-Feingold must be revisited. Thank you for the opportunity to present these views.

[The prepared joint statement of Mr. McGahn and Mr. Reiff was submitted for the record:]

Senator KING. Thank you, Mr. McGahn. Mr. Ornstein.

STATEMENT OF NORMAN J. ORNSTEIN, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. ORNSTEIN. Thanks so much, Mr. Chairman, and it is really a pleasure to be here to talk about this issue. I want to start by commending Senator Cruz for his full-throated support of disclo-

sure, and I look forward to his vote for the DISCLOSE Act when it comes up in the Senate.

Senator KING. I wrote that down myself.

Mr. ORNSTEIN. I also want to thank Senator Roberts for putting up the text of the First Amendment, which I read and re-read as I have done so many times and I am still looking for the word money in the First Amendment. And I just have to say that if money is defined as speech, then the rights of citizens as equals in this process to participate simply gets blown away. Those who have lots of money have lots of speech; those who have little money have very little or no speech.

Having said that, I want to really talk about two larger concerns that are generated by the multiple recent moves that I believe have knocked the pins out from under the regulatory regime that has long operated in American politics.

I wrote my testimony going back to the Tillman Act in 1907, but as I have reflected on it, it really does take us back at least to the 1830s, and the two things I want to talk about are, first, the corrosive corruption that has caused when you remove the modest limits on money that have existed, and second, a real focus of the hearing, of course, is the efforts to limit disclosure and enable these huge flows of dark money to enter the system without the accountability necessary in a democratic political system.

As I look through history, what we know is that the focus on corruption, the concerns about corruption and money are not new at all. They go back at least to an attempt, in 1837, to prohibit the parties from shaking down Government employees and giving contributions.

As historian John Lawrence noted, Abraham Lincoln, who I believe was a Republican, warned that concentrated capital had become, quote, enthroned in the political system, and he worried about an era of, quote, corruption in high places until the republic is destroyed. I have to believe that if Abraham Lincoln were around today, he would be reinforced in that particular judgment.

As we went through the corruption in the Grant Administration that led to the Pendleton Act in 1883, the corruption involving outsized corporation influence on President Theodore Roosevelt that led to the Tillman Act in 1907, the Teapot Dome scandal that resulted in the Federal Corrupt Practices Act of 1925, the abuse of Federal employees that led, in 1938, to the passage of the Hatch Act, the Taft-Hartley Act in 1947, the Watergate scandal spurring the Federal Election Campaign Act of 1974, and that was revised, of course, by Buckley, and on through the abuses of soft money and in other ways that brought about the Federal Election Campaign—the Bipartisan Campaign Reform Act of 2002.

It was scandals that led to corruption that led to change. All of that focus was turned on its head by Citizens United brought as a very narrow, as applied, decision and then broadened out to basically take away almost all of those protections, at least going back to 1907, and then to McCutcheon.

Now, I want to make a couple of broad points, particularly about McCutcheon. Despite some of the other focal points, what has alarmed me the most about the McCutcheon decision was Justice Roberts basically now taking corruption out of the equation, and

the appearance of corruption entirely out of the equation, and defining corruption in the narrowest way, as a quid pro quo that would only be applicable in a case like ABSCAM or its more popularized American Hustle variety where you have videotape and an exchange of money in return for a favor.

That is so far away from the real world, and in particular now with McCutcheon, where officials, elected officials can solicit large contributions, something that we tried to restrain deeply in the McCain-Feingold bill. It takes me back to an era that I remember well where we had president's clubs and speaker's clubs and leader's clubs around here with a menu of access.

Give $10,000 and you get to meet with all the Committee chairs. Give $25,000, you could have a one-on-one with the Speaker. This is a trade of access-for-money and it leads down a dangerous path and a path that becomes even more dangerous when we do not have disclosure of who is involved with a lot of these contributions.

Frankly, the notion that McCutcheon is going to enhance disclosure was, I think, blown out of the water by Justice Breyer's very compelling dissent, and what we have already seen happening within a day after McCutcheon was passed where high-priced lawyers, some of whom are in this room, are working very feverishly to make sure that these contributions get channeled through multiple committees back and forth in different ways so that we will not have any effective disclosure.

Let me end with just a few recommendations for the Committee or for what Congress could do from now on. First, Congress should make every effort to pass the DISCLOSE Act. Let us get some reasonable disclosure. Second, the Senate should hold public hearings, and this Committee, on the dysfunctional Federal Election Commission and look to reform it to make it a reasonably functional body that acts to enforce the law, not to thwart it.

Third, for every hearing that we see on the purported scandal at the IRS, which is trying to apply the law now, which says that organizations called 501(c)(4) shall be exclusively social welfare organizations, we should have a hearing on the real meaning of social welfare organizations and the need to clarify those regulations.

Fourth, the Senate should pass a rule amending its ethics code to make it a violation for Senators or senior staffers to solicit the large contributions for party committees now allowed under McCutcheon. Next, you should consider the broader reform of the campaign finance system, and I am delighted that there will be a vote on Senator Udall's constitutional amendment.

We have a lot of work and a lot of heavy lifting to do. The next huge scandal is going to bring about a new drive for reform, but before that, I fear that things will get a whole lot worse. Thank you.

[The prepared statement of Mr. Ornstein was submitted for the record:]

Senator KING. Thank you, sir. Mr. Trevor Potter.

STATEMENT OF TREVOR POTTER, ESQ., PRESIDENT AND GENERAL COUNSEL, CAMPAIGN LEGAL CENTER, WASHINGTON, D.C.

Mr. POTTER. Mr. Chairman, thank you for the opportunity to testify today, Senator Roberts, Senator Udall. I appreciate the opportunity to be here to talk about these important issues.

I know, Mr. Chairman that you have said that you would like the focus to be on the McCutcheon case and the issue of disclosure and the lack of disclosure. I would make two brief points in response to testimony and comments today about the McCain-Feingold law.

First, I was pleased to see the endorsement by my colleagues on this panel, Mr. McGahn and Mr. Reiff, in their written testimony today of the McCain-Feingold goal of prohibiting, "six and seven-figure contributions", to national party committees, "in exchange for access to Executive Branch personnel as well as members of Congress."

I agree such huge contributions were and are potentially corrupting and give rise to the appearance of corruption, and thus, are bad for our democracy. I worry that they will resurface after the McCutcheon decision through the device of contributions to party committees participating in joint fundraising committees. I also worry that the Supreme Court's majority in Citizens United and McCutcheon does not share the same concern about the corruption inherent in Congress or the Executive Branch selling access that Mr. McGahn, Mr. Reiff, Mr. Ornstein and I do.

My second point about party committees under McCain-Feingold is that they have actually done quite well financially. Look at the picture of two elections, 2000, the last presidential campaign before McCain-Feingold, and 2012, our most recent.

In 2000, the two political parties and their presidential candidates raised and spent a combined total of $1.1 billion in that election, a huge sum. Today, adjusted for inflation, that would be $1.45 billion. Compare that to the amount spent in the most recent election by the parties and their candidates. In 2012, the total was $2.5 billion, double the actual amount, up 80 percent in inflation-adjusted dollars.

It is true that outside groups also spent significant sums in 2012, but the national party committees and their candidates clearly were well-resourced, better than before McCain-Feingold.

In terms of disclosure, or the lack of disclosure, my written testimony describes how we have ended up in a situation where the Supreme Court stated in Citizens United the importance to our democracy of full disclosure of the sources of campaign funding, but we have less and less of it. My written testimony says that the FEC has deadlocked repeatedly on whether to issue a Notice of Proposed Rulemaking to deal with the question of disclosure after Citizens United. That is correct. The Commission appears to still be deadlocked on this issue.

However, I would like to note for the record that the Commission, in late 2011, managed to issue a Citizens United rulemaking notice that did not mention disclosure. The Commission even had a hearing, but that is the end of the story. No new regulation, no action on disclosure.

Mr. Ornstein's written testimony demonstrates how dramatically disclosure of the sources of funding of public advertising has fallen. In 2004, the first election under McCain-Feingold, 98 percent of outside groups running campaign ads disclosed their donors. A few years later, that number was down to 34 percent. In absolute dollars, the amount spent on advertising, only 40 percent was disclosed as to source in 2012 by these outside groups.

Why is this a problem? Let me turn to Justice Kennedy's explanation in Citizens United. He said, "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."

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.

So Justice Kennedy said the deal was unlimited independent expenditures, but full disclosure of funders. And today, we have only half the deal, and as Justice Kennedy says, speaking for eight justices, that is a problem for our democracy.

How can shareholders hold their corporations accountable for the shareholder money spent in political campaigns if they have no idea what is being spent, and for and against which candidates? How can voters hold elected officials accountable if they do not know which moneyed interests are financing those officials' election?

Finally, how can the electorate, voters, make informed decisions and give proper weight to different speakers and messages, as the Court says is important to the functioning of our democracy, if voters do not know who is financing the constant barrage of advertising run by these groups? Thank you, Mr. Chairman.

[The prepared statement of Mr. Potter was submitted for the record:]

Senator KING. Thank you, Mr. Potter. Our next panel member is Ann Ravel, former Chair of the California Fair Political Practices Commission and currently Vice Chair of the Federal Election Commission. Ms. Ravel, thank you for joining us.

STATEMENT OF THE HONORABLE ANN M. RAVEL, VICE CHAIR, FEDERAL ELECTION COMMISSION, WASHINGTON, D.C.

Ms. RAVEL. Thank you, Mr. Chairman, Ranking Member Roberts, and Senator Udall. Thank you for inviting me to testify today. As indicated, I am the Vice Chair of the Federal Election Commission, but I am not testifying in that capacity today, nor am I speaking for the Commission. Instead, my testimony concerns a case pursued during my tenure as Chair of the California Fair Political Practices Commission, FPPC, to expose dark money in a California election.

FPPC versus Americans for Responsible Leadership—and I am going to use the word of the day—is a Byzantine story of campaign contributions being funneled all over the country in an apparent effort to avoid revealing to the public who is behind political campaigns.

We discovered that networks of non-profits anonymously injected millions of dollars into our election by using shell corporate entities, wire transfers, and fund-swapping. This allowed donors to skirt disclosure laws and cloak their identities from the public view.

Just a few weeks before the 2012 election, a California political action committee, which was focused on supporting one and defeating another ballot measure, received an $11 million contribution. This was the largest anonymous contribution ever made in the history of California elections. The contribution came from an Arizona non-profit, Americans for Responsible Leadership, or ARL, which had never before spent a dime in California.

After a complaint was filed with the FPPC, we attempted to determine whether ARL abided by the requirements of California law to disclose the source of the contribution. We eventually had to seek relief in court. The California Supreme Court ruled unanimously in an emergency Sunday session that ARL had to hand over its records.

Because of this, the day before the election, ARL revealed that the sources of the $11 million were two other non-profits, one based in Virginia and another in Arizona called CPPR. ARL admitted that it functioned solely as an intermediary to receive the money from the two non-profits and funnel it to the California political action committees.

This is a clear violation of the law that prohibits making contributions in the name of another. After the election, a full investigation found that approximately $25 million raised from California donors who wished to remain anonymous went to the Virginia non-profit and then was transferred to the other non-profit, CPPR.

There was a tacit understanding that CPPR would direct other funds back to California in the same amount or more through an intricate web of groups. After passing through multiple non-profits around the country, $15 million was then returned to California to the original political committees to spend on the ballot measures. $11 million of that money was funneled through ARL and $4 million through an Iowa non-profit.

Because of the FPPC litigation that was pending, the remaining $10 million of the original $25 million raised from the California donors was not anonymously pumped back into the California election. The FPPC, which is a bipartisan commission, unanimously levied a record-setting fine of $1 million, and also sought disgorgement from the recipient committees of the $15 million in improperly disclosed funds.

The FPPC's investigation and litigation demonstrates clearly that public officials from both parties can work together to uphold disclosure laws, but the story of FPPC versus ARL also shows that dark money is a national problem that is best solved on the Fed-

eral level. I would be glad to answer your questions about this case. Thank you again for the opportunity to speak.

[The prepared statement of Ms. Ravel was submitted for the record:]

Senator KING. Thank you for joining us today. Finally, Neil P. Reiff, as I mentioned, a lawyer here in Washington and former Deputy General Counsel for the Democratic National Committee. Mr. Reiff.

STATEMENT OF NEIL P. REIFF, ESQ., SANDLER, REIFF, YOUNG & LAMB, WASHINGTON, D.C.

Mr. REIFF. Mr. Chairman, thank you for the opportunity to testify today. I am here today as a practitioner in the field of campaign finance law and I represent over 40 Democratic state party committees. As a recent article explains, McCain-Feingold has had a profound effect on state and local party committees, and I would like to provide a couple of examples that illustrate how the law has federalized most of the state parties' activities in connection with state and local elections.

As Mr. McGahn said, it ought to be revisited. In our article, we agree that national party soft money ban and the limitation on solicitations by national party officers, Federal candidates, and officeholders achieve the goals to address soft money practices at the national level at the time of its passage.

However, Congress could have and should have stopped there. Instead, with little forethought to its consequences, McCain-Feingold extended its reach to state and local party committees who, unlike national party committees, were thoroughly invested and acted in state and local elections.

Under McCain-Feingold, state parties have been subject to a labyrinth of regulation that seeks to intercept all of their activities and force them in the Federal system, regardless of whether those activities have any relation to Federal elections or candidates. McCain-Feingold federalized all elections through its introduction of a new term, Federal election activity, which subjected traditionally local activities, such as voter registration and get-out-the-vote to Federal regulation and limitation.

The implementation of this new concept has proven rocky. When passed, it was claimed to be a narrowly targeted anti-circumvention measure. Defense of the law followed suit and minimized the reach of the new law. After the law was upheld in McConnell versus FEC, however, supporters changed their tune and argued that the Federal Election Commission, the agency charged with enforcing the law, was not reading the new mandates broadly enough. Additional litigation ensued and courts instructed the FEC to rewrite and broaden its rules governing state and local parties.

For example, under the FEC's recently redefined definition of get-out-the-vote, essentially all public communications undertaken by a state party committee, even those made totally independent of any Federal candidate involvement, are subject to Federal law merely by exhorting the voter to go vote for a state or local candidate. Therefore, if a party committee wishes to air a television or radio ad that tells listeners or viewers to go vote for Smith for Gov-

ernor, Federal law may mandate that this advertisement be paid for entirely or in part with Federally regulated funds.

Prior to McCain-Feingold, state law governs state or local candidate support, but today, parties are governed by Federal law; whereas, a non-party group could run the same exact advertisement free of such Federal limitation.

In addition, under the FEC get-out-the-vote definition, if a party committee sends out a mailing on behalf of a state or local candidate and merely informs the voter on when the polls are open, the location of their polling place, or how to obtain an absentee ballot, Federal law regulates and limits the funding of the mail piece based upon the provision of such information in the mailer even when the mailing makes no reference to any Federal candidate.

It is common practice for state parties to avoid including such information in mailings in order to avoid federalizing those communications. Simply put, party committees have been muzzled when it comes to their ability to inform voters of the most basic voting information if they want to avoid being subject to Federal regulation. We cannot conceive of any policy justification that would support this, particularly when other groups who engage in the exact same sort of activity do so without such regulation.

McCain-Feingold has had other detrimental effects. Its federalization of state parties has created disincentives for state parties to run joint campaigns that feature the entire party ticket. Prior to McCain-Feingold, it was commonplace for state parties to pay for communications that featured candidates from the top of the ticket to the bottom of the ticket.

In addition, state and local candidates have bypassed party committees when engaging in advocacy and get-out-the-vote activities due to the incompatibility of Federal and state law. The current structure of the law has caused a significant demise in state and local party relevancy as funding sources seek out less regulated organizations such as Federal, state, and local super PACs who may independently spend money without any restriction on how those communications are funded and how much voting information that they can provide.

The demise of parties has had serious implications for the American political system. Party committees have played a vital role in grassroots campaigning. Historically, parties have been instrumental in delivering positive party messaging, an increasing turnout in American elections to grassroots voter contact methods, now what some may characterize as single issue outside groups have come in to fill the void.

Although such activities are perfectly legal, it seems to be exactly the opposite system of what was envisioned by proponents of reform. Recently, the Association of State Democratic Chairs passed a unanimous resolution at its meeting in November of last year that calls on Congress and the FEC to reevaluate how state and local party committees are regulated.

We have provided a copy of this resolution and legislative recommendations made by the ASDC for your review. None of the proposals made by the ASDC advocate for the repeat of any contribution limit. Rather, the ASDC seeks common sense regulation that

balances the need to have vital party organizations along with the need to provide safeguards against political corruption.

Although Mr. McGahn and I each have a number of ideas and suggestions regarding specific changes to the law, we both believe that any common sense steps to help revitalize state and local party committees would be helpful. I have a few examples.

Refine and simplify the existing volunteer exemptions for grassroots activities to make them easier to use by state party committees and consider expanding them to other grassroots activities.

Repeal the McCain-Feingold provisions that have needlessly federalized joint and non-Federal campaign activities undertaken by state party committees. In the alternative, modify the FEC's current interpretation of the existing rules to scale back the expansive scope that essentially federalizes all party campaigning on behalf of state and local candidates.

And finally, index contribution limits to party committees as these limits were inexplicably excluded from the contribution indexing provisions provided for by McCain-Feingold. Similarly to the extent that limitations on coordinated party expenditures are still required, update those limits to more closely reflect modern economic reality.

In the short time we have today, we can only briefly touch upon the Byzantine nature of Federal regulation that state parties are subject to. Thank you for the opportunity to present our views.

Senator KING. Thank you, Mr. Reiff. We are going to have seven-minute question rounds. I would like to begin. First, the term Byzantine has been used a couple of times. This is a chart prepared by the Center for Responsive Politics that is a chart of money in 2012. I think we are insulting the Byzantines, frankly, by likening this to their conduct. This chart will be available in larger form.

It is illustrative of what is going on. I did a rough calculation. There are $300 or $400 million here that is flowing through all of these various organizations. They have even come up with a name which I think is a marvelous one, a disregarded entity. That is—I do not know quite what that it is. It is an oxymoron, I would think.

Mr. Ornstein, in preparing for this hearing, to coin a phrase, my conclusion was it is worse than I thought. We got a report just yesterday from the Wesleyan Media Project, which is a very interesting project that does not try to track contributions, because a lot of them are not disclosed, but tracks ads on television all over the country and then attributes a value to them based—estimated value—based upon the air time in the media market. And, of course, it is only air time. It is not production or other costs.

But the startling thing, this is spending by non-disclosure groups' cycle to date, in other words, to April 29th, yesterday. And what struck me is the gigantic growth in these independent expenditures. And that is what I meant in my opening statement, that this is not a little incremental change. This is a revolutionary change. And the same thing, this is non-disclosure money cycle to date. This is outside spending cycle to date and these are the off-year elections, and you can see between 2010 and 2014 an enormous growth, almost ten times more.

Would you say that this is an accelerating problem and that is one of the reasons we should have to address it?

Mr. ORNSTEIN. It is an exploding problem, Mr. Chairman, and I think what we have seen is a set of very often explicit efforts to try to hide where the money is coming from. It is not only through these—I will not call them Byzantine—bizarre sets of arrangements. And Ann, I think, described very well how this can play out across many state lines.

I only briefly alluded to the role of the IRS in all of this, and one thing that we know is that moving towards 2012, there was another explosion which was applications for 501(c)(4) status from groups that, in many cases, and we knew leading up to this, were moving into influence elections and were using that IRS status simply to hide the names of donors.

We know that American Crossroads created another entity, Crossroads GPS, and basically the head of it said very clearly, this is for people who do not want to disclose. So lots of groups moved in there. The IRS, in a pretty ham-handed way, tried to deal with this explosion by using code words.

Of course, the reality is, if you have a group that has the name party in it and they say in their application that they want to influence elections, they should be registering under Section 527 of the Code. And now the IRS is moving to try and come up with common sense regulations that keeps these sham groups that are not social welfare organizations in any way, shape, and form from doing what the law intended and they are being attacked viciously.

Senator KING. We all remember the Swift Boat Veterans for Truth in 2004. That was a 527. But that required disclosure of donors. As I understand it, that vehicle has atrophied and is very rarely used, and now it is the 501(c)(4)s, which do not require disclosure of donors and that is where all the money seems to be going. Is that correct?

Mr. ORNSTEIN. That is correct. And some of the other 501(c)s may be used as well. But we know that in 2000, before McCain-Feingold, Congress actually did move to try and require disclosure, more disclosure from 527s.

It is also important to emphasize what Trevor Potter put very eloquently into his testimony, which is, so much of the problem here is not based on either the law or the court, which is very much in favor of disclosure. It is the Federal Election Commission which has tried to redefine—you know, take Pat Moynihan's term of defining deviancy down.

They have tried to define disclosure down to make it even more difficult, and that is the root of some of the problems here as well.

Senator KING. Well, Mr. Potter, as I went back and looked at Citizens United and McCutcheon, it was clear that the whole holding was based upon a premise of vigorous disclosure. That was how the courts justified—those two courts—justified eliminating the limits, but they posited a disclosure regimen that does not exist. Is that correct?

Mr. POTTER. Yes. As an outsider, I think one of the mysteries to the Supreme Court's decision in Citizens United is the very strong language by Justice Kennedy where he says "until today, we have not had a system with unlimited corporate spending but full disclo-

sure." And now that we have corporate spending allowed in Federal elections and full disclosure, and then he goes as I quoted in my opening statement, "Citizens will be able to figure out who is spending the money. Shareholders will know what their corporations are up to."

So the question is, why did Justice Kennedy say that? I think the answer is pretty clear, which is he is looking at the law. He is looking at McCain-Feingold, the Bipartisan Campaign Act, which requires disclosure of the sources of spending of advertising if someone gives more than $1,000 to the groups that are doing it or if it is done through a separate group they set up for that spending.

Senator KING. Before my time expires, the issue about disclosure, as I have heard it articulated, that if donors' names are disclosed, they will be subject to intimidation and threats and those kinds of things. My old colleague from Virginia law school, who I know as Nino Scalia—I understand is now Antonin Scalia—said requiring people to stand up in public for their political acts fosters civic courage without which democracy is doomed.

In Maine, we have town meetings every spring. Nobody is allowed to go to a Maine town meeting with a bag over their head. If they are going to make a speech, they have to acknowledge who they are, and that is part of the information that the voters need, it seems to me.

Mr. Ornstein, what do you make of this argument that disclosure will lead to reactions and intimidation and threats?

Mr. ORNSTEIN. I agree with Justice Scalia very much in this front. I must say, Mr. Chairman, you know, as I have been watching the pictures from Ukraine and you see these people not with bags but with masks over their heads, it made me think about this a little bit, that there are societies where they try to hide identities. That is not what America is all about.

And some of the discussion here that goes back to a case involving the NAACP is really not a very good parallel. It is one thing if you have threats of death and the like, but in a democracy where there is rough and tumble, and it is something actually that I think both Senator Roberts and Senator Cruz talked about, that is the nature of a democracy.

If you are going to be involved in this process and somebody is going to criticize you for it, there is nothing wrong with that. You have to have some reasonable limits, it is true, if you do have direct intimidation, but there are laws very much that guard against that already on the books.

Senator KING. Thank you. Senator Roberts.

Senator ROBERTS. I would just like to observe that no one spending money exercising their First Amendment rights, to my knowledge, is endorsing fire in theaters or pornography or noise pollution. I suspect, however, that many on both sides of the aisle have characterized their opponents as stating noise pollution or conducting themselves with regard to noise pollution.

The other thing I would say is the exercise of free speech that one disagrees with is not pornography, although we all know it when we see it, when we put on our partisan glasses, nor is it necessary to label repeatedly, repeatedly to characterize those with whom you disagree as un-American.

Mr. Ornstein, Norm, the IRS is not moving to promulgate the regulations that were in place, the exact regulations that were in place that some of us believe caused the problem with the IRS trampling on the rights, the First Amendment rights of some conservative groups, primarily the Tea Party.

They are not moving because they received over 200,000 comments, and by law, you have got to go through them and so they have stopped, but they have also stopped because Senator Flake of Arizona and myself, at least suggested to John Koskinen, the new Commissioner of IRS, that it might be a good thing to withhold writing the regulations until the Finance Committee of the United States Senate, Ways and Means Committee of the House, and the Inspector General would get done with the investigations.

We are having problems, like every other investigation, with redaction and other things, but we are persevering and we are trying to do it in a bipartisan manner, more especially with the Senate Finance Committee. So they have held off right now, and I think that is a good idea, and I think once we finish the investigations, we can determine what actually happened.

I have some feeling about that as to where that really came from and I think it came from more than a number of Senators writing basically to the IRS stating that they felt the activities of various groups were not in keeping with what they envisioned the provision to call for. But that aside, I just wanted to mention that.

You referenced the Hatch Act. Yesterday it was announced that an FEC attorney resigned for admitted violations of the Act. According to a release from the Office of Special Counsel, the employee posted dozens of partisan political tweets, including many soliciting campaign contributions to the President's 2012 election campaign and other political campaigns, despite the Hatch Act restrictions that prohibit the FEC and other further restricted employees from such activity.

The employee also participated in a Huffington Post live Internet broadcast via webcam at an FEC facility criticizing the Republican Party and the presidential candidate at that time, Mitt Romney.

I think you can understand why reports of this nature make Republicans somewhat wary of the FEC and their ability to regulate their behavior. Are we to believe that there are not others at the Commission who share these views but just have not been caught expressing them? Now, I mentioned you, Norm, but really that question is directed to Ms. Ravel, who I think could give a better answer, although I am sure you could give a good answer.

Ms. RAVEL. Well, as I indicated, Senator Roberts, I cannot speak on behalf of the FEC, but I will tell you that the FEC responded very quickly to that issue when it came to the attention of people within the agency, and understood that it was totally inappropriate behavior on behalf of an employee.

And further, there has been an investigation internally and there is no reason to believe that this is extensive or goes beyond anybody except this one individual who has since been terminated.

Senator ROBERTS. That was my next question and you have already answered it. My question was, in your experience at the Commission, are any negative views of the Republican Party widespread among the employees there or members of the FEC? Even

sitting around and having coffee and saying, My God, what are those crazy Republicans doing now?

Ms. RAVEL. Senator——

Senator ROBERTS. Or what Roberts is doing?

Ms. RAVEL [continuing]. I have never heard your name mentioned——

Senator ROBERTS. Thank you.

Ms. RAVEL [continuing]. At the FEC.

Senator ROBERTS. At least I am not part of that dark money scandal.

Ms. RAVEL. No. And as I indicated, I was speaking on behalf of—relating to an incident, the case at the FPPC, but I, in my six months at the FEC, have never heard any partisan communications by either employees or Commissioners. While we all are appointed based on our party——

Senator ROBERTS. That must be one agency that is an island in the sun. Mr. McGahn, what do you think about this? What was your experience in this regard? Should we view this as an isolated incident or as evidence of a broader problem?

Mr. MCGAHN. I saw the news and I was very troubled by it. When the FEC has that issue, I think it is very serious. I think it certainly calls into question what many of the reform lobbyists have sold for years, which is that there is this idea of a non-partisan staff that can exist divorced from politics and provide objective advice and that sort of thing.

That being said, what I can say is, most of the folks at the FEC play it straight. They show up on time, they do their job well, they are very committed to their job, and they do not have an agenda. But there are some folks who seem to get a little carried away with themselves from time to time and I think that is troubling.

The cure for this is, one, the Hatch Act; two, keep in mind what the FEC is and that it is not. It is not an independent agency composed of career staff. It is actually six persons appointed by the President, confirmed by the Senate. It is not a non-partisan agency. It is a bipartisan agency. And under the statute, in order for the Commission to actually take action, it takes at least four of six Commissioners to confirm that.

So if staff get a little carried away, that is not good, but in my view, the Commission is then—this is a reason why Commissioners need to remain vigilant and really exercise the power the Congress has given them under the statute to run the agency.

The idea that the Commissioners want to delegate to staff and that sort of thing, I have never been a big fan of that and I think the unfortunate release that came out yesterday is evidence that my view of the law is sound that really it shows the wisdom of the original system of the FEC where the Commissioners have to act in a bipartisan manner to avoid one party essentially targeting the other party.

Senator ROBERTS. I appreciate that. My time has expired, Mr. Chairman.

Senator KING. Thank you, Senator. Senator Udall. Oh, sorry.

Senator KLOBUCHAR. We look similar.

Senator KING. I am awfully sorry. Senator Klobuchar, welcome to the hearing.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, and I had two previous hearings, including the Joint Economic Committee where I am the Senate Chair. So I apologize for getting here now, but I think this is an incredibly important topic. I thank you for holding this hearing. I thank Justice Stevens for his testimony and his support for a constitutional amendment. I also thank my colleague here, Senator Udall, for his work in leading the constitutional amendment, which I am a co-sponsor.

I am very troubled by the recent Supreme Court decision, the McCutcheon decision, extending the damage Citizens United caused in my mind. I looked back. I was cleaning out a back room in my house in Minnesota last week and found a bunch of things from my campaign for Hennepin County Attorney, where, Mr. Chairman, we had a $100 limit on contributions in the off election years and $500 in the election year.

I literally found letters where we returned $10.00 if people had gone over the $100 limit. I then thought of my first days. I found a bunch of stuff from the 2006 Senate campaign where I knew no one to ask money from nationally. I literally went through my entire Rolodex and I remember setting the all-time Senate record of raising $17,000 from ex-boyfriends.

[Laughter.]

Senator KLOBUCHAR. Those days are behind us as we head into this new era, after the Supreme Court decisions, and I am incredibly troubled by these decisions when you can have a few thousand people be able to give hundreds of thousands of dollars, and I just think it destroys our campaign finance system.

I guess I will start with you, Mr. Potter. There has been a lot of discussion about what the real world impact of Citizens United has been and how McCutcheon will affect it going forward. Can you describe what trends or major shifts you see in campaign finance since the Citizens United ruling and how McCutcheon will impact those trends in the future?

Mr. POTTER. Yes, thank you, Senator. Well, I think the first trend, which was noted in the Chairman's question a moment ago, is that contrary to what the Supreme Court said in Citizens United, we are seeing secret spending. The Court's assumption was that although we would have new sources of spending, corporations and then unions, that they would be disclosed and that shareholders and citizens therefore would know who was speaking, and could evaluate that speech.

That is not what is happening now. Because of the FEC's position on what has to be disclosed, because of the proliferation of tax exempt groups that do not disclose their donors, we have ended up with a parallel avenue of spending in elections.

Essentially, if someone wants to influence an election today, if they are being solicited for money, the first question is, "well, am I willing to have my spending disclosed or not?" And if not, then you look at all of these vehicles that are available to spend the same money, to run the same ads, but have it avoid being a matter of public record, so that——

Senator KLOBUCHAR. Yes. I remember $99.00 contributions in my $100 race for county attorney, and I know that, but this is taking

it to a whole different level, as you point out, when there is no disclosure and the effect that will have.

I guess the other question—you took this even a step further, Mr. Ornstein, when you talked about how the definition of corruption is so narrow in the Supreme Court case. It says that we can only regulate donations to prevent actual quid pro quo bribery. Why do you think this is problematic, and should we be able to regulate this?

Mr. ORNSTEIN. First of all, let me say that you were a great Hennepin County Attorney. But beyond that, anybody, I think, who has been around the political process at all knows what happens when you have money intersect with power and the many ways, indirect and otherwise, that you get corrupting influences.

I have had some of your colleagues tell me, in the aftermath not just of Citizens United, but what I think was an equally corrosive decision, Speech Now, that followed it that created the explosion of the super PACs and in other ways, say that they are visited by somebody who says, I am representing Americans for a Better America, and they have got more money than God and, you know, pouring in $10 million in the final two weeks of a campaign to destroy somebody, that is easy.

They really want this amendment. I do not know what will happen if somebody opposes them, but that is the reality, and they leave. And human beings are going to think, well, it is one little amendment, or will think, I had better raise $10 million not just what I need for my campaign, but as an insurance fund just in case because I cannot do that in the final two weeks of a campaign.

That is just one set of examples. Now in the aftermath of McCutcheon, I can imagine a bunch of people coming in and waving checkbooks and saying, each one of us has checks that can total $3.75 million now that we will give to the hundreds of committees, the joint fund-raising committees, spread it around, and, of course, we will have candidates we would prefer. The notion that this will actually keep the individual limit is out the window.

We will all write these checks, but there is one little thing here in the legislative arena that we want in return. You do not have to say it directly and it will not be on videotape. This is corrupting. We saw it in the gilded age, and what I think both Justice Kennedy and Justice Roberts have now done in these decisions is to open up a new gilded age.

Senator KLOBUCHAR. And you being a political scientist and not just a campaign expert here understand that one of the problems is we have had people so polarized, you know, whatever special interest is to the left or the right, and one of the things I am worried about as I looked at this McCutcheon decision, even more than the expenditures decision, is that it will just play to the poles.

It will make it even harder for people to do things in the middle where they have to compromise and they have to be able to kind of go in the face of some of the people from their own base, from their own party, if they are just going to be punished in a big way by major donors. Do you think there is any truth to that?

Mr. ORNSTEIN. I think you get, when it comes to big donors, maybe four categories of people. There are two that represent the

poles and they are trying to use their money as electoral magnets to pull people further apart.

Senator KLOBUCHAR. That is a good analogy.

Mr. ORNSTEIN. A third type are those who may not have a deep ideological interest, but they have pecuniary interests and they will use money to make money. I, frankly, am surprised that we do not have more spending by big corporate interests in Washington because it is the best investment you can make. Put in, you know, $20 million that goes into funding of campaigns. Maybe you will get a billion dollar contract out of it. And we will see more of that now and I think we are heading down a slippery slope of direct contributions by corporations to candidates.

And then maybe you have a category of those who are just looking out for the broader public interest. But I think that is a much smaller category than the other three.

Senator KLOBUCHAR. I think the last thing I would raise, no question, and maybe we can go back after you are done, Senator King, but it is just this issue where even when you are making a decision as an elected official to do what you consider the right thing for your state, you know, maybe you have a lot of employees in a certain area and you think it is very important or you think it is the right thing for the country.

I think with this lack of trust with all these big contributions, people still will now look at it, even though you know in your heart you made the decision for the right reason, and they look and they see, Oh, but you got money from these interests. I just think even when you are doing it for the right reason, it completely breaks down trust from the public about why you are doing things.

And that is one of the major problems and why I support this constitutional amendment.

Senator KING. Thank you. A couple of follow-up questions. In listening to this and thinking about these organizations that essentially are designed to disguise identify, the term identity laundering comes to mind. I mean, that is what is really going on here. It is a reverse on the whole idea of money laundering.

Ms. Ravel, which was essentially exactly what was going on in your case, where there were donors in California who the money went to Virginia to Arizona back to California. It was all about laundering the identity out of that contribution. Is that not correct?

Ms. RAVEL. Yes. Yes, Mr. Chairman. The initial request for the money in California was, if you want your identity to be known, you can give directly to a PAC. If you do not want your identity to be known and you want to remain anonymous, it can go to this Virginia non-profit.

And so, the money that went to the Virginia non-profit was specifically for the purpose of not revealing identity and it was then moved circuitously through all the other non-profits for the same reason.

Senator KING. Thank you, Ms. Ravel. That is exactly the way it appeared. Mr. Ornstein, one of the situations is, whenever you try to do something about an issue like this—and by the way, I really enjoyed this morning sitting literally in the center between Senator Roberts and Senator Schumer—but when you try to do something,

everybody thinks of it in partisan terms. Does this advantage my party versus the other party, my candidate versus the other?

But this data I referred to that came out yesterday indicates that the gap—the red or the more conservative-leaning groups, the blue are more liberal groups, and the gap between them is diminishing significantly. It was 85 or 90 percent conservative back in 2010. As you see here, there is still a big disproportionate in 2012. But the gap is now 60–40.

Hopefully, both sides are going to realize that this is a danger. I think this is not a partisan issue to me. I think this non-disclosed money is a danger to the republic no matter who it favors one year to the next. As the Old Testament says, if you sow the wind, you will reap the whirlwind. I am afraid that people are sort of saying, Okay, right now today this benefits my party, but next year or the year after that, it could benefit the other party. That is why I think we need to make a change like this.

Mr. ORNSTEIN. You know, it is interesting, Mr. Chairman, that before McCain-Feingold, you really did have a bipartisan consensus on the need for more disclosure. And indeed, when Congress was considering, in 2000, requiring more disclosure of 527 groups, we had overwhelming bipartisan majority support it.

One who did not was the Senate Republican leader, Mitch McConnell, but what Senator McConnell said at the time was he did not support it because it did not require enough disclosure, including what he said was a requirement for disclosure from these non-profit groups, now what we think of as the 501(c)(4)s.

We have a very different attitude now. It has become more polarized. And I do not see why disclosure should be a partisan issue at this point. I do not see why we cannot cut through that, and I do think that this is something where now that there are more avenues for money, people who have interests, and that includes the polar opposites as well on both sides, are going to start to pour more and more money into it and, in many cases, they are going to try and hide where that money is coming from.

One of the things that we have seen is, they will often use inappropriate vehicles, 501(c)(3)s, the pure non-profits, to then give grants of money to other groups that can go to other groups that can go to other groups that finally end up in a 501(c)(4) that does not get disclosed.

There are so many opportunities here to hide identities and to hide money that how can voters figure out when a message is coming who is providing that message, which is a requirement of context, to know whether to believe it.

Senator KING. Well, one of the interesting data points in this new study from Wesleyan is that voters tend to put more credit to ads that come from these groups than they do from the candidates, even though they do not know who the groups are. The groups may be Americans for Greener Grass and voters tend to think, well, it is not a candidate ad, it must have more authority, but they do not know who is funding Americans for Greener Grass. By the way, I am in favor of these ads.

Mr. ORNSTEIN. One of the things as well, we have talked, and Senator—excuse me—Justice Stevens talked about a level playing field. One of the things that concerns me is that the level playing

field is moving very much away from the candidates of both parties and in a host of ways. Candidates have to raise money in $2,600 increments and groups that now can spend untold amounts, that can pour it in at the end of a campaign when a candidate does not have an opportunity to answer those messages have now, I think, an overweening influence.

And it is not that that money will necessarily be spent. The threat of spending, unless something is done, is enough. In many cases, we will see actions taken by Government behind closed doors or by changing amendments that nobody will know about without a dime being spent under these circumstances as anonymous groups apply that threat. It is not a good way to run business in a democracy.

Senator KING. Mr. Potter, I thought one of the most interesting moments today was when Senator Cruz said, unlimited contributions and immediate disclosure. React to that concept.

Mr. POTTER. Well, I think there are two different issues here. One is the idea of full and immediate disclosure, which is the one Senator Cruz talked about, I believe, in the context, in fairness to Senator Cruz, in the context of contributions to candidates. The other is the issue of how much candidates should be able to accept as contributions, or party committees which are comprised of candidates, without citizens thinking that they have been bought.

That has been the debate, really, since certainly Watergate where you had million-dollar contributions.

Senator KING. But if you have full disclosure, the citizens can make that decision. They can say, look, my candidate took half a million dollars from XYZ and I do not like that.

Mr. POTTER. They can and that is where we were in the early 1970s when there were million-dollar contributions to the Nixon reelection campaign. The reaction was, something is being sold or something is being bought for a million dollars. The Supreme Court in Buckley said, it is not an irrational conclusion. It is common sense that people will believe that huge contributions are intended to buy access and influence legislative results, and that people who take those contributions are in some way being bought.

So that is why the Court in Buckley said it makes perfectly good sense to limit the size of contributions to candidates and party committees because of the perception, the danger and the perception that there is a transaction.

If you have an unlimited contribution that is fully disclosed, you still have the million dollars coming in. And the question, Justice Stevens' question asked is, so what about people who do not have a million dollars? They just do not get to buy any access or influence?

That has been the justification for the contribution limits. The debate has been, what size should they be? The assumption has been that those contributions will be disclosed, and as far as we know they are all fully disclosed, but that the independent expenditures that the Court allowed in the Buckley decision, which the Court said were not going to be corrupting because they would be totally, wholly, completely independent of candidates, would also be fully disclosed.

We have ended up, in a way, with the worst of both worlds, which is contrary to what the Court said, these expenditures are not fully disclosed, as we have discussed, or they need not be. There is an option there. And secondly, they are not wholly, totally, and completely independent of candidates either.

The Court's assumption was they cannot be corrupting because candidates and parties will have nothing to do with them, but the reality, as we have seen, is that many of these super PACs are created by former employees of candidates and close associates of candidates. They are, in many ways, tied to the candidates.

Candidates have appeared at events for these groups to thank donors for giving to them so they are not totally, wholly independent as the Court expected. In that sense, they are not fulfilling the role that the Court thought they would.

Senator KING. We have used the word—and this is a subject that really has not come up today—we have used the word perception a number of times. I do not think there is much question, and polls support this, that this whole money and politics is part of what is turning off the American people to the process. It is part of what is undermining the confidence and trust in the system, which is ultimately what our system rests upon.

I think that is part of it. It does not have to be a bribe. It just is unseemly and people realize that. It may be one of the reasons that our collective approval rating around here is below al Qaeda. And it just strikes me. There has not been enough discussion of that, is the underlying distaste for this whole system that is undermining trust and confidence in our Government.

Senator Klobuchar, you wanted to follow up?

Senator KLOBUCHAR. Sure. I was just listening to Mr. Potter, so I am a big fan of transparency, but I do not think in any way will it solve all the problems because I think what is going to happen, I want to get it, but it is going to happen, I know it. Certain people who give in certain states where maybe their entity or what they have done is not as unpopular, and then someone else will give money in another state.

They will just find a way. I think with good disclosure law, they will have to disclose, but I just do not think it is going to fix the problem of the trust that Senator King just talked about, as well as the amount of money that can be spent. Not just the unseemliness, but it is a thin line between what is unseemly and what is almost a bribe.

So, Mr. Potter, what do you think? Do you think disclosure is enough?

Mr. POTTER. Well, as you point out, if you get full disclosure, you now know what is happening. Will people like what is happening? That is a different question. And it may well be that full disclosure leads the American public to think that only a limited number of people are being able to buy access, that these campaigns cost so much that members have to spend so much time raising money and they are going to spend it logically with the people who have money.

So full disclosure does not get you everywhere. Full disclosure is, I think, a start to a larger discussion of how we want to finance campaigns.

Senator KLOBUCHAR. So you think it is very possible we need to do more than just disclosure?

Mr. POTTER. Oh, absolutely.

Senator KLOBUCHAR. Okay, good. But I think that your argument would be that if you have disclosure, then maybe that will more easily lead to other measures.

Mr. POTTER. Right. My concern here, going back to the McCutcheon decision—is that I think the five Justices in the Court majority are in a position where they are saying, Congress, you cannot do more. We have said disclosure is fine, Internet disclosure, all that is really great, but unless it is bribery, it is okay.

So this intermediate area that the Chairman talks about, which is it is unseemly, that it diminishes confidence in Government, that used to be covered by the, "appearance of corruption", the notion that Congress could legislate, as it did with soft money, not because there was proof of quid pro quo bribery with people going to jail, but because of the unseemliness of six and seven figure contributions, as Mr. Ornstein says, these were often solicited in terms of join the Chairman's Club, have a breakfast meeting with the Chairman of the XYZ Committee.

Congress said, you cannot do that because it is bad for the institution and it is bad for public confidence in Congress. And what I worry about is that the five Justices in the Court majority are saying, too bad, you cannot fix that, and you cannot regulate that. If it is not actual outright bribery, Congress cannot prevent that sort of activity. And that seems to me to be a crisis for this institution in terms of public confidence.

Senator KLOBUCHAR. Mr. Ornstein.

Mr. ORNSTEIN. Senator Klobuchar, I want to add a couple of points to this. One is, when we think about corruption, it goes both ways, and I think one of the problems with removing all the limits is that the pressure on big donors who can no longer say with an umbrella of protection, I have maxed out, being pushed to give more and more.

Or in some instances, as we have seen before, being told that if they give to the other side, then mayhem will ensue upon them in the legislative process, is another part of this that is a very real problem. And then what I would also like to say, if you will give me permission is, Senator Cruz said none of these reforms have done anything except increase corruption.

I think it is important to set the record straight in the sense that, you know, Mr. Potter talked about Watergate and it led to a law that changed the way presidential campaigns were funded. And to me, it is just incontrovertibly clear that for decades after, we changed the presidential system.

So there were voluntary spending limits and there were public grants. We had a much cleaner and better system. It fell apart because we did not adjust those numbers and it became absurd. There was not enough money there. And to be frank, there was not enough public support for public money in the campaigns.

Now I think you are absolutely right, Senator King, that—and we have lots of polls that show it—the sense that the public believes that all of politics, and particularly in Washington, is thoroughly corrupt, that citizens do not have much of a say here, that

other interests are prevailing, has a corrosive impact on the ability of a democracy to function with legitimacy.

And these two Supreme Court decisions pretty much blithely push that aside, to me, is a really troubling development.

Senator KLOBUCHAR. And I am convinced that it is not just a perception issue, which it is, but I think in Minnesota where we have had some very strong limits at the local and the state levels—I mentioned the ones I had for county attorney—it made a difference. It makes a difference in the kind of politics. It makes a difference in the civility.

It has made a difference in the outcome. It gave us Governor Jesse Ventura, which is for sure, because we had the public funds. But it gave the citizens a say and we have the highest voter turnout in the country nearly every single year, and a lot of that, I think, is because people can have a better trust in their Government and they do not see that big money, at least at the state level.

Speaking of that, Ms. Ravel, you were talking about the dark money and the Virginia and Arizona in the case that you worked on. One of the things that has been debated is the impact of these decisions on foreign entities to be involved in funding. You know, if you can do this from state to state to state and it is all hidden, do you think that these decisions could make it easier for foreign entities to fund United States elections?

Ms. RAVEL. I do not think there is any question about that. One of the positive things about transparency and disclosure for all groups, regardless of their tax status or how they are set up, is that the public will know, or prosecutors could know whether or not some of the contributions are made illegally, and that includes foreign money.

Senator KLOBUCHAR. All right. Just last, a trust issue. Under Federal law, super PACs, as you know, are not allowed to coordinate with their candidates' campaigns or coordinate activities. I already see you having a smirk on your face, Mr. Ornstein.

But there has been a lot of discussion over the fact that the organizers of some super PACs have had very close ties to candidates that they have supported. This is on both sides. What impact do you think this has on the public trust of Government?

Mr. ORNSTEIN. When you have presumed independence and then you see big funders standing behind candidates as they give their speeches, appearing with them at fund-raising efforts, riding with them on their private planes and sitting right next to them, and then we have the idea which is infused in Citizens United, that because they are independent, then these entities can give as much money as they want and we do not need to worry about corruption or the appearance of corruption, it is a big joke, frankly. For that, we have to thank, as I said, not just Citizens United, but Speech Now.

Senator KLOBUCHAR. Right. Thank you very much.

Senator KING. Senator Klobuchar, since you brought up my independent gubernatorial colleague, Jesse Ventura, I have to——

Senator KLOBUCHAR. Is it true that he once asked you to be his running mate for President?

Senator KING. The answer to that is true.

Senator KLOBUCHAR. I just thought we should get that on the record.

Senator KING. If you would like to say no to Jesse, you are welcome to.

[Laughter.]

Senator KING. But it has been attributed to him, I think, one of the most ingenious suggestions on this issue. He believes that members of Congress should have to wear jackets like NASCAR drivers with their sponsors on the jacket. Only Jesse would come up with an idea as creative as that.

Mr. ORNSTEIN. You would need trench coats, actually.

Senator KING. I want to thank all of you on behalf of the Rules Committee for your important testimony today. I also want to thank the Center for Responsive Politics and the Wesleyan Project for their help, as well as Fred Wertheimer at Common Cause, Dean Olsen, Citizens for Responsibility and Ethics in Washington who helped develop a lot of the background.

This concludes the second panel for today's hearing. Before we adjourn, I would like to ask unanimous consent that a Supreme Court brief written on this subject by Senators McCain and Whitehouse be included in the record without objection.

[Brief of United States Senators Sheldon Whitehouse and John McCain as Amici Curiae in Support of Respondents was submitted for the record:]

Senator KING. And also without objection, the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing for our witnesses to answer. I want to thank my colleagues for participating and joining us in this hearing, sharing their thoughts and comments on this important topic. This hearing of the Rules Committee of the United States Senate is now adjourned.

[Whereupon, at 12:04 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

April 30, 2014

Statement of Justice John Paul Stevens (Ret.)

Senator King, Chairman Schumer, Ranking Member Roberts, and distinguished Members of this Committee, thank you for the opportunity to appear before you today to discuss the important issue of campaign finance.

When I last appeared before this body in December 1975 my confirmation hearing stretched over three days. Today I shall spend only a few minutes making five brief points:

First, campaign finance is not a partisan issue. For years the Court's campaign finance jurisprudence has been incorrectly predicated on the assumption that avoiding corruption or the appearance of corruption is the only justification for regulating campaign speech and the financing of political campaigns. That is quite wrong. We can safely assume that all of our

candidates for public office are law abiding citizens and that our laws against bribery provide an adequate protection against misconduct in office. It is fundamentally wrong to assume that preventing corruption is the only justification for laws limiting the First Amendment rights of candidates and their supporters. Elections are contests between rival candidates for public office. Like rules that govern athletic contests or adversary litigation, those rules should create a level playing field. The interest in creating a level playing field justifies regulation of campaign speech that does not apply to speech about general issues that is not designed to affect the outcome of elections. The rules should give rival candidates - irrespective of their party and incumbency status - an equal opportunity to persuade citizens to vote for them. Just as procedures in contested litigation regulate speech in order to give adversary parties a fair and equal opportunity to persuade the decision-maker to rule in their favor, rules regulating

political campaigns should have the same objective. In elections, the decision-makers are voters, not judges or jurors, but that does not change the imperative for equality of opportunity.

Second, all elected officials would lead happier lives and be better able to perform their public responsibilities if they did not have to spend so much time raising money.

Third, rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions. An important recent opinion written by Judge Brett Kavanaugh of the D.C. Circuit and summarily affirmed by the Supreme Court, *Bluman* v. *Federal Election Commission*,[1] upheld the constitutionality of the federal statute that prohibits foreign citizens from spending money to support or

[1] 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct 1087 (Jan. 9, 2012).

oppose candidates for federal office. While the federal interest in preventing foreigners from taking part in elections in this country justified the financial regulation, it placed no limit on Canadians' freedom to speak about issues of general interest. During World War II, the reasoning behind the statute would have prohibited Japanese agents from spending money opposing the re-election of FDR but would not have limited their ability to broadcast propaganda to our troops. Similar reasoning would justify the State of Michigan placing restrictions on campaign expenditures made by residents of Wisconsin or Indiana without curtailing their speech about general issues. Voters' fundamental right to participate in electing their own political leaders is far more compelling than the right of non-voters such as corporations and non-residents to support or oppose candidates for public office. The *Bluman* case illustrates that the interest in protecting campaign speech by non-voters is less

worthy of protection than the interest in protecting speech about general issues.

Fourth, while money is used to finance speech, money is not speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries - actions that clearly were not protected by the First Amendment.

Fifth, the central error in the Court's campaign finance jurisprudence is the holding in the 1976 case of *Buckley* v. *Valeo*[2] that denies Congress the power to impose limitations on campaign expenditures. My friend Justice Byron White was the only member of the Court to dissent from that holding. As an athlete and as a participant in Jack Kennedy's campaign for the presidency, he was familiar with the importance of

[2] 442 U.S. 1 (1976).

rules requiring a level playing field. I did not arrive at the Court in time to participate in the decision of the Buckley case, but I have always thought that Byron got it right. After the decision was announced, Judge Skelly Wright, who was one of the federal judiciary's most ardent supporters of a broad interpretation of the First Amendment, characterized its ruling on campaign expenditures as "tragically misguided."[3] Because that erroneous holding has been consistently followed ever since 1976, we need an amendment to the Constitution to correct that fundamental error. I favor the adoption of this simple amendment:

> Neither the First Amendment nor any provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for

[3] J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Col. L. Rev. 609, 609 (1982).

public office, or their supporters, may spend in election campaigns.

I think it wise to include the word "reasonable" to insure that legislatures do not prescribe limits that are so low that incumbents have an unfair advantage or that interfere with the freedom of the press. I have confidence that my former colleagues would not use that word to justify a continuation of the practice of treating any limitation as unreasonable.

Unlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who provided them with money than to the interests of the voters who elected them. That risk is unacceptable.

Thank you.

Prepared Joint Testimony of Neil Reiff and Donald McGahn

Before the Senate Committee on Rules and Administration

April 30, 2014

"Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond"

Executive Summary

Our testimony today focuses on the detrimental effects that McCain-Feingold has had on the American political system. It was hailed by the so-called "reform" groups who supported its passage as landmark legislation that would cure the ills of the American campaign finance system. Rather than correct the campaign finance system, it has created a perverse scheme of regulation that was caused by the law's own myopia and a string of Supreme Court decisions that were decided in response to the law's overreach.

As passed, McCain-Feingold claimed to accomplish three main goals: (1) End the soft-money system that dominated the national parties during the 1990's; (2) reduce the number of so-called "negative ads" by prohibiting a large portion of issue advocacy spending; and (3) penalize self-funding candidates by providing their opponents with unusually large contribution limits in response to self-funders.

Instead of achieving its core goals, the Supreme Court has struck two of those three goals as unconstitutional. To the extent that McCain-Feingold was ever a carefully balanced compromise, it is certainly not that today. As for the surviving goal, it has succeeded in profoundly altering the state of American politics by severely weakening American political parties to the benefit of outside spending groups who may raise and spend unlimited funds in connection with federal elections.

Since the passage of McCain-Feingold, the American political system has seen an increase in spending, primarily on independent television advertising. However, the data relating to political parties shows that campaign spending by the state and local party committees has essentially flat-lined. This phenomenon has been caused in large part by the plethora of regulation placed upon state and local party committees by the McCain-Feingold law, while other players in the political system have benefitted from judicially mandated deregulation.

It is time for Congress to reconsider what is left of McCain-Feingold, particularly its overreaching provisions that unnecessarily weakened state and local party committees. We believe that empowering state and local party committees will improve voter education and involvement, accountability, as well as effective governance and transparency.

Prepared Joint Testimony

Thank you for the opportunity to appear before you today. We are practitioners in the area of campaign finance, and our views are shaped by decades of experience in advising and representing real people who wish to participate in politics in a legally compliant manner. Our clients include candidates for office, political party committees, political action committees, and other persons who wish to either participate in elections directly or otherwise be part of the debate regarding issues of public importance. Although we have similar clients (and are not here to represent the views of any of those clients), we differ in one significant way: one of us represents Republicans, conservatives and libertarians, while the other represents Democrats, liberals and progressives. Such a partisan difference in the modern world would ordinarily preclude any notion of common ground. But not here. Despite our party difference, we agree on much about the current state of campaign finance law: what the law is, what the law ought to be, problems with the law and – most critically – real solutions to those problems.

Recently, we co-authored an article that was published in *Campaigns & Elections* magazine that explained our views on the good, the bad, and the ugly of the current law, particularly the aspects imposed by the Bipartisan Campaign Reform Act of 2002, commonly called McCain-Feingold. In our article, which we have attached, we explain that much of what many perceive to be problems in the current system can be traced back to the underlying statute itself. To be fair, much of what Congress has passed over the years has been declared unconstitutional or otherwise rewritten by the courts. But that is precisely the point. As we predicted, McCain-Feingold has become a warped version of itself, where heavily regulated candidates and party committees have taken a back seat in our current system.

We suggest a different approach, one that flows from a different premise firmly grounded in our shared First Amendment tradition: That in order for voters to be truly informed, they need to hear directly from the candidates themselves. Thus, the candidates' voice ought to be the central voice in American democracy. In our view, the parties are the best vehicles to assist with achieving that goal – in other words, they are uniquely situated to echo their candidates' message. Unfortunately, current laws place parties at a competitive disadvantage. Laws ought to be designed to ensure the parties can once again play a critical role in our democracy and to further liberty. That liberty must be the governing principle is abundantly clear from a mountain of Supreme Court precedent that dates back decades. To us, it makes no sense to engage in academic debates over whether or not the courts got it right or not. At least since *Marbury v. Madison*, Court opinions are the law of the land. Any solution to any problem, whether real or imagined, ought to be grounded in the reality that court decisions are law that must be followed. Unfortunately, it has been the so-called "reforms" that sought to overcome such precedent, and that have had the effect of diminishing the voice of candidates and the political parties. Ultimately, recalibrating the law to strengthen candidate

and party speech will be forces for better voter education and involvement, accountability, effective governance and transparency – precisely the sorts of things that many believe to be sorely lacking in American politics today.

Which brings us to the 2014 campaign landscape. Certainly, direct contribution limits remain – albeit at artificially low levels that do not match the rate of inflation that has occurred since they were first instituted. For example, the $1,000 candidate contribution limit imposed by the 1974 amendments to the law would translate to about $4,800 today – almost double the current $2,600 limit. The effect on the parties is even more apparent, as the $10,000 state party limit in today's dollars ought to be about $48,000. And in addition to regular inflation, the cost of campaigning has skyrocketed, particularly due to the cost of television advertising. Other prophylactic measures imposed by the law have been struck – except those that limit the ability of the political party committees to effectively assist their candidates. Meanwhile, nonparty single-issue groups are free to spend in ways that, if undertaken by parties, would be illegal. And campaign disclosure has survived, albeit in a more limited form than that which was originally passed. The result? Candidates are struggling to be heard over the din of single issue and other groups, and the party committees – who historically had been a candidate's natural ally – have been significantly diminished and essentially replaced by independent Super PACs and single issue nonprofits. To us, this seems backwards, and ironically, is the opposite of the "reform" goal of equality.

We anticipate that *McCutcheon v. FEC* will help address this problem to some degree. To see this, one needs to be clear as to what *McCutcheon* did and did not do. First, it did not strike the limitations and prohibitions on direct contributions to candidates and party committees. Corporate money is still banned, and candidates can still receive only $2,600 per individual per election. What was struck was the so-called biennial limit – essentially an umbrella limit that prevented citizens from giving to more than a few handfuls of candidates and party committees. Chief Justice Roberts illustrated the underlying faulty logic of the biennial aggregate limit in operation: "If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime." Thus, the immediate impact of *McCutcheon*: more candidates, including challengers and those that are not seen as "safe bets," will have access to additional financial support. Similarly, such a candidate's natural ally – the party committees - will no longer have to compete with each other for resources to the degree caused by McCain-Feingold.

But this sort of change is not enough to fix that which ills our system of privately-funded campaign finance. McCain-Feingold must be revisited. What was billed as a carefully constructed balance between breaking the link between so-called "soft money," while at the same time limiting so-called "negative ads," is in shambles. As we stated in our recent article, the national party soft money ban was well intended and helped stop practices at the national level, where national party

committees were leveraging 6 and 7 figure contributions in exchange for access to executive branch personnel, as well as Members of Congress. A narrow fix would have been to limit such funds. Congress could have, and should have, stopped there. But Congress did not simply limit "soft money" accounts of national party committees, or limit how much money national party committees, members of Congress and candidates for Congress could solicit. McCain-Feingold went much, much further.

Perhaps in anticipation of other hypothetical tools of evasion, McCain-Feingold gutted state and local party committees by essentially federalizing all of their important and effective activities, even activities that are designed to only benefit state and local candidates. The unchecked rationale of such "reforms" was that any attempt to elect a candidate somehow benefits a federal candidate, to a degree that if unchecked would create an appearance of corruption. By virtue of this rationale, the framework of McCain-Feingold saw no downside to requiring state and local party committees to use federally regulated and limited funds to engage in campaign efforts up and down the ticket, even when those activities were targeted solely to benefit state and local candidates. This approach ignored the fact that there are 50 other campaign finance regimes that regulate state and local elections, several of which are wholly incompatible with federal law. Also ignored was that our party committees had been a stabilizing force in our democracy for almost 200 years, and an effective way for citizens to participate in politics at the grassroots level.

The effects of this approach have been devastating to state and local party committees and grassroots activists, and have driven an unnecessary wedge between them and the candidates they wish to support. Under McCain-Feingold, state parties and their supporters have been subject to a labyrinth of regulation that seeks to intercept all of their activities and force them into the federal system, regardless of whether those activities have any relation to federal elections or candidates. In addition, some of the regulatory choices that McCain-Feingold have forced party committees to make in order to operate in compliance with the law can only be seen as bizarre.

McCain-Feingold federalized all elections through its introduction of a new term, "federal election activity," which subjected traditionally local activities such as voter registration and get-out-the-vote to Federal regulation and limitation. The implementation of this new concept has proven rocky. When passed, it was claimed to be a narrowly targeted anti-circumvention measure. Defense of the law followed suit, and minimized the reach of the new law. After the law was upheld *McConnell v. FEC*, however, supporters changed their tune, and argued that the Federal Election Commission (FEC), the agency charged with enforcing this law, was not reading the new mandates broadly enough. Litigation ensued, and courts instructed the FEC to rewrite and broaden its rules governing state and local parties.

Today, McCain-Feingold's "federal election activity" covers virtually any state and local party activity that matters. For example, under the FEC's recently redefined definition of "get-out-the-vote," essentially all public communications undertaken by a state party committee – even those made totally independent of any Federal candidate involvement -- are subject to federal law, merely by exhorting the voter to go vote for a state or local candidate. Therefore, if a party committee wishes to air a television or radio ad that exhorts listeners or viewers to go "Vote for Smith for Governor," federal law may mandate that this advertisement be paid for entirely or in part with federally regulated funds. Prior to McCain-Feingold, state law governed such state or local candidate support. But today, parties are governed by federal law, whereas a non-party group could run the same exact advertisement free of such federal limitation. Worse, state party organizations are disproportionately subjected for audit by the FEC, and pay a disproportionate amount of the fines levied on non-candidate committees. This is not necessarily a reflection of targeting by the FEC, but a predictable result caused by the complexity and scope of the laws that regulate state and local party committees.

In another example, if a state party undertakes certain mailings that exhort readers to vote exclusively for a state or local candidate, it can only pay for the mailing if the exhortation to vote is "incidental" to the entire mailing (a term that has not been defined by the FEC) and as long as the mailing does not provide the voter with any information on how to actually vote. In other words, if a party committee informs the voter on when the polls are open or how to obtain an absentee ballot, federal law regulates and limits the funding of the mail piece. Yet a non-party nonprofit could send the same exact mail piece, free of any federal election law limitations. That the parties are disadvantaged limits the ability to assist ordinary citizens in obtaining information on where and when to vote.

Simply put, the party committees have been muzzled when it comes to their ability to inform voters of the most basic voting information if they want to avoid being subject to federal regulation. We cannot conceive of any logical policy justification that would support this – particularly when other groups who engage in the exact same sort of activities do so without such regulation. Much of the current regulation of state and local parties is at odds with recent Supreme Court precedent. This is best illustrated by example. In light of *Citizens United v. FEC*, a corporation could fund a multi-million dollar independent expenditure advocating the election of a candidate. But if a party committee wished to do the same advertisement, even if done independently of the candidate, it could only use money subject to federal limitations. Given that the Supreme Court has repeatedly made clear that the application of regulation cannot turn on the identity of the speaker, it is hard to see how the restrictions that apply only to parties can withstand constitutional scrutiny.

McCain-Feingold has had other detrimental effects. Its federalization of state parties has created disincentives for state parties to run joint campaigns that feature the entire party ticket. Prior to McCain-Feingold, it was commonplace for state parties to pay for communications that featured candidates from the top of the

ticket to the bottom of the ticket. Due to the barriers of federal law, such communications are now few and far between and have been replaced mostly by single candidate communications in the most competitive of races, where state parties can allocate their scarce resources. In addition, state and local candidates have bypassed party committees when engaging in advocacy and get-out-the-vote activities, due to the incompatibility of federal and state law. The current structure of the law has caused a significant demise in state and local party relevancy as funding sources seek out less regulated organizations, such as federal, state and local Super PACs, who may independently spend money without any restriction on how those communications are funded and how much voting information that they can provide. All this has had a detrimental impact on the ability of ordinary citizens to be involved in politics at the grassroots level.

This demise of the parties has had serious implications for the American political system. Party committees have played a vital role in grassroots campaigning. Historically, parties have been instrumental in delivering positive party messaging and increasing turnout in American elections through grassroots voter contact methods. Now, what some may characterize as single-issue, outside groups have come in to fill the void. Although such activities are perfectly legal, it seems to be exactly the opposite system of that envisioned by proponents of "reform."

That the Republican Party has generally been opposed to the typical "reforms" should come as no surprise. After all, the Republican National Committee was one of the plaintiffs in McCain-Feingold. Now, however, as the real effects of the law have become apparent in actual application, opposition has become significantly more bi-partisan. Recently, the Association of State Democratic Chairs passed a unanimous resolution at its meeting in November of last year that calls on Congress and the FEC to reevaluate how state and local party committees are regulated. Attached is a copy of this resolution and legislative recommendations made by the ASDC for your review. None of the proposals made by the ASDC advocate for the repeal of any contribution limit. Rather, the ASDC seeks common sense regulation that balances the need to have vital party organizations along with the need to provide safeguards against political corruption.

Critically, our views and suggestions are not designed to simply transfer relevancy back to the parties for relevancy's sake. Recall that the plaintiff in *Buckley v. Valeo* – Senator James Buckley of New York – was not nominated by one of the two major parties. And it was precisely that sort of candidate that felt the burdens of that wave of "reform" the most. Certainly, history teaches that anything taken to the extreme can cause problems, and parties have had their share of issues. But in our view, freeing the parties from the shackles of McCain-Feingold is the best way to counteract recent trends and encourage more effective grassroots activism. Whether one looks to the rise of the Tea Party or the Occupy Wall Street movement, grassroots activists will organize and speak. The law ought to encourage such

grassroots involvement, and not single-out and deter the party committees from participating in such activism in ways that they had in the past.

Although we each have a number of ideas and suggestions regarding specific changes to the law, we both believe that any common sense steps to help revitalize state and local party committees would be helpful, such as:

- Refine and simplify the existing volunteer exemptions for grassroots activities to make them easier to use by state party committees and consider expanding them to other modes of grassroots campaign activities.

- Repeal those McCain-Feingold provisions that have needlessly federalized joint and non-federal campaign activities undertaken by state and local party committees. In the alternative, modify the FEC's current interpretation of the existing rules to scale back their expansive scope that essentially federalizes all party campaigning on behalf of state and local candidates.

- Index contribution limits to party committees, as these limits were inexplicably excluded by the contribution limit indexing provided for by McCain-Feingold. Similarly, to the extent that limitations on coordinated party expenditures still are required, update the limits to more closely reflect modern economic reality.

In the short time that we have today, we can only briefly touch upon the byzantine nature of federal regulation that state parties are subject to. Thank you for the opportunity to present our views.

###

Biographies

Neil P. Reiff is a founding member of the firm of Sandler, Reiff, Young & Lamb, P.C., in Washington, D.C., with over fifteen years of experience concentrating advising national and state party committees, candidates and other political organizations in campaign finance and election law matters.

Mr. Reiff's primary field of expertise is federal and state campaign finance law. He has successfully represented numerous clients before the Federal Election Commission and various state election agencies. Mr. Reiff has spoken on numerous panels on campaign finance law and has provided public testimony before the Federal Election Commission on numerous occasions. Mr. Reiff has also co-authored two amicus briefs pertaining to campaign and election law before the United States Supreme Court. In addition, Mr. Reiff was a member of the legal team representing plaintiffs in the landmark Supreme Court case *McConnell v. FEC.* Mr. Reiff has authored and co-authored several published articles on campaign finance law.

Prior to becoming Deputy General Counsel at the DNC, Mr. Reiff served the DNC as Deputy Compliance Director (1990-1991) and Compliance Director (1991-1993). In that capacity, Mr. Reiff was responsible for ensuring DNC compliance with federal and state election laws, as well as the filing of all disclosure reports by the DNC with federal and state election authorities. From June 1993 until May 1998, Mr. Reiff served as Deputy General Counsel of the Democratic National Committee, until joining Joe Sandler in founding Sandler, Reiff, Young & Lamb.

Mr. Reiff graduated from the National Law Center at George Washington University in 1992. He graduated Phi Beta Kappa from the State University of New York at Binghamton in 1989.

Donald McGahn is a Partner at the law firm of Patton Boggs LLP in Washington, D.C., where he advises and represents elected officials, candidates, national and state parties, political consultants and others on election law and related issues. Prior to joining Patton Boggs, Mr. McGahn served as a commissioner of the Federal Election Commission (FEC). Nominated by President George W. Bush in May 2008, his nomination received unanimous consent of the U.S. Senate the following month, and in July 2008 Mr. McGahn was elected chairman of the FEC. During his time at the FEC, Mr. McGahn led what has been called a "revolution" in campaign finance.

Before his appointment to the FEC, Mr. McGahn served as the head of McGahn & Associates PLLC, a Washington-based law practice which specialized in political law. In his capacity as head of the practice, Mr. McGahn counseled numerous federal and state candidates, members of Congress, national and state political party committees, leadership political action committees (PACs),

corporations and corporate PACs, nonprofits, trade associations and political consultants. Representations have included issues related to campaigns, including the regulation of broadcast television and radio, direct mail, telephones, defamation, polling, ballot access, voter identification, get-out-the-vote, election contests and recounts, election day operations and party conventions. Mr. McGahn has represented those involved in politics before the FEC, the House and Senate Ethics Committees, several state agencies, and in federal and state court as well as in connection with grand jury proceedings.

Mr. McGahn served as general counsel for the National Republican Congressional Committee (NRCC) for nearly 10 years. As general counsel, he updated the NRCC's legal operations and compliance and introduced several innovations, including what has become the standard structure for making independent expenditures. In this role he also managed and oversaw legal issues for the party, including compliance with federal and state campaign finance laws (and the transition mandated by the passage of McCain-Feingold), defending FEC or state regulatory matters, defending and managing all civil litigation, and other related legal issues. Mr. McGahn assisted countless House campaigns with a variety of legal.

Mr. McGahn has been featured in both the *Wall Street Journal* and the *New York Times*, which referred to him as one of the "architects of the campaign finance revolution." His writings have appeared in national publications, including *Campaigns & Elections, The New York Times, The Washington Post, Politico, Roll Call, The Hill* and the *Washington Examiner*. Mr. McGahn has spoken or lectured at several law schools, including Harvard, the University of Pennsylvania, New York University, the University of Virginia, George Washington University, William & Mary, and American University, and appeared as a keynote speaker for the Practicing Law Institute and NABPAC. Mr. McGahn has addressed members of Congress and their senior staff at several House and bi-cameral retreats regarding congressional ethics and appeared numerous times on television, including on *Fox News*, *PBS* and *C-SPAN*. He graduated from the University of Notre Dame and the Widener University School of Law.

TESTIMONY ON DARK MONEY AND CAMPAIGN FINANCE REFORM

SENATE COMMITTEE ON RULES AND ADMINISTRATION

APRIL 30, 2014

NORMAN J. ORNSTEIN

Mr. Chairman and members of the Committee, it is both an honor and a privilege to testify before you today on the challenges of money in politics. In my testimony, I want to raise two larger concerns generated by the multiple recent moves that have knocked the pins out from under the regulatory regime that has long operated in American politics, going back at least to the Tillman Act in 1907. First is the corrosive corruption caused by removing the modest limits on money that have existed. Second is the many efforts to limit disclosure and enable huge flows of dark money to enter the system without the accountability necessary in a democratic political system.

There are many who believe there should be no regulations on campaign finance, requirements for disclosure of contributions and spending, or limitations on contributions. This is not a new question in American politics. Concerns about corruption-- the understanding that money in campaigns can be a corrosive force, both from well-heeled individuals and groups seeking influence in government and from government actors shaking down individuals and groups to raise money-- were present quite early in our country's history.

The concerns were real. Periodically, scandals would engulf the system, leading to a backlash and a drive for reform. The scandals occurred, of course, because a wide open system, where anything goes, provided ample room for that corruption. Government has power-- power to provide jobs, via a spoils system; power to provide opportunities for individuals and interests to make huge sums of money via government contracts, tax breaks, regulations or rights of way, and in many other ways. And the power of government can be used to extract money from those seeking favor or afraid of punishment. This is not a problem unique to America; it is a cancer afflicting societies across the globe, a danger to free governance and systemic legitimacy everywhere.

The history of American politics and political money shows that for at least 150 years, and arguably for more, concerns about corruption and the appearance of corruption often triggered by scandal, led to efforts to balance First Amendment freedoms by putting modest and reasonable restrictions on campaign fundraising and contributions, to push for more disclosure as a disinfectant, to find ways to limit the overweaning influence of monied interests, including corporations and labor unions. Attempts to prohibit parties from shaking down government employees for contributions began in 1837. Historian John Lawrence has noted, Abraham

Lincoln warned that concentrated capital had become "enthroned" in the political system and he worried about an era of "corruption in high places ... until the Republic is destroyed." The first actual restriction on campaign funding came after the Civil War, with an 1867 provision prohibiting the solicitation of contributions from naval yard government employees. The very modest change did not have any appreciable impact on the overall system.

Corruption in the administration of Ulysses S. Grant led to more calls for reform, culminating in the Pendleton Act in 1883, which resulted in the end of the patronage system and assessments. The end of the spoils system led to the rise in influence of corporations, which filled the vacuum in party and campaign funding. A backlash against huge corporate and business contributions, including allegations of outsized corporate influence on President Theodore Roosevelt, led Roosevelt to lead a new reform movement in 1905 and 1906; that led to the Tillman Act of 1907. The Tillman Act made it illegal for "any national bank, or any corporation organized by authority of any laws of Congress" to make a contribution relating to any election for federal office. In 1910, the Federal Corrupt Practices Act required national party committees and congressional campaign committees to disclose their contributions and expenditures after each election.

Scandal continued to spur reform efforts and reform. The Teapot Dome scandal resulted in the Federal Corrupt Practices Act of 1925, which expanded disclosure and adjusted the spending limits upward. Reports of abuse of federal employees working for the re-election of Speaker of the House Alben Barkley in 1938 led to passage of the Hatch Act in 1939, a revision of the 1883 Pendleton Act, which prohibited partisan political activity by most federal employees and also banned solicitation of contributions from workers on federal public works programs.

Labor's increasing political activity during the presidency of Franklin D. Roosevelt led to several efforts to limit labor's contributions, like those of corporations. In 1947 the Republican Congress made a ban on labor contributions to campaigns permanent, as part of the Taft-Hartley Act.

The Watergate scandal spurred the Federal Election Campaign Act of 1974, which was substantially revised by the landmark Buckley v Valeo decision in 1976. The Bipartisan Campaign Reform Act of 2002 was spurred by scandals over soft money fundraising and the misuse of the funds from corporations and unions for electioneering communications.

Then came Citizens United. The longstanding concerns about corruption, or its appearance, were brushed aside; Justice Kennedy's opinion suggested that campaign activity and money raised or spent independently could have neither a corrupting influence nor the appearance of corruption, unless there was a direct quid pro quo. But Citizens United also upheld vigorously the importance of disclosure. By 8 to 1, the Court otherwise deeply divided on the issues upheld disclosure requirements for corporations, including nonprofit corporations, making independent expenditures, saying "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."

Now comes McCutcheon. And here I want to paraphrase from a column I wrote recently on this most recent and most destructive Supreme Court decision. Many analysts have written a lot about the decision, with a natural focus on its direct implications for campaigns. Those are huge and important. But they are, I believe, overshadowed by the impact of the decision on corruption in America.

Some have suggested that McCutcheon was not a terribly consequential decision—that it did not really end individual-contribution limits, that it was a minor adjustment post-Citizens United. Others have said that it may have a silver lining: more money to parties, more of the money disclosed. I disagree on both counts. Justice Stephen Breyer's penetrating dissent to the decision pointed out the many methods that campaigns, parties, and their lawyers would use to launder huge contributions in ways that would make a mockery of individual limits. Chief Justice John Roberts pooh-poohed them as fanciful. And, of course, they started to emerge the day after the decision.

As for disclosure, the huge amounts that will now flow in through political parties will be channeled through joint committees, state and local party committees, and others in complex ways that will make real disclosure immensely difficult, if not impossible.

More significant, in any case, were Roberts's sweeping conclusions about corruption and the appearance of corruption in the decision. The chief justice took the shaky conclusion reached by Justice Anthony Kennedy in the Citizens United decision—that money given "independently" of campaigns could not involve corruption or its appearance—and applied it in an even more comprehensive fashion to money given directly to candidates and campaigns. Thanks to McCutcheon, only quid pro quo corruption is sufficient to trigger any restrictions on campaign contributions—meaning, direct bribery of the Abscam or American Hustle variety, presumably captured on videotape for the world to see. The appearance of corruption? Forget about it. Restrictions on elected officials soliciting big money? Forget about them, too.

To anyone who has actually been around the lawmaking process or the political process more generally, this is mind-boggling. It makes legal what has for generations been illegal or at least immoral. It returns lawmaking to the kind of favor-trading bazaar that was common in the Gilded Age.

With intense competition between parties over election outcomes, with the stakes incredibly high over who will capture majorities in a polarized era, and with money everywhere and intense competition for dollars, the trade of favors for money—and the threat of damage for the failure to produce money—will be everywhere. Access to lawmakers, presidents, their aides, and subordinates is precious, including when they are actually marking up legislation. In the aftermath of Roberts's decisions, this precious access will be sold to the highest bidders.

I remember well the pre-reform era where there were "Speaker's Clubs" and "President's Clubs" with menus for soft-money donors: for $10,000, lunch with key committee chairs and a day hobnobbing with important lawmakers and committee staffers; for $25,000, all that and a small breakfast or lunch with the speaker; and so on. Those will be back, with the dollar amounts higher and the access more intimate. Big donors will make clear to party leaders that multimillion-dollar donations are one step away—and will be forthcoming if only the leaders will understand the legislative needs of the donor. McCutcheon not only made all that legal but also gave it the Supreme Court's seal of approval.

On disclosure, I have already noted the full-throated endorsement of full disclosure of campaign donors in Citizens United and McCutcheon. Of course, it was always going to be a priority for high-priced campaign lawyers to try to find ways around the system, to hide donors where they could. In that sense, the dynamic is no different than high-priced tax attorneys looking for loopholes to enable their wealthy clients to avoid paying taxes. We count on aggressive regulators to keep them honest, and to keep the integrity of the system intact.

It is clear that when it comes to disclosure, the direct and manifest intent of both Congress in Buckley and BCRA and the Supreme Court in Citizens United and McCutcheon has been repeatedly undermined by a feckless set of commissioners at the Federal Election Commission, and by the failure to implement the clear intent of the tax law by the IRS.

Trevor Potter, in his compelling testimony, details how the FEC, through the Republican members of the Commission, worked actively to undermine the language and intent of the law, and has chosen to narrow the disclosure requirements regarding electioneering communications to a point where they are almost meaningless. A Public Citizen report in 2010 showed the impact of the FEC's action on disclosure:

- While most groups making electioneering communications in 2004 and 2006 reported their sources of funding, by 2010 only 1 out of 3 did.

- In 2004, 47 groups reported expenses, 46 of which reported their donors (98%);
- In 2006, 31 groups reported expenses, 30 of which reported their donors (97%);
- In 2008, 79 groups reported expenses, only 39 reported their donors (49%);
- In 2010, 53 groups reported expenses, only 18 reported their donors (34%). The top 10 spenders reported spending $63 million, but reported only $6.9 million in contributions—or about 1 out of every 9 dollars.
- Of the 308 groups—excluding party committees—that reported spending money on the 2010 elections, only 166 (54%) provided any information on the sources of their funding. These groups spent $136 million in 2010, which was almost double the total amount spent by all groups ($69 million) active in the 2006 midterm election.

It is not only the FEC that has been derelict here. So too has the IRS, which now is trying finally to provide clarity under the law for nonprofit groups that have misused tax categories, namely those under Section 501(c)4, as a means to channel dark money through the system. As I wrote in a column in the Atlantic, tax law has many provisions for nonprofit organizations, including 29 under Section 501(c) in the Internal Revenue Code. Federal credit unions, for example, are under 501(c)1, business trade associations are under 501(c)6, mutual insurance companies are under 501(c)15, black-lung benefit trusts are under 501(c)21, and so on. Most of what we think of as nonprofits—religious, educational, scientific, and charitable organizations—are under Section 501(c)3.

Section 501(c)4 applies to "social-welfare organizations," nonprofits that promote social welfare through public-education campaigns, including some lobbying. What about nonprofits that aim to influence elections and engage in campaigning as their primary activity? Those entities organize under Section 527 of the code. That includes political parties, PACs, and other related groups. The law clearly and unequivocally defines 501(c)4s as *exclusively* social-welfare organizations. But for decades, in direct contradiction to the clear language of the law, the IRS has used regulations that define 501(c)4s as *primarily* social-welfare organizations. Why did the IRS do this? Tax experts in this area tell me that this is a convention used at times by the agency to give it a tiny bit of flexibility to avoid rigid characterizations and applications of the law—meaning that if an organization accidentally or unknowingly used an insubstantial portion of its resources in ways that were not within the rubric of social-welfare organizations, the agents or auditors would not be forced to throw the book at it.

Groups classified as 501(c)4s do not have to disclose the identity of their donors. Before 2000, 527s did not have to disclose their donors either—outside organizations used 527s to run ads clearly designed to elect or defeat candidates, but they were called "issue ads" because they did not explicitly say "elect" or "defeat" Candidate X or Y. These outside groups gravitated to

527s to escape disclosure and run their campaigns in secret—and to avoid contribution limits. But after Congress changed the rules in 2000, the new way to avoid disclosure became the 501(c)4s. Following the *Citizens United* decision in 2010—which opened the door to corporations, including nonprofit groups, to make direct expenditures in federal elections—enterprising and aggressive lawyers pushed the envelope. They used the IRS's application of "primarily" in its regulatory approach to social-welfare organizations to mean 50.01 percent of the organizations' activities, and encouraged the newly formed groups to spend a fortune on political ads during a campaign, and then afterward run so-called "issue ads"—many of which were in fact barely disguised campaign ads—to meet their 50.01 percent standard.

For a group intent on influencing the outcome of elections, there was only one reason to create a 501(c)4 instead of turning to a 527 or simply forming an independent super PAC—secrecy. For many groups, that was explicit: When Karl Rove and his colleagues formed Crossroads GPS to operate alongside his super PAC, American Crossroads, the communications to potential donors made it clear that if they wanted to remain anonymous, the GPS route would enable them to do so.

If you are a "Tea Party" group, with a direct goal of influencing elections, you clearly belong as a 527.

For a federal revenue service that is understaffed and deeply sensitive about getting in the middle of a political dispute, the easiest way out was the passive one: Accept the standard that flew directly in the face of the law but was insisted upon by aggressive political consultants and their consiglieri to inject huge amounts of dark money into federal races. When the IRS publicly announced that it would consider applying gift taxes to donors to these groups that went over the line, the organized and concerted campaign of intimidation by the pols forced the agency to back off.

After *Citizens United* and another related appeals-court decision, *SpeechNow*, we saw an explosion of super PACs and of outside money flooding into campaigns, and an explosion in groups trying to get 501(c)4 status. Many clearly did not deserve it—if you are a "Tea Party" group, with a direct goal of influencing elections, you belong as a 527. The same is true of many organizations aimed at influencing elections with the word "party" in the name, or even of others using words like "progressive" or "occupy." Faced with a flood of applications, and recognizing, thanks in part to efforts by reform groups and lawmakers, that their handy interpretation of "primarily" in the regulations had exploded into a gaping loophole, the IRS began its ham-handed and overreaching efforts to screen groups.

Now, appropriately and commendably, the IRS is trying to write new and clear regulations that meet the test of complying with the explicit language of the law, as the Supreme Court itself, in decisions like *Better Business Bureau v. the United States*, has said means exactly what it says: Exclusively means exclusively. A very modest amount of political activity can fit under the rubric of social-welfare organizations, and the IRS is trying to make it easy for organizations by defining both what those political activities are and what proportion of the organization's budget can be applied.

Not surprisingly, opponents are going to DEFCON 1—for one reason, and one reason only: They want to keep secret the hundreds of millions in dark, undisclosed money to run attack ads and muddy the waters. This attack on the IRS, by lawmakers like Mitch McConnell, Darrell Issa, and Dave Camp, and by their outside political hacks and counselors, is all about muzzling the IRS to maintain secrecy and avoid the disclosure that the Supreme Court has wholeheartedly and overwhelming endorsed.

What can Congress do? First, despite the steeply uphill battle to enact any reasonable laws these days, it should make every effort to pass the DISCLOSE Act. Second, the Senate should hold probing hearings on the dysfunctional Federal Election Commission and look to reform it to make it into a reasonably functional body that acts to enforce the law and not to thwart it. Third, for every hearing in the House highlighting the purported "scandal" at the IRS, the Senate should hold a hearing on the real meaning of social welfare organizations and the need to clarify in IRS regulations what the law specifically intends. Fourth, the Senate should pass a rule amending its ethics code to make it a violation for senators or senior staffers to solicit the large contributions for party committees now allowed under McCutcheon. Fifth, Congress should begin serious consideration of a broader reform of the campaign finance system, one that would empower small donors as a counterweight to the oligarchs, having it ready for the day when, as John McCain has predicted, the next huge scandal creates a new momentum for reform. Before that happens, I fear that deep damage will be done to the fabric of the American political system.

Testimony of Trevor Potter* before the Senate Rules Committee at its hearing:
Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Elections and Beyond

April 30, 2014

Thank you for the invitation to appear before you today as you take a much needed look at the effect of the flood of undisclosed money on our elections. Because it is difficult to map the road ahead without knowing how we got where we are, I would like to talk about how we moved from the full disclosure of electioneering communications required by Congress in 2002 as part of the Bipartisan Campaign Reform Act (BCRA), to where we are today, post-*Citizens United* and post-*McCutcheon*. What we have seen in the dozen years since Congress enacted BCRA is the steady unraveling of the Act's disclosure requirements. However, that unraveling has been the result of political developments and administrative action and inaction, not federal court decisions.

Both *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 572 U.S. ___ (2014), reversed over half a century of the Supreme Court's deference to Congress's understanding of how large aggregations of wealth used to influence elections corrupts our democracy. But, even as the Court tossed aside longstanding limits and prohibitions on the sources of campaign contributions or expenditures, it spoke of—in fact, relied upon—the importance of disclosure, and the value of providing the electorate meaningful information about the funding of political communications in order to help them make decisions about their elected officials. In his *Citizens United* majority opinion, Justice Kennedy referred to prior Supreme Court precedent and wrote glowingly in favor of disclosure:

> 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. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens "'make informed choices in the political marketplace.'"
>
> . . .
>
> 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. 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

---

* President and General Counsel, the Campaign Legal Center; former Commissioner and Chairman, the Federal Election Commission.

> speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests. The First 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, 558 U.S. at 370-71 (internal citations omitted). Importantly, this is the only part of the *Citizens United* opinion joined by eight out of the nine justices, demonstrating a broad consensus across the Court on the importance of the disclosure of the sources of funding of political speech.

Earlier this month in *McCutcheon*, Chief Justice Roberts again emphasized the importance of disclosure in our campaign finance system and echoed Justice Kennedy's reliance on modern technological means for achieving such disclosure rapidly in our connected world:

> [D]isclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. . . . With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

McCutcheon, No. 12-536, slip op. at 35-36 (internal citations omitted).

I agree with the Court about the fundamental importance of disclosure in providing voters with critical information about who is funding communications supporting and opposing candidates. Unfortunately, the high value the Supreme Court places on such disclosure is not reflected in the reality of how those laws are currently interpreted and administered by the Federal Election Commission (FEC). In fact, the FEC's actions have eviscerated the reach of Congress's disclosure requirements, and Commission deadlocks have made the situation worse. What remains of federal campaign finance disclosure laws does not comport with the Supreme Court's description in *Citizens United* and *McCutcheon*, and thus does not deter corruption or provide citizens with sufficient information to properly evaluate speakers in the way the Court envisions.

The short history of this state of affairs, so dangerous to our democracy and so contrary to the Supreme Court's expectations, began with the proliferation of so-called "issue ads" in the elections of the 1990s and 2000 paid for by unregulated and undisclosed soft money, where the "issue" was which candidate deserved your vote. In response to this, Congress included a provision in BCRA creating a new category of campaign spending called "electioneering communication." BCRA defines electioneering communication as a broadcast, cable or satellite communication referring to a federal candidate, made within 30 days of a primary or 60 days of a general election and targeted to the candidate's electorate. Crucially, BCRA required all persons, including corporations and labor organizations, who make disbursements exceeding

$10,000 in a calendar year for electioneering communication to disclose the names and addresses of all contributors who contributed $1,000 or more to the person making the disbursement, or the disclosure of all contributors who contribute $1,000 or more to a segregated account of the organization used to make the disbursement.

The FEC's initial regulation implementing BCRA's electioneering communication disclosure requirement tracked the language of the statute. Unfortunately, the Commission thereafter promulgated a revised, and significantly narrowed, regulation in 2007 after the Supreme Court's decision in *FEC v. Wisconsin Right to Life* (*WRTL*). In that case, the Supreme Court narrowed BCRA's ban on corporate electioneering communications to only apply to communications containing express advocacy or its functional equivalent. However, the Supreme Court expressly said that this narrowing construction did not apply to the disclosure requirements for electioneering communications. In response to the decision and a petition for rulemaking to incorporate the *WRTL* holding into its regulations, the FEC initiated a rulemaking. Although the Supreme Court had said the *WRTL* holding did not apply to the disclosure rules, and the rulemaking petitioners had not raised the issue of disclosure in their petition, the Commission nonetheless proposed to revise its electioneering communication disclosure regulation. Specifically, the Commission asked for public comments regarding whether the electioneering communication disclosure requirement should be limited to "funds donated for the express purpose of making electioneering communications."

In its final rule, the Commission adopted this narrow "for the purpose of furthering" language. The consequence was to make it easy for organizations to hide the source of the money funding electioneering communications. As long as there was no proof that a person "earmarked" the donation or gave it specifically for the purpose of furthering such ads, the Commission regulation does not appear to require disclosure of the donor. This is true even where it was clear that the organization would be producing electioneering communications.

But that was not the end of the FEC's attack on disclosure. When it came to actually enforcing its electioneering communication disclosure regulation, the FEC has effectively further limited the already narrow regulation. In 2010, three members of the six-member Commission blocked an enforcement investigation into whether Freedom's Watch, a 501(c)(4) corporation, violated the law by failing to disclose its major donor, Sheldon Adelson, after making electioneering communications. The three Commissioners interpreted the regulation even more narrowly than what is required by the plain language of the regulation, stating that donor disclosure is required "only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report. Otherwise, the corporation or union is under no obligation to disclose such information." In other words, unless a donor specifically designates their contribution for the airing of a particular ad, the Statement of Reasons of those three Commissioners held that no donor disclosure is required by law. Given that political ads are typically created after the money is raised to pay for them, this effectively means there is no required donor disclosure, even where the donor specifically designated their contribution for the general purpose of funding electioneering communications that have not yet been created.

It is also worth noting that in addition to the Commission's failure to adequately define and enforce the existing law, the Commission has failed to update its regulations in response to

Citizens United. To date, more than four years after *Citizens United*, the FEC has failed even to approve a Notice of Proposed Rulemaking to begin the process of revising its rules on disclosure in response to the Court's decision. In 2011 alone, the Commission deadlocked three times on the simple question of whether to initiate a post-*Citizens United* rulemaking before compromising and issuing a NPRM which does not address disclosure . This is important because the Supreme Court's endorsement of the value of disclosure of the sources of funding of such campaign advertising, and its apparent unawareness that the Commission had gutted the disclosure requirement of BCRA, can and should be addressed by the FEC in such a rulemaking. If it did so, the Commission could undo the lawless change made in its 2007 rulemaking, and restore the BCRA disclosure requirements mandated by Congress and upheld by the Supreme Court.

In 2011, Representative Chris Van Hollen brought suit against the FEC challenging the Commission's narrow electioneering communication disclosure regulation. The district court agreed with Representative Van Hollen that the FEC's disclosure regulation was contrary to law, resulting in the reinstatement of the BCRA statutory electioneering communication donor disclosure requirement. However, in September 2012, the D.C. Circuit Court of Appeals reversed the district court's decision and sent the case back to the district court for further review and proceedings. The district court has not yet rendered another decision in the *Van Hollen* case. Thus, independent expenditures and electioneering communications are both currently subject to the "for the purpose of furthering" donor disclosure requirements. As a result of the FEC's regulation, corporate and other donors to 501(c) organizations and other non-political committee entities may refrain from designating contributions "for the purpose of funding" election ads, and by so doing, avoid the statutory federal campaign-finance law donor disclosure requirements.

The result of these court decisions and the FEC's narrow interpretation and application of the electioneering communication disclosure requirement has been a steep decline in the disclosure of donors funding outside spending (spending that excludes the party committees). In 2008, outside groups (that did not register with the FEC or IRS as political entities) spent $69,187,001 on political ads without disclosing the funders of that advertising. This number more than quadrupled to $310,818,577 in secret funding in the 2012 election cycle. The numbers do not look much better when you consider the percentage of outside spenders that disclosed their donors. In 2008, only 64.5% of outside spending was accompanied by full donor disclosure. In 2012, this number had dropped to only 40.7% of outside spending accompanied by donor disclosure.[1]

The reason for these enormous drops in the level of donor disclosure is that these "dark money" expenditures are occurring through groups that claim that their "major purpose" is something other than participating in federal elections, and therefore do not register or report with the FEC as political committees or with the IRS as 527 organizations. Instead, they file as 501(c)(4)s, 501(c)(6)s, 501(c)(7)s or other non-profit legal entities. As a result they do not disclose their donors in their IRS public filings, and because they claim that they received no funds designated for political advertisements as defined under the FEC's 2007 regulation, they do not report their

[1] Numbers courtesy of the Center for Responsive Politics, *available at* http://www.opensecrets.org/outsidespending/disclosure.php.

donors to the FEC either. By contrast, contributions to Super PACs (which are entities registered with the FEC as political committees) are publicly reported—unless the contributions are made through shell corporations or other entities designed to avoid disclosure of the true funder.

There are several promising proposals out there to begin to address the current lack of transparency and provide better disclosure in political fundraising. Senator King introduced a bill earlier this month, S.2207, that would require political committees to report all cumulative contributions of $1,000 or more to the FEC within 48 hours of receipt. The DISCLOSE Act, introduced in 2012, would have required any "covered organization"—a corporation, labor union, 501(c) organization (other than (c)(3)), Super PAC and section 527 organization—that spends $10,000 or more on a "campaign-related disbursement" to file a disclosure report with the FEC within 24 hours of the spending and to file a new report each time an additional $10,000 or more was spent. Covered organizations could have established a segregated bank account to make its campaign-related disbursements and would have then been required only to disclose the donors of more than $10,000 to that segregated account. If, however, the campaign-related disbursement was paid for out of its general treasury fund, the organization would have been required to disclose the source of all donations totaling more than $10,000. Finally, the American Bar Association adopted a resolution earlier this year urging Congress to mandate consistent disclosure of all political expenditures and contributions by all entities, regardless of type or tax status.

I would like to again quote Chief Justice Roberts' opinion in *McCutcheon*, "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information." I would take the Chief Justice's remark even one step further and say that we have never had such powerful tools available to provide comprehensive and easily accessible disclosure of the sources of large donations to groups making significant expenditures in federal elections. Unfortunately, we do not have meaningful content to put these tools to good use.

Finally, I would like to address the arguments made by opponents of full disclosure that requiring such disclosure chills First Amendment-protected speech. These arguments rely on a line of Supreme Court cases that exempt organizations from disclosure requirements "if there [is] a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370.

The case most often cited to oppose disclosure requirements is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In that case, the Supreme Court held that the free speech and association protections of the Fourteenth Amendment Due Process Clause prohibited the state of Alabama from compelling the NAACP to disclose its membership list. 357 U.S. at 466. The NAACP had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. The Court concluded that the state's purported interest in disclosure of the NAACP's membership list—determining whether the organization had violated state law by failing to register as a foreign corporation doing business in the state—was insufficient "to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." *Id.* at 463-64.

In today's debates, billionaires and associations of large corporations sometimes claim that they are in the shoes of the NAACP in Alabama in the 1950s. This distorts the context of that case, where a small and vulnerable minority organization faced not only threats of physical violence, including lynching, and cross burnings, but also the organized repression by the state of Alabama, including its state and local police forces, so that it had no reasonable expectation of protection by public safety officials.

Instead, the proper standard for an analysis of the disclosure obligations of wealthy and powerful individuals and business corporations in 2014 begins with the Supreme Court's decision in *Buckley v. Valeo*, where the Court made it clear that the constitutional standard for the "threats, harassment, or reprisals" exemption is exceedingly narrow. Under the formulation articulated in *Buckley*, the exemption is only available when the "threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [the challenged disclosure requirements] cannot be constitutionally applied." 424 U.S. 1, 71 (1976). The *Buckley* Court explained that the narrow exemption from disclosure requirements that the Court described is "necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights[,]" but "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Id.* at 66 (citing *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). "The governmental interests sought to be vindicated by [the Federal Election Campaign Act] disclosure requirements are of this magnitude." *Id.*

The Supreme Court applied *Buckley*'s "reasonable probability" of "threats, harassment, or reprisals" standard for exemption from disclosure laws in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982). The case involved another very small and vulnerable political organization, in many ways similar to the NAACP. The Supreme Court held: "In light of the substantial evidence of past and present hostility from private persons and government officials against the SWP [*i.e.*, Socialist Workers Party], Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id.* at 102. The Court reviewed the evidentiary record compiled in the district court, explaining that the SWP had introduced evidence of incidents including "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office." *Brown*, 459 U.S. at 99. The Court continued: "There was also evidence that in the 12- month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership." *Id.* The Court explained that although the state of Ohio "contend[ed] that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court's conclusion that 'private hostility and harassment toward SWP members make it difficult for them to maintain employment.'" *Id.*

More recently, in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), the U.S. District Court for the District of Columbia rejected an argument by the ACLU, Chamber of Commerce, National Association of Manufacturers, and National Rifle Association that, due to their "controversial" nature, the groups were entitled to the "threats, harassment, or reprisals" exemption from FECA's "electioneering communication" disclosure requirements. *Id.* at 242-47. The court explained that "[n]either *NAACP* nor *Brown* stand for the proposition that disclosure laws that apply to organizations 'whose positions are often controversial and whose

members and contributors frequently request assurances of anonymity' are facially unconstitutional." *Id.* at 245.

Most recently, the Supreme Court referenced *Buckley*'s "threats, harassment, or reprisals" standard in *Doe v. Reed*, 130 S. Ct. 2811 (2010). In *Doe*, proponents of a referendum to deny certain benefits to same-sex couples claimed that disclosing the referendum petitions would unconstitutionally subject signatories to threats, harassment and reprisals. *Id.* at 2820-21. The Court rejected the plaintiffs' facial challenge to the disclosure of referendum petitions and Justice Scalia observed:

> Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. . . . There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.

Id. at 2836-37 (Scalia, J., concurring).

All of these cases show that the "threats, harassment, or reprisals" exemption is intended to carve out a narrow protected space for speakers who are sufficiently weak and vulnerable that they would otherwise be forced to retreat from the "marketplace of ideas" in the face of physical attack or other extreme reprisals. Thus, the "threat, harassment, or reprisals" exemption does not cover individuals and groups seeking anonymity merely because they are expressing controversial or potentially unpopular ideas. Instead the Court has wisely acknowledged that publicly taking responsibility for speech is an important element of debate in our representative democracy.

I thank this Committee for the invitation to testify today.

Executive Summary of Testimony

Although Ann Ravel currently serves as Vice Chair of the Federal Election Commission, she is not testifying in that capacity nor is she speaking for the Commission during this hearing. Instead, her testimony concerns a case pursued during her tenure as Chair of the California Fair Political Practices Commission (FPPC). *FPPC v. Americans for Responsible Leadership* revealed how dark money networks use a variety of tactics to move large amounts of money into the political process while avoiding disclosure rules.

Just a few weeks before the 2012 election, an $11 million contribution was made to a California political action committee focusing on two initiatives on the California ballot. After receiving a complaint, the FPPC attempted to determine whether the contributor, Americans for Responsible Leadership (ARL), was in compliance with California disclosure law. Following a unanimous ruling by the California Supreme Court, ARL revealed the day before the election that it was solely an intermediary and that two other non-profits actually were the sources of the contribution.

The FPPC's subsequent investigation found that approximately $25 million was transferred to those two non-profits. Then, after being routed through a series of non-profits around the country, $15 million was returned to California to be spent on the initiative campaigns. $11 million of it was funneled through ARL, and another $4 million went through an Iowa non-profit. Based on these findings, the FPPC levied a record-setting $1 million fine and sought disgorgement of $15 million in inadequately disclosed funds.

* * *

Testimony of Ann M. Ravel
Former Chair, California Political Practices Commission

Before the Committee on Rules and Administration
United States Senate

At a Hearing Entitled
"Dollars and Sense: How Undisclosed Money and Post-*McCutcheon* Campaign Finance Will Affect the 2014 Election and Beyond"

April 30, 2014

Mr. Chairman, Ranking Member Roberts, and distinguished Members of the Committee:

Thank you for inviting me to appear before you today. Although I am Vice Chair of the Federal Election Commission, I am not testifying in that capacity nor am I speaking for the Commission today. Instead, my testimony concerns a case from my tenure as Chair of the California Fair Political Practices Commission (FPPC) during the 2012 election cycle.

That case, *FPPC v. Americans for Responsible Leadership*, revealed how dark money networks are able to anonymously inject large amounts of money into our political process. Using shell corporate entities, wire transfers, and fund swapping with no apparent purpose other than to hide the sources of funds, these national networks skirt disclosure rules with relative ease.

In 2012, California voters had two statewide initiatives on the California ballot — Proposition 30, which proposed to raise taxes, and Proposition 32, which sought to prohibit unions from using automatic payroll deductions to raise money for political campaigns. On October 15, 2012, just a few weeks before the election, an $11 million contribution was made to a California political action committee, the Small Business Action Committee PAC (SBAC), a group that opposed Prop 30 and favored Prop 32.

This was the largest anonymous donation in California campaign history. It was made by an Arizona nonprofit corporation, Americans for Responsible Leadership (ARL), a group that had never before made a contribution in California. Indeed, ARL had never made a contribution over $500,000 to any political action committee, even in Arizona. The group's generic-sounding name revealed little or nothing about its donors or incorporators.

A complaint was filed with the FPPC concerning this contribution. In response, the FPPC requested information from ARL to determine whether it had followed California law in documenting and disclosing the source of its $11 million contribution.

California law requires groups like ARL to maintain records related to their contributions. The law also requires these groups to disclose the source of the contribution if the money was given to the group in response to a solicitation. Or if the funds were earmarked for a political committee, the original source would have to be reported. In short, California law requires adequate disclosure *before* the election so that voters can make informed choices at the ballot box.

ARL did not provide information showing it had complied with California law. So, with only two weeks before the election, the FPPC and California's Attorney General's Office filed suit to compel an audit. On the Sunday before the election, a unanimous California Supreme Court issued an unusual weekend decision ordering ARL to immediately provide records to the FPPC. The next morning, the day before the election, ARL finally disclosed the source of the contribution — two other nonprofit groups.

ARL disclosed that the $11 million originated from a Virginia-based nonprofit, which transferred the funds through an intermediary group called the Center to Protect Patients Rights (CPPR). CPPR then passed the money to ARL to give to SBAC. With this disclosure, ARL admitted that it was solely an intermediary, meaning it contributed money that actually originated with another source.

ARL's admission and the FPPC's subsequent formal investigation revealed how dark money networks sidestep disclosure rules and are able to anonymously infuse large amounts of money into an election. Ultimately, the FPPC discovered that $15 million — not the $11 million originally thought — was used to influence California's election. Yet none of it was adequately disclosed.

The genesis was with a California consultant who began raising money in connection with Propositions 30 and 32. Some of the money went to political action committees in California, which are required to disclose their donors. But approximately $29 million was sent out of state, to the Virginia nonprofit, because the donors did not want their identities disclosed. The Virginia nonprofit planned to use the funds to run issue advertisements in California.

In September 2012, when it became known that California law might require donor disclosure of issue ads within 60 days of the election, the money was transferred to CPPR. But this arrangement — seemingly a no-strings-attached gift of millions of dollars to CPPR — was not entirely arm's length.

The California consultant had worked closely with CPPR's founder on the California ballot initiative strategy and understood that he had access to a national network of nonprofits. So when the money was transferred to CPPR, it was done with confidence and the founder's assurance that other funds from other groups in the network would be guided back to California to help oppose Prop 30 and support Prop 32. In fact, the California consultant told investigators that he believed CPPR's founder may have been interested in the fund-swapping arrangement because the infusion of funds from the Virginia nonprofit could help CPPR avoid disclosure of its activities under federal law.

With this tacit understanding, the Virginia nonprofit began transferring nearly $25 million to CPPR. CPPR, in turn, began directing funds through a series of other groups back to California's ballot initiatives. In two sets of transactions involving four different nonprofits, CPPR and ARL funneled $15 million into California's 2012 election.

In the first series of transactions, a transfer of $4.05 million was made to CPPR, and shortly thereafter an almost identical amount — $4.08 million — was transferred to a group called California Future Fund (CFF). FPPC investigators discovered that, at the California

consultant's suggestion, CPPR had transferred funds to an Iowa-based group that, in turn, sent funds to CFF for use on the California ballot initiatives. This entire chain of transactions — routed through multiple nonprofits — occurred within three days and without disclosure.

The second series of transactions, involving the $11 million contribution that originally raised suspicions, followed a similar pattern but used different groups in the network. The California consultant told investigators that, around the time of a $14 million transfer to CPPR, he requested $11 million from CPPR for the California ballot initiative. CPPR then routed $11 million to SBAC, using ARL as an intermediary. This $11 million transfer was arranged via text message, illustrating the ease with which a network is able to avoid disclosure. After traveling a circuitous route through multiple nonprofits around the country that obscured its true origins, the money then returned to SBAC in California, where it was disclosed as a contribution from ARL.

The *Americans for Responsible Leadership* case shows that enforcing compliance with disclosure requirements is complicated by the nationwide scope and elusiveness of these networks. The web of organizations involved in this case stretched from Virginia to Arizona to Iowa. None of these out-of-state groups had any apparent connection to California, each had generic names revealing nothing about their donors or incorporators, and they may have been little more than shell entities.

For example, although California Future Fund was a registered California political committee, it had an Iowa address and its principal officers had no apparent connection to California. CPPR's office address was listed as a post office box in Arizona and apparently no longer exists with that same name. With entities operating across state lines, popping up and then disappearing or changing names, it is difficult to ensure meaningful disclosure.

These tactics have no apparent purpose other than to conceal the sources of funds. The U.S. Department of Justice has expressed concern that the lack of disclosure increases opportunities for unseen *quid pro quo* corruption. In testimony before the Senate Judiciary Committee's Subcommittee on Crime and Terrorism last year, a Justice Department official explained that without transparency it is much more difficult to detect, for example, the payment of bribes to corrupt officials or the use of foreign funds to influence elections. And section 81002(a) of the California Government Code provides that "[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."

Just as important, without timely action to require disclosure, voters can be denied information when it matters most — *before* the election. The FPPC's quick action in *Americans for Responsible Leadership* resulted in some disclosure of the sources of the $11 million contribution on the eve of the 2012 election. That disclosure was significant to the people of California, but it took another year to untangle the web of transactions and provide the public with more information about the full scope of the transactions.

Ultimately, a record-setting $1 million fine was levied against CPPR and ARL. In addition, California law requires the final recipients of the inadequately disclosed funds to disgorge the total amount.

The purpose of the California Political Reform Act was to "assure public trust in government" by requiring disclosure. Dark money in the political system not only increases the risk of corruption and undermines the ability to ferret out that corruption, it also contributes to public distrust and disassociation from government.

The litigation and investigation by the FPPC in this case shows that public officials from both political parties can work together in a responsible way to enforce the law. In addition, improving disclosure laws at the state and local level certainly can make a difference. But because dark money has a nationwide impact, it would be most effectively remedied by a federal solution.

While I am not here to comment on FEC-related matters, I would be glad to answer your questions about the *Americans for Responsible Leadership* case.

Thank you again for the opportunity to appear before the Committee.

* * *

Biography of Ann M. Ravel
Vice Chair, Federal Election Commission

Commissioner Ann M. Ravel is Vice Chair of the Federal Election Commission for 2014. Ms. Ravel was nominated to the Federal Election Commission by President Barack Obama on June 21, 2013. After her appointment received the unanimous consent of the United States Senate, Ms. Ravel joined the Commission on October 25, 2013.

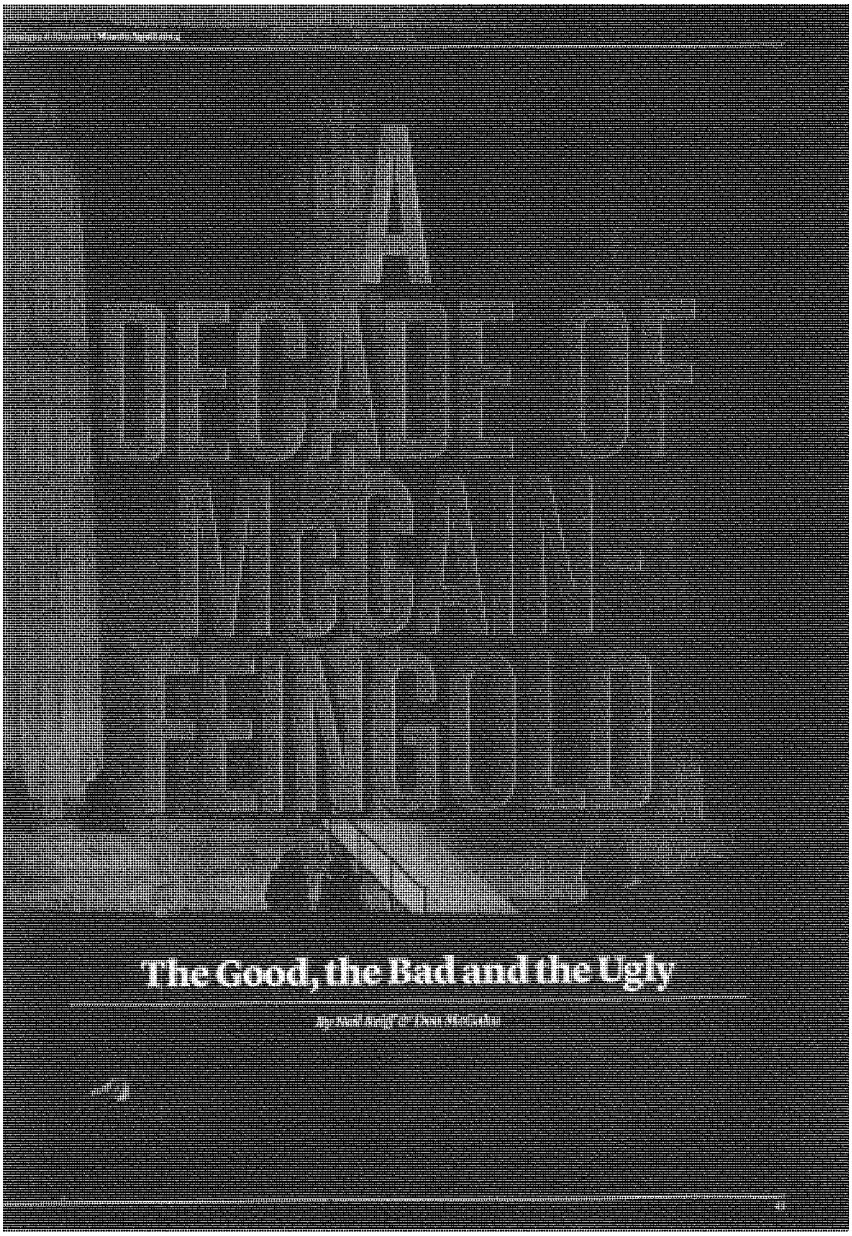
From March 2011 until her appointment to the Commission, Ms. Ravel served as Chair of the California Fair Political Practices Commission (FPPC), to which Governor Edmund G. Brown, Jr. appointed her. At the FPPC, Ms. Ravel oversaw the regulation of campaign finance, lobbyist registration and reporting, and ethics and conflicts of interest related to officeholders and public employees. During her tenure at the FPPC, Ms. Ravel was instrumental in the creation of the States' Unified Network (SUN) Center, a web-based center for sharing information on campaign finance.

Before joining the FPPC, Ms. Ravel served as Deputy Assistant Attorney General for Torts and Consumer Litigation in the Civil Division of the United States Department of Justice. Ms. Ravel also worked as an attorney in the Santa Clara County Counsel's Office, ultimately serving as the appointed County Counsel from 1998 until 2009. Ms. Ravel represented the County and its elected officials, provided advice on the state Political Reform Act, and initiated groundbreaking programs in elder abuse litigation, educational rights, and consumer litigation on behalf of the Santa Clara County government and the community.

Ms. Ravel has served as an elected Governor on the Board of Governors of the State Bar of California, a member of the Judicial Council of the State of California, and Chair of the Commission on Judicial Nominees Evaluation. In 2007, the State Bar of California named Ms. Ravel Public Attorney of the Year for her contributions to public service.

Ms. Ravel received her B.A. from the University of California, Berkeley and her J.D. from the University of California, Hastings College of the Law.

* * *


A
DECADE OF
MORTIN
FINGER
The Good, the Bad and the Ugly

Feature

Challenges to McCain-Feingold's provisions have profoundly altered the state of campaign finance law in America. Was the initial effort worth the trouble?

We're now five election cycles removed from the passage of McCain-Feingold, which drastically altered the landscape of campaign finance law and has been at the center of countless court challenges over the past decade. It's more than enough time to properly assess the long-term impacts of the law and judge how its major provisions have fared through the years.

Since the 2004 election cycle, when McCain-Feingold took effect, we've had a front row seat, representing candidates, party committees and third party groups grappling with the ever-changing campaign finance landscape. So from the perspective of a Democratic campaign finance attorney and a Republican former chairman of the Federal Election Commission, what follows is a bipartisan perspective on the law—the good, the bad and the ugly.

Let's flash back to 2002. A Democrat-controlled Congress sought to address several issues it believed to be destroying American politics. Party committees were supposedly running amok. Spending by "unregulated" outside groups, which were running issue ads with unregulated funds, was rising. And the effects of the 1996 election scandals were still being felt—highlighting fundraising practices in both parties, as well as troubling attempts by foreign donors to funnel money into American elections.

Although McCain-Feingold faced many hurdles, adept political maneuvering by its proponents created a law that was quite different than the one initially introduced. McCain-Feingold was carefully crafted to achieve two goals: break the link between politicians and soft money, and reduce the number of so-called negative sham issue ads that had begun to make incumbents nervous.

Once passed, it wasn't a slam dunk that then-President George W. Bush would sign the bill into law. Yet he did sign the Bipartisan Campaign Reform Act of 2002 (commonly referred to as McCain-Feingold) into law in March of 2002. The law's provisions were to take effect after the 2002 elections. Unsurprisingly, even before the ink on the president's signature was dry, legal challenges were filed. Although the reform groups and the federal government successfully defended most of these initial facial challenges, several subsequent challenges to McCain-Feingold's provisions have profoundly altered the state of campaign finance law in America. This leaves us wondering: Was the initial effort worth the trouble?

THE GOOD

THE SOFT MONEY BAN

The lynchpin of McCain-Feingold was the prohibition on national party committees raising funds from sources and in amounts that were inconsistent with federal law—that is, unlimited soft money contributions from corporations, individuals and labor unions. To date, the ban has withstood constitutional challenge.

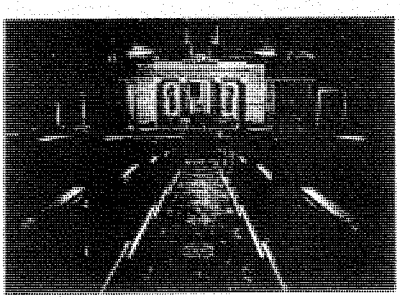
In theory, these funds were intended to help pay for a portion of the party's overhead and for their activities in state and local elections. Starting in the mid-90s, party committees began using these funds to pay for "issue ads" that promoted their candidates and attacked their party opponents. Based upon FEC rulings, the party committees could pay for such ads, without limit, in full coordination with their candidates, and in large part, with soft money.

As you could imagine, the success of these ads created a significant dependence on these large contributions by the national party committees and party leaders, which brought to light many unseemly fundraising practices where six-figure donors were offered special access to lawmakers and the president. One of the more celebrated examples of this practice: sleepovers in the White House.

To the extent that McCain-Feingold sought to break the link between national parties and soft money, it has achieved this stated goal. Some claim the parties have more than made up for this shortfall, pointing to gross fundraising numbers. For example, in the 2012 cycle, the Democratic National Committee and the Republican National Committee raised over $650 million combined, as compared to approximately $330 million combined in the 2000 election cycle (the final presidential cycle before McCain-Feingold took effect).

Such comparisons over-simplify the harm the law has caused. First, in the 2000 cycle, the two major national party committees raised over $300 million combined in soft money. Second, such comparisons tend to be selective, ignoring the other national party committees dedicated to House and Senate elections and the negative effect it's had on these entities, particularly in non-presidential cycles. Third, it ignores the exponential increase in the cost of communicating with voters. From the cost of postage to the explosion in the cost of broad-

McCain-Feingold placed a complex set of regulations upon state and local party committees, which make the law regulating state parties look like a Rube Goldberg contraption.



cast air time, party committees simply do not have the buying power they used to have. In absolute dollars, the parties appear healthy; but in political bang-for-the-buck, they are a shadow of what they used to be.

CONTRIBUTION LIMITS

Although not included in the original bill, McCain-Feingold was amended to raise contribution limits to candidates and party committees, and also index many of those limits for inflation. The change was a long time coming, and it was the first amendment to the incoming contribution limits since the mid-70s.

The new limits helped replace some of the money being excluded from the system by the soft money ban. The limits for national party committees were raised from $20,000 to $25,000 and the candidate limit was doubled from $1,000 per election to $2,000 per election, both of which were indexed for inflation. However, these increased limits had some other consequences. For one, they have permitted candidates to raise more money. This can either be perceived as a good or bad trend, depending on how you look at the issue. In the 2012 cycle, congressional candidates raised over $1.8 billion compared to $980 million during the 2002 cycle.

At the presidential level, the increased contribution limits, combined with successful Internet fundraising, have made the current presidential public financing system completely irrelevant. President Obama and his Republican challenger Mitt Romney collectively raised more than $1 billion in 2012. Had each agreed to the public grant for the general election period, each candidate would have been limited to spending no more than $92 million in the general.

While the numbers are staggering, raising contribution limits to catch up to inflation, and indexing them to inflation, is a good thing for the political system. Several states have either higher limits than those in federal races, or no limit at all, without any additional threat of corruption. It helps campaigns to keep up with rising costs. Critically, it can help some challengers raise the funds necessary to wage a credible campaign against entrenched incumbents.

On the other hand, the ability to raise more funds, coupled with the rising costs of political messaging, significantly increased the average spending in federal races, which may deter otherwise enthusiastic challengers. More and more campaigns are being dominated by self-funders, who need not rely on smaller contributions or party committees.

THE BAD

STATE AND LOCAL PARTY COMMITTEES

Although sold as a national party soft money ban, buried in the details of McCain-Feingold were several provisions that have harmed state and local parties. Essentially, McCain-Feingold federalized almost all elections, even those for state and local office, and forced the state and local parties to pay for most everything they do with hard money.

McCain-Feingold created a new concept called "federal election activity," which includes the traditional party programs to register voters, develop voter lists, provide sample ballots and get voters to the polls on Election Day. The law piled on several restrictive provisions that apply even if those activities also benefitted state and local candidates, and even if not undertaken to assist federal candidates.

In addition, McCain-Feingold placed a very complex set of regulations upon state and local committees, which make the law regulating state parties look like a Rube Goldberg contraption. Of course, most state campaign finance laws are less restrictive than federal law. Therefore, the new law has created disincentives for state and local party committees to engage in a consolidated effort to elect both federal and state candidates together.

As spending from candidates, national party committees and outside groups is skyrocketing, state party spending has stayed relatively flat.

The days of spending on ticket-wide mailings and slate cards have been replaced by separate appeals for federal and maybe, if they can afford it, state and local candidates. Although state party federal limits were doubled in McCain-Feingold, total receipts from the 100 Democratic and Republican state party committees in the 2012 election cycle (not including joint fundraising projects) were only about $200 million, or an average of $2 million per committee. State party committees have lagged far behind candidates, national party committees and the nascent Super PACs in their ability to raise federal funds. Many state parties had received significant transfers of funds from the national parties as well, which all but disappeared with the passage of McCain-Feingold.

As spending from candidates, national party committees and outside groups is skyrocketing, state party spending has stayed relatively flat. This may be an indication that state and local party committees are becoming marginalized in the current campaign finance scheme. This is unfortunate. The two-party system has been a stabilizing force in our democracy for over 200 years. Without that stabilizing force, however, there has been a significant rise in the number of single-issue candidates, nasty primaries pitting the middle against the hard partisan flank, and a general polarization. It is time for Congress to reconsider whether some of the regulations placed upon state party committees should be revisited, especially in light of the rise of Super PACs and other outside spending.

CANDIDATE FUNDRAISING

Recognizing that nothing can feel more awkward than a phone call from your party chairman, member of Congress, or perhaps even the president, asking you to contribute $100,000 or more to a national or state party committee, McCain-Feingold altered the ability of politicians to raise funds. Under McCain-Feingold, party officers, candidates and members of Congress were limited to soliciting only federally permissible funds for outside groups that participate in elections or for the non-federal accounts of party committees. But the First Amendment limits the ability to impose such limits, and based upon FEC and court rulings, candidates have found it relatively easy to continue to appear at events that raise large contributions. Ironically, they at the same time have been restricted in raising contributions, under state rules, for their state and local party committees.

Prior to McCain-Feingold, state party committees relied heavily on the ability of their candidates for federal office to raise non-federal funds for their campaign efforts. By cutting off the ability of members and candidates to raise these otherwise legal funds, the struggle for state and local party committees to be relevant in the campaign finance system has been further exacerbated. Add to this the new practice of a candidate's ability to raise funds for Super PACs, but not being specific in how much they can ask for, and it is not hard to see that McCain-Feingold's promise of breaking the link between politicians and money has not come to pass.

MILLIONAIRES

One of the more bizarre additions to McCain-Feingold was its so-called Millionaire's Amendment. It raised contribution limits to the opponents of self-funding candidates whereby they could accept, in some cases, up to $12,000 from each donor to match self-funded candidates. This provision was largely perceived as an incumbency protection measure to shield entrenched incumbent members from self-funded challengers. This provision was declared unconstitutional by the United States Supreme Court in 2008. One side consequence of the Supreme Court decision: the logic of the Court's opinion was applied to strike down several state laws that attempted to incorporate outside spending in the context of public funding programs. Another consequence: much of the opinion was a precursor of things to come, particularly the Supreme Court's landmark decision in *Citizens United v. FEC*.

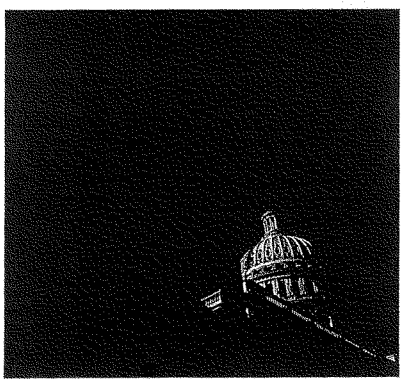
THE UGLY

OUTSIDE SPENDING

In addition to the regulation of party spending, the other major objective of McCain-Feingold was to rein in the exploding amount of spending on "issue ads" being undertaken by outside groups that had paralleled the explosion of party "issue ad" spending since the mid-90s.

Similar to the Millionaire's provision, this was largely seen

The answer to the cries and complaints about so-called "dark money" groups is not more regulation. The candidate's voice should be the central voice in American democracy.



by the law's opponents as something passed by members of Congress who were tired of being held accountable for their various legislative positions. No incumbent wanted to be bashed with millions of dollars in spending by groups whose ads were declared by some to be craftily designed campaign ads in the guise of issue discussion. During this period, the favored vehicles of choice for this unregulated spending were groups organized under section 527 of the tax code.

In 2000, prior to the passage of McCain-Feingold, Congress hastily passed a law that required these organizations to disclose their spending. It was through this law that Congress and reformers had their first chance to shed light on the amount of spending being undertaken by these groups and the individuals, unions or corporations who were funding them. McCain-Feingold attempted to regulate issue ad spending by requiring broadcast ads shortly before an election to be disclosed within 48 hours to the FEC, and by banning such spending from corporations and unions. (Simply referencing someone who was a candidate was banned in certain instances.)

This provision did little to stem issue ad spending and these ads were prevalent during the 2004 presidential election. In addition to its failure to stop issue ad spending, the provision triggered lawsuits that would reach the Supreme Court and significantly alter the state of campaign finance.

Ultimately, in *Citizens United v. FEC*, the Supreme Court invalidated the issue ad spending provisions of McCain-Feingold. Some hyperbolically claimed that it reversed a 100-year ban on express advocacy spending by corporations and unions in the process. Although not really true, the Supreme Court certainly issued a watershed opinion, which undercut or otherwise rejected much of the assumptions upon which campaign finance regulation is based. Overnight, many of the assumptions made by reform groups and regulators were swept away.

The world after Citizens United is dominated by two major developments: 1) the rise of Super PACs, which are federal PACs that are no longer restricted on how much they can raise from any source and engage in independent expenditures that can expressly advocate the election or defeat of a federal candidate without limit; and 2) the reemergence of issue advocacy, not by 527 organizations but by 501(c)(4) organizations, which are not currently required by IRS laws to publicly disclose their donors.

Some think the jury is still out on McCain-Feingold, but the evidence is pretty clear. While it had some laudable goals, the law and its aftermath have profoundly changed the landscape of campaign finance law. Today, corporations and unions are free to run explicit election ads that, if run by party committees, would still be subject to the onerous restrictions of McCain-Feingold. It makes no sense that the law now permits certain speakers to speak, yet effectively precludes others (particularly party committees, which fully disclose their activities) from doing so.

The answer to the cries and complaints about so-called "dark money" groups is not more regulation. Instead, any offered solution ought to flow from a common premise: The candidate's voice should be the central voice in American democracy. The party committees have historically been the obvious echo chamber for the message of candidates, and they ought to be free to ensure that our voters have as much information about those candidates as possible. McCain-Feingold has frustrated this goal, and it has left the candidates untethered from their historical political party allies.

It is time to revisit McCain-Feingold. It was sold as a balance to reduce the corrupting influence of money by banning party soft money and banning certain negative advertising. The second part has been declared unconstitutional. It is time to revisit the first part, and permit the parties to once again provide the stabilizing force to our system of government that they had historically been. As we illustrate, there ought to be bipartisan support for this.

From where we sit, the good, bad and the ugly impacts of the law, presented above, aren't all that debatable. But you can be sure the proponents and opponents of campaign finance regulation will continue to debate (and probably litigate) its legacy for years to come.

Neil Reiff is a founding member of the law firm Sandler, Reiff, Young & Lamb, and a former deputy general counsel at the DNC. Don McGahn is a partner with the law firm Patton Boggs LLP, and is the former chairman of the Federal Election Commission.

No. 11-1179

IN THE

Supreme Court of the United States

AMERICAN TRADITION PARTNERSHIP, INC., F.K.A. WESTERN TRADITION PARTNERSHIP, INC., ET AL.,

Petitioners,

v.

STEVE BULLOCK, ATTORNEY GENERAL OF MONTANA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Montana

BRIEF OF UNITED STATES SENATORS SHELDON WHITEHOUSE AND JOHN MCCAIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

NEAL KUMAR KATYAL
Counsel of Record
JUDITH E. COLEMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT. 3

II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE. 5

A. Political Spending After *Citizens United* Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System. 8

B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for *Quid Pro Quo* Corruption. 17

C. The Appearance of Corruption Created by Independent Expenditures is Strong. 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES:

Arizona Free Enterprise Club's Freedom Club PAC v. *Bennett*, 131 S. Ct. 2806 (2011) 9

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5, 8

Caperton v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009) 19

Citizens United v. *FEC*, 130 S. Ct. 876 (2010) ..... *passim*

McConnell v. *FEC*, 540 U.S. 93 (2003) 6, 16

Youngblood v. *West Virginia*, 547 U.S. 867 (2006) 5

STATUTE:

26 U.S.C. § 501(c) 13

REGULATION:

26 C.F.R. § 1.501(c)(4)-1(a)(2) 13

RULES:

Sup. Ct. R. 10 ..... 2, 4

Sup. Ct. R. 36.7 1

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:*

American Crossroads, Request for FEC Advisory Opinion, No. 2011-23, Oct. 28, 2011 11

Kim Barker, *et al.*, *With Spotlight on Super PACs, Nonprofits Escape Scrutiny*, ProPublica, Feb. 3, 2012, http://www.propublica.org/article/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny 14

Center for Responsive Politics, Outside Spending Database, http://www.opensecrets.org/outside-spending/cycle_tots.php 17

Russ Choma, *Super PAC Spending Teeters at $100 Million Mark*, Center for Responsive Politics Open Secrets Blog, May 10, 2012, http://www.opensecrets.org/news/2012/05/super-pac-spending-teeters-at-100-million-mark.html 9

Democracy Corps & Public Campaign Action Fund, *Two Years After Citizens United, Voters Fed Up with Money in Politics* (Jan. 19, 2012), http://www.democracycorps.com/wp-content/files/PCAF-memo-FINAL1.pdf 20

TABLE OF AUTHORITIES—Continued

Page(s)

Demos & U.S. PIRG Education Fund, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, Feb. 8, 2012, *available at* http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election 15-16

Dan Eggen, *Most Independent Ads for 2012 Election Are From Groups That Don't Disclose Donors*, Wash. Post, Apr. 24, 2012 18

Kim Geiger, *FEC Deadlocks on Question of Coordinated Advertising*, L.A. Times, Dec. 5, 2011, http://articles.latimes.com/2011/dec/05/news/la-pn-crossroads-fec-20111205..... 11

Maggie Haberman, *Coordination Rules A One-Way Street*, Politico, May 2, 2012, http://www.politico.com/news/stories/0512/75834.html 10

Richard L. Hasen, *The Numbers Don't Lie*, Slate, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html..... 13

Dave Johnson, *Super PAC Hate-Spending*, Slate, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how_.html 19

TABLE OF AUTHORITIES—Continued

Page(s)

Letter to IRS from Campaign Legal Center, Sept. 28, 2011, http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf 10, 13

Letter to IRS from Campaign Legal Center, Dec. 14, 2011, http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf 13

Dave Levinthal, *2011 Sees Super PAC Explosion*, Politico, Oct. 6, 2011, http://www.politico.com/news/stories/1011/65310.html 9-10

Morgan Little, *Negative Ads Increase Dramatically During 2012 Presidential Election*, L.A. Times, May 3, 2012 9

Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. Times, Oct. 17, 2010 15

Spencer MacColl, *A Center for Responsive Politics Analysis of the Effects of Citizens United*, May 5, 2011, *available at* http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html 13, 17

TABLE OF AUTHORITIES—Continued

Page(s)

Evan Mackinder, *Super PACS Cast Long Shadow Over 2012 Race*, Center for Responsive Politics Open Secrets Blog, Mar. 21, 2012, http://www.opensecrets.org/news/2012/03/super-pacs-continued-to-show.html 18

Robert Maguire & Viveca Novack, *The FreedomWorks Network: Many Connections, Little Disclosure*, Center for Responsive Politics Open Secrets Blog, Mar. 16, 2012, http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html 15

Brody Mullins & Danny Yadron, *Gingrich Super PAC's Funding Runs Dry*, Wall St. J., Mar. 21, 2012 18

Viveca Novack & Robert Maguire, *For Friends, Crossroads Helps With the Tab*, Center for Responsive Politics Open Secrets Blog, Apr. 18, 2012, http://www.opensecrets.org/news/2012/04/for-friends-crossroads-helps-with-t.html 15

N.Y. Times, *Who's Financing The Super PACs*, http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html (last updated May 7, 2012) 16

Norman Ornstein, *Effect of Citizens United Felt Two Years Later*, Roll Call, Jan. 18, 2012 12

TABLE OF AUTHORITIES—Continued

Page(s)

Pew Research Center for People and the Press, *Super PACs Are Having A Negative Impact, Say Voters Aware of 'Citizens United' Ruling* (Jan. 17, 2012), http://www.people-press.org/files/legacy-pdf/1-17-12%20Campaign%20Finance.pdf 20

Molly Redden, *Mitt Romney's Southern Strategy*, Salon, Mar. 28, 2012, http://www.salon.com/2012/03/28/mitt_romneys_southern_strategy 11, 12

Jim Rutenberg & Nicholas Confessore, *A Wealthy Backer Likes the Odds on Santorum*, N.Y. Times, Feb. 8, 2012 ..... 11, 18

Fredreka Schouten, *Super PAC Limits Blur Ahead of Nov. 6*, USA Today, Mar. 1, 2012 ..... 8, 9, 10, 11

Al Shaw, *et al.*, *A Tangled Web: Who's Making Money from All This Campaign Spending?*, ProPublica, http://www.propublica.org/special/a-tangled-web (last updated Mar. 21, 2012) 10

This American Life: Take the Money and Run for Office, No. 461 (WBEZ radio broadcast Mar. 30, 2012) (transcript *available at* http://www.thisamericanlife.org/radio-archives/episode/461/transcript) 7, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Kenneth P. Vogel, *Both Sides Now in Dash for Political Cash*, Politico, Jun. 29, 2011, http://www.politico.com/news/stories/0811/60731.html 15

Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, Politico, Dec. 13, 2010, http://www.politico.com/news/stories/1210/46355.html 15

Voltaire, Candide (1759) 7

Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All*, ProPublica, Nov. 21, 2011, http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all 8, 10, 12

Drew Westen, *Why Attack Ads? Because They Work*, L.A. Times, Feb. 19, 2012, http://articles.latimes.com/2012/feb/19/opinion/la-oe-westen-why-negative-campaigning-works-20120219 6

* *All web addresses were last accessed on May 14, 2012.*

STATEMENT OF INTEREST[1]

Amici are U.S. Senator Sheldon Whitehouse of Rhode Island and U.S. Senator John McCain of Arizona.

Amici file this brief for two reasons. First, as active, democratically elected legislators, they have a direct understanding of the effects of unlimited independent election expenditures on our legislative system and our democracy. *Amici's* observations about both the risk and the appearance of corruption created by unlimited independent expenditures will assist the Court as it decides to consider "whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway," 132 S. Ct. 1307 (2012) (statement of Justices Ginsburg and Breyer).

Second, as national political leaders, *amici* have a strong interest in the proper functioning of our democracy. In their view, the appearance of corruption undermines trust and participation in our elections, the opportunity for corruption makes the legislative process more difficult, and both diminish the standing of our democracy in the eyes of the world. Accordingly, *amici* respectfully ask the Court to confirm that Congress and state legislators may, upon an appropriate record demonstrating the potential for corruption or perceived corruption created by independent expenditures, enact legislation in response to that real and significant threat.

---

[1] Pursuant to Rule 37.6, counsel certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.

SUMMARY OF ARGUMENT

This case concerns an issue of paramount importance to our nation: the effective functioning of American democracy. America's democracy has long stood as a model to the world. The costs of disrupting a fair and effective American democracy are high – to our states, our nation, and our world.

1. The Montana court reviewed extensive record evidence of corruption, evidence of the type this Court deemed a "cause for concern" in *Citizens United* v. *FEC*, 130 S. Ct. 876, 911 (2010). *Citizens United* held that when a legislature "finds that a problem exists" – when it makes a legislative finding based on evidence that "elected officials succumb to improper influences from independent expenditures" – judges "must give that finding due deference" and "must give weight" to laws that "seek to dispel the appearance or reality of these influences." *Id.* That is what the Montana Supreme Court did in this case, which is reason enough to deny the petition. Sup. Ct. R. 10. Petitioners' inevitable disagreement with the ruling against them does not justify the exercise of certiorari here.

2. If the Court does grant the writ, however, summary reversal is not the appropriate disposition of the case. Full briefing and argument, and a decision in the ordinary course, would allow the Court to confirm lawmakers' continuing authority to respond when the evidence shows "that a problem exists." *Citizens United*, 130 S. Ct. at 911.

And a problem does exist. Evidence from the 2010 and 2012 electoral cycles has demonstrated that so-called independent expenditures create a strong potential for corruption and the perception thereof. The news confirms, daily, that existing campaign finance rules purporting to provide for "independence" and "disclosure" in fact provide neither. Regulatory

filings show that much of the funding for independent expenditures comes from shell companies, pass-through entities, and non-profit organizations that conceal the true source of the individuals and companies supporting them. These non-disclosed funding sources were not what the Court had in mind when it issued its ruling in *Citizens United*, and therefore it did not consider the strong potential for corruption and the appearance of corruption they would create, including through threats and promises of spending.

In light of these developments, if the Court grants the petition, it should revisit *Citizens United*'s finding that vast independent expenditures do not give rise to corruption or the appearance of corruption. The Court should clarify that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriate preventative legislation in response.

ARGUMENT

I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT.

The Court in *Citizens United* explained its holding as an application of the basic principle that when an elected legislature "finds that a problem exists," it may not choose a remedy that is "asymmetrical" to the risk. 130 S. Ct. at 911. The Court anticipated that if Congress found that "a problem exists" as the result of independent expenditures, the Court would "give that finding due deference" and "give weight" to any legislative remedy. *Id.* These statements are inconsistent with Petitioners' *per se* rule prohibiting laws like the Montana Corrupt Practices Act.

The Montana Supreme Court did just as this Court instructed. First, it determined that the State had a "compelling interest" justifying the law based on the extensive evidence in the trial record (a record this Court did not enjoy in *Citizens United*). *See* Pet. App. 17a-29a. It noted the historical evidence of actual corruption, including vote-buying in the legislature, *id.* at ¶¶ 24-26, 36; gubernatorial misconduct, *id.* at ¶ 24; and judicial bias and bribery, *id.* at ¶¶ 23, 36, noting a particular danger in Montana, where advertising is cheap. *Id.* at ¶¶ 29-32, 38. It cited concerns about the independence of the State's judiciary. *Id.* at ¶¶ 42-45. The court also found substantial evidence that Montana voters believe that corporate independent expenditures lead to corruption, and that this belief has contributed to widespread cynicism and low voter turnout. *See id.* at ¶¶ 28, 33, 38.

Then, the Montana Supreme Court assessed whether the State's prohibition of corporate expenditures was "narrowly tailored" to the problem identified in the record. *See* Pet. App. 31a-32a. Looking specifically at the characteristics of Petitioners' corporate entities, the Court concluded that the law, *as it applied to them*, had no more than a "minimal impact," if any. *Id.*

This Court has "rarely granted" a petition for certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Montana Supreme Court faithfully applied the law to the factual record before it. No further justification should be needed to deny the petition.

II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE.

If this Court concludes that review of the Montana court's decision is nevertheless warranted, a full hearing is necessary. Summary reversal is plainly not the appropriate course, whatever this Court concludes about the petition's merits. *Cf. Youngblood* v. *West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting) ("In vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the special deference owed * * * to state courts") (internal quotation marks omitted).

The linchpin of the Petition concerns this Court's statement in *Citizens United* that vast corporate independent expenditures "do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. Petitioners repeatedly refer to that statement from *Citizens United* as a "holding" and "a matter of law." Application to Stay Decision at 19; *see* Pet. at 15, 16.

That cannot be so. Whether independent expenditures pose dangers of corruption or apparent corruption depends on the actual workings of the electoral system; it is a factual question, not a legal syllogism. In a passage from *Buckley* v. *Valeo* discussed in *Citizens United*, this Court stated that "the independent advocacy restricted by the provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. 1, 46 (1976) (emphasis added). The *Buckley* Court's use of the phrase "presently appear" reflects that the risk of corruption is in reality a factual determination to be made about the functioning of the electoral system at a particular time.

The peculiar posture of *Citizens United* deprived the Court of a factual record (in contrast to previous decisions of this Court, such as *McConnell* v. *FEC*, 540 U.S. 93 (2003), which relied heavily on exhaustive records developed by Congress and in the litigation).[2] The Court acknowledged that "[w]hen Congress finds that a problem exists, we must give that finding due deference" and "give weight to attempts by Congress to seek to dispel either the appearance or reality of these influences." *Citizens United*, 130 S. Ct. at 911.

Evidence from the 2010 and 2012 election cycles confirms that "a problem exists" – new political expenditures have opened the door to *quid pro quo* corruption and the appearance thereof. Massive new spending, most of it on negative attack ads that are proven to change voting patterns,[3] has been closely coordinated with campaigns, and much of it has been undisclosed. As a result, outside groups can now spend – or credibly threaten to spend – overwhelming amounts of money in support of or against a candidate, without a publicly disclosed paper trail. If spent on negative attack ads, the substance of the ads may not even yield a clue to the interest of the attackers, let alone their identities.

---

[2] The Supreme Court (and appellate tribunals generally) have traditionally limited themselves to reviewing factual findings made by a lower court, and have not made factual determinations themselves.

[3] *See* n.35, *infra*; Drew Westen, *Why Attack Ads? Because They Work*, L.A. Times, Feb. 19, 2012 ("A well-crafted positive ad can 'stick' too, but there's nothing like a sinister portrayal of a greedy, self-centered villain, replete with grainy images and menacing music, to stir up our unconscious minds."); *see also* Morgan Little, *Negative Ads Increase Dramatically During 2012 Presidential Election*, L.A. Times, May 3, 2012 (seventy percent of political ads aired in the 2012 election cycle have been negative – up from only nine percent in 2008).

The ability to make and to credibly threaten large expenditures gives outside groups the opportunity to exert improper leverage over politicians running for office. Through backchannel communications, or simply a quiet phone call, candidates can be warned, for example, that failure to take the "right" position will be punished with a large expenditure against them.[4] "Killing an admiral" from time to time might be enough.[5] Alternatively, interest groups can gain improper influence by promising to support a political candidate with a large expenditure if the need arises. Before *Citizens United*, a threat of attack or pledge of support would mean a maximum $5,000 PAC contribution, or perhaps hosting a fundraiser for a legislator, with all contributions disclosed. Today, this could mean an unlimited independent expenditure, including an anonymous one, that could elect or defeat a candidate.

If the threat is successful or if the pledge of support turns out to be unnecessary, there will be no record of the *quid pro quo* : no public advertising, no disclosure, no trail of receipts, and no account statements for regulators, prosecutors and media outlets to track. The lack of disclosure thus makes ferreting

---

[4] *See This American Life: Take the Money and Run for Office*, No. 461 (WBEZ radio broadcast Mar. 30, 2012) (transcript *available at* http://www.thisamericanlife.org/radio-archives/episode/461/transcript) (Norman Ornstein: "I've had this tale told to me by a number of lawmakers. You're sitting in your office and a lobbyist comes in and says, 'I'm working with Americans for a Better America. And I can't tell you who's funding them, but I can tell you they really, really want this amendment in the bill.' And who knows what they'll do? They've got more money than God.").

[5] *See* Voltaire, Candide, ch.23 (1759) ("In this country, it is good to kill an admiral from time to time, in order to encourage the others.").

out this *quid pro quo* corruption extremely difficult. Plenary review would afford the Court an opportunity to consider the implications of this phenomenon for its finding that independent expenditures do not corrupt.

A. Political Spending After *Citizens United* Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System.

A premise of *Citizens United* was its finding that independent expenditures do not create a risk of corruption or the appearance of corruption. That premise rested on two critical assumptions: (i) that anti-coordination rules "substantially diminish[ ]" the "potential for abuse" of independent expenditures, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47); and (ii) that the Bipartisan Campaign Reform Act created a regime of "effective disclosure" that would "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Id.* at 916.

Political spending in the 2010 and 2012 election cycles has undermined both of these core assumptions.

1. Coordination Rules are Ineffective.[6]

In *Citizens United*, the Court assumed a strong and well-enforced prohibition on coordination between campaigns and "independent" advocates. As

---

[6] *See* Fredreka Schouten, *Super PAC Limits Blur Ahead of Nov. 6*, USA Today, Mar. 1, 2012; Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All*, ProPublica, Nov. 21, 2011, http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all.

the Court saw it, "[t]he separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned." *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2826 (2011) (citing *Citizens United*, 130 S. Ct. at 908).

The Court did not anticipate how coordination rules operate – or fail to operate – with respect to the new breed of "independent expenditure-only committees," commonly known as super PACs. In effect the "separation between candidates and independent expenditure groups" that was an essential predicate to the *Citizens United* decision has been eliminated. Evidence from the current election cycle bears this out:

Candidate-Specific Super PACs. The ongoing presidential and congressional races are now heavily driven by a handful of super PACs, each founded and managed for the benefit of a single candidate.[7] Wealthy donors who have maxed out their contributions to the candidate are now using these candidate-specific super PACs as convenient proxies to make the functional equivalent of campaign contributions.[8]

---

[7] Russ Choma, *Super PAC Spending Teeters at $100 Million Mark*, Center for Responsive Politics Open Secrets Blog, May 10, 2012, http://www.opensecrets.org/news/2012/05/super-pac-spending-teeters-at-100-million-mark.html ("The hard-fought Republican primary, which dragged out longer than many expected, attracted the bulk of the super PAC money. The five top outside spenders, all of them super PACs formed to support one of the GOP candidates, account for $86 million of this first $100 million spent.").

[8] *See* Schouten, *supra* n.6 (prominent campaign supporter was also single-largest donor to candidate's super PAC); Dave

Closely Connected Staff and Consultants. Many prominent candidate-specific super PACs are run by former high-level aides to the candidate,[9] and nothing prevents those affiliated with a super PAC from later taking a job with the candidate's campaign.[10] It is probably not a coincidence, then, that super PACs and the candidates they support also often use the same outside consultants and advisers.[11]

Coordinated Fundraising and Advertising. Campaign committees and super PACs openly coordinate on fundraising. Candidates appear at super PAC fundraising events and share their fundraising lists.[12] Super PACs are permitted to run ads that

---

[Footnote continued from previous page]

Levinthal, *2011 Sees Super PAC Explosion,* Politico, Oct. 6, 2011, http://www.politico.com/news/stories/ 1011/65310.html.

[9] For example, the President's super PAC, Priorities USA Action, is run by his former deputy press secretary, and Mitt Romney's super PAC was founded by his 2008 campaign general counsel. *See* Wang, *supra* n.6; *see also* Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 4, 9, http://www.campaign.legalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf.

[10] *See* Maggie Haberman, *Coordination Rules A One-Way Street,* Politico, May 2, 2012, http://www.politico.com/news/stories/0512/75834.html (top Republican strategist who advised American Crossroads joined Romney campaign as Senior Adviser).

[11] *See* Al Shaw, *et al.*, *A Tangled Web: Who's Making Money from All This Campaign Spending?*, ProPublica, http://www.propublica. org/special/a-tangled-web (last updated Mar. 21, 2012); *see, e.g.*, Schouten, *supra* n.6 (super PAC uses same polling and direct-mail consultant as campaign).

[12] *See, e.g.*, Schouten, *supra* n.6 (President Obama's campaign manager at a Priorities USA fundraiser); Wang, *supra* n.6 (Rep.

are "fully coordinated" with a candidate, feature an appearance from the candidate, and follow a script reviewed and approved by the candidate.[13] In some cases, super PACs have simply reused and repackaged material from the candidate's old advertisements.[14]

Strategic Timing. In light of their closely connected staff and fully coordinated fundraising efforts, it should come as little surprise that super PACs have been acting as successful surrogates for campaign committees in states where the candidate has made few appearances or spent little money on advertising.[15] The candidate and the super PAC need not

---

[Footnote continued from previous page]

Pelosi and Sen. Reid fundraising for super PACs; also Mitt Romney for Restore Our Future).

[13] Kim Geiger, *FEC Deadlocks on Question of Coordinated Advertising*, L.A. Times, Dec. 5, 2011, http://articles.latimes.com/2011/dec/05/news/la-pn-crossroads-fec-20111205; *see* American Crossroads, Request for FEC Advisory Opinion, No. 2011-23, at 3 (Oct. 28, 2011) (advertisements "would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement").

[14] American Crossroads, *supra* n.13, at 3 n.2 (advertisements "may include phrases or slogans that the featured [candidate] has previously used"); Schouten, *supra* n.6 (super PAC ran television commercial candidate aired in 2007 during previous campaign).

[15] *See* Jim Rutenberg & Nicholas Confessore, *A Wealthy Backer Likes the Odds on Santorum*, N.Y. Times, Feb. 8, 2012 (candidate-specific super PAC spent millions to win Minnesota for Santorum, when candidate had no money left to spend); Molly Redden, *Mitt Romney's Southern Strategy*, Salon, Mar. 28, 2012, http://www.salon.com/2012/03/28/mitt_romneys_southern_strategy (candidate-specific super PAC "consistently

communicate for spending to be coordinated in this way; news articles and shared consultants provide all the information a super PAC needs to direct the money to where it is needed most.[16]

In sum, super PACs *are* coordinating with campaigns, and they are using methods the Court did not contemplate in its *Citizens United* decision. Contrary to the Court's assumption, there is now little distinction in practice between a contribution to a candidate-specific super PAC and a direct contribution to the candidate's campaign, other than its being unlimited, and potentially concealed.[17]

2. Disclosure Rules Are Inadequate.

The second critical assumption of *Citizens United* was that unlimited independent expenditures would take place under the glare of complete and effective disclosure. That is plainly not the case today. Much of the outside money spent in the 2010 election came from groups that are not required to – and do not – disclose their donors.

[Footnote continued from previous page]

spent millions in Southern primaries" including in one state where candidate bought no television advertising).

[16] *See* Wang, *supra* n.6 (quoting public statements by campaign officials about spending strategy); Redden, *supra* n.15 (quoting former FEC counsel: "This is clearly not being done by people who have absolutely no idea what the candidate or campaign is doing").

[17] *Cf.* Norman Ornstein, *Effect of Citizens United Felt Two Years Later*, Roll Call, Jan. 18, 2012 (the mandatory non-coordination disclaimer at the end of a super PAC's advertisement is "nonsensical," and voters realize super PACs "are effectively arms of the campaigns," but "without any of the restrictions or timely disclosure requirements the candidates themselves face").

Certain types of political spending groups, organized under section 501(c) of the tax code, are not required to disclose their donors to the public, but only to the IRS on confidential grounds. These groups include so-called social welfare groups, which are permitted to engage in political advocacy so long as it is not the organization's primary purpose. *See* 26 U.S.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1(a)(2). Several "(c)(4)" entities have interpreted IRS rules to allow them to spend up to *49 percent* of their funds on express advocacy[18] – and one has evidently spent 87 percent of its funds on political ads.[19] When a (c)(4) organization spends money on political advocacy, its donors are not publicly disclosed.

Much of the outside money spent on electioneering communications in the post-*Citizens United* 2010 election came from (c)(4) organizations and other non-disclosing groups. These organizations spent so much money – $134 million – that by the end of the 2010 cycle, they accounted for 47 percent of all outside political spending.[20] In the 2006 election, by contrast, these groups spent $0.[21]

---

[18] Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 1, http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf.

[19] Letter to IRS from Campaign Legal Center, Dec. 14, 2011, at 3, http://www.campaignlegalcenter.org/attachments/IRS_LETTER _12_14_2011.pdf.

[20] Spencer MacColl, *A Center for Responsive Politics Analysis of the Effects of Citizens United*, May 5, 2011, at 4, 5, *available at* http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

[21] *See* Richard L. Hasen, *The Numbers Don't Lie*, Slate, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/politics/

Super PACs, 501(c)(4) organizations and political campaigns are knitted into a fundraising web that allows unlimited, non-independent and anonymous (to the public) political donations for the benefit of a specific candidate. With respect to political campaigns, the disclosure issue is not limited to what would be characterized as larger donations. For instance, political campaigns are not required to disclose contributions that are $200 or less. Additionally, under IRS rules, (c)(4) groups are permitted to make independent expenditures in their own name, to donate money to super PACs, and to give to other (c)(4) entities. As a result, a person or company seeking to support or influence a candidate without public disclosure can donate to a (c)(4), which will in turn do one of three things: (1) spend the money on advocacy, (2) donate it to a super PAC to spend on advocacy, or (3) donate it to another (c)(4), which would then have the same set of options, behind an additional layer of "identity-laundering" for the donor.

Many of the most prominent super PACs have created affiliated (c)(4) entities to take advantage of the considerable sums of anonymous money they can raise.[22] In one instance, the (c)(4) had supplied the

---

[Footnote continued from previous page]

2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html.

[22] *See* Kim Barker, *et al.*, *With Spotlight on Super PACs, Nonprofits Escape Scrutiny*, ProPublica, Feb. 3, 2012, http://www.propublica.org/article/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny. Super PACs with 501(c)(4) affiliates include: Priorities USA Action (Priorities USA); American Crossroads (Crossroads GPS); Majority PAC (Patriot Majority USA); FreedomWorks for America (FreedomWorks, Inc.); American Bridge 21st Century (American Bridge 21st Century Foundation). Priorities USA Action and American

super PAC with almost half of its $3 million in funding.[23] Another group, American Crossroads, set up its (c)(4) affiliate, Crossroads GPS, precisely because "some donors didn't want to be disclosed."[24] Crossroads GPS spends 40 percent of its money on explicit, declared political activity.[25] Moreover, as part of its mandatory "non-political" spending, it gave several million dollars to a dozen groups that in turn spent

---

[Footnote continued from previous page]

Bridge 21st Century received $438,000 from their affiliated nonprofits last year. A Democratic-leaning super PAC, Citizens for Strength and Security, reported that almost all of its $72,000 came from a (c)(4) – also called Citizens for Strength and Security. The super PAC FreedomWorks for America reported that half of the contributions it received last year – $1.34 million – were "in kind" payments from its affiliate (c)(4), FreedomWorks, Inc.

[23] Robert Maguire & Viveca Novack, *The FreedomWorks Network: Many Connections, Little Disclosure*, Center for Responsive Politics, Open Secrets Blog, Mar. 16, 2012, http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html.

[24] Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, Politico, Dec. 13, 2010, http://www.politico.com/news/stories/1210/46355.html (quoting super PAC's political director); *see also* Vogel, *Both Sides Now in Dash for Political Cash*, Politico, Jun. 29, 2011, http://www.politico.com/news/stories/0811/60731.html (quoting Democratic strategist: "Many such donors [to (c)(4) organizations] 'feel more comfortable donating to groups that don't disclose'" because they do not want publicity or to be on fundraising lists).

[25] Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. Times, Oct. 17, 2010.

millions on independent expenditures and electioneering communications.[26]

Even excluding the (c)(4) organizations, many of the top donors to super PACs are themselves limited-liability corporations or otherwise obscure entities.[27] *Cf. McConnell*, 540 U.S. at 197 (federal disclosure laws intended to prevent confusion by groups "hiding behind dubious and misleading names"). Many have only a P.O. Box as an address; and several – including the single largest donor in 2010 and 2011 – have been discovered to be primarily pass-through entities for wealthy individuals.[28]

The coupling of 501(c) anonymity and corporate obscurity to super PAC fundraising and coordination has catalyzed an explosion of undisclosed outside spending, which this Court could not foresee when it suggested that disclosure rules are an "adequate" and "effective" means of serving the public's substantial information interest. 130 S. Ct. at 916; *cf. McConnell*, 540 U.S. at 197 (noting that plaintiffs "never satisfactorily answer[ed] the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public"). Where the spending is on negative attack ads, the substance of the ad might

---

[26] Viveca Novack & Robert Maguire, *For Friends, Crossroads Helps With the Tab*, Center for Responsive Politics Open Secrets Blog, Apr. 18, 2012, http://www.opensecrets.org/news/2012/04/for-friends-crossroads-helps-with-t.html.

[27] *See* Demos & U.S. PIRG Education Fund, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, Feb. 8, 2012, at 17, table 1, *available at* http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election.

[28] *See* N.Y. Times, *Who's Financing The Super PACs*, *at* http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html (last updated May 7, 2012).

not even provide a hint of what interest is behind the expenditure.

B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for *Quid Pro Quo* Corruption.

The unprecedented scale of new spending, often on negative attack ads, coupled with the failure of the disclosure and coordination rules, enhances the risk of corruption. Counting both independent expenditures and spending on electioneering communications,[29] outside spending on the 2010 election exceeded spending by political parties, $289 million to $184 million.[30] Of the $210 million spent on independent expenditures alone, two-thirds of that money came from groups that benefited from the removal of caps on corporate donations after *Citizens United*.[31]

For the 2012 election, outside spending exceeded $120 million as of May 14, with six months still to go.[32] That is double the amount spent by this date in the 2008 presidential election cycle. As the election nears, the pace of outside spending will significantly augment these already massive figures. Super PACs, which alone have spent over $100 million in

---

[29] "Independent expenditures" fund express advocacy for or against a candidate, as opposed to "electioneering communications," which are advertisements that appear in the 30 days preceding a primary or 60 days preceding a general election and mention a candidate's name but do not expressly advocate for or against that candidate. These figures exclude spending by political parties.

[30] MacColl, *supra* n.20, at 11.

[31] *Id.* at 4.

[32] Statistics in this paragraph are taken from the Center for Responsive Politics Outside Spending Database, http://www.opensecrets.org/outside-spending/cycle_tots.php.

this election cycle, have another $100 million on hand to spend in the remaining months leading up to November – meaning that those groups can spend over half a million dollars *every day* ($570,000) until the election, without even raising another cent.

As for spending by 501(c)(4) nonprofit organizations, there is no way to predict how much they will spend on the 2012 election – because they disclose their finances after the election year – but it is estimated they will spend more than super PACs this election cycle.[33]

A well-heeled super PAC can now influence or threaten to influence a race with a single mammoth expenditure. The ongoing presidential primary season has shown this to be true on several occasions.[34] The dominating influence of super PACs is particularly significant for those in congressional races with

---

[33] Dan Eggen, *Most Independent Ads for 2012 Election Are From Groups That Don't Disclose Donors*, Wash. Post, Apr. 24, 2012 ("The numbers signal a *shift* away from super PACs, which are required to disclose their donors" toward "big-spending nonprofits that do not have to identify their financial backers.").

[34] *See* Brody Mullins & Danny Yadron, *Gingrich Super PAC's Funding Runs Dry*, Wall Street Journal, Mar. 21, 2012 (candidate won South Carolina primary despite ranking fourth in Iowa "in part because [the Gingrich super PAC] spent nearly $1 million on TV ads for him in the final week, while his own campaign could muster only $337,000"); Rutenberg & Confessore, *supra* n.15 (candidate who "could not afford to pay for a single commercial" at the time won Minnesota primary owing to the "critical support" of a super PAC); *see also* Evan Mackinder, *Super PACS Cast Long Shadow Over 2012 Race*, Center for Responsive Politics Open Secrets Blog, Mar. 21, 2012, http://www.opensecrets.org/news/2012/03/super-pacs-continued-to-show.html (super PACs' earlier support for several failed candidates was "propping them up entirely").

smaller media markets, such as Montana's, and makes it all the easier for those seeking legislative favors and results to discreetly threaten such expenditures if Members of Congress do not accede to their demands.[35]

A promise or threat to a candidate that goes unseen or unheard by the public is a means of corruption that was not considered in *Citizens United.* This massive leverage goes beyond the mere "influence" this Court deemed inadequate to support the restrictions at issue in that case. *Cf. Caperton* v. *A.T. Massey Coal. Co.,* 556 U.S. 868, 884 (2009) ("there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign"). The Court in *Caperton* found that the remedy for such massive expenditures was recusal by the Judge – but there is no such remedy available for Members of Congress.

* * * * *

The Court's opinion in *Citizens United* could not account for the particular risks and appearances of

---

[35] *See, e.g., This American Life, supra* n.4 (super PAC's $680,000 expenditure paid for negative advertisement to be shown so frequently that average viewer was likely to see it 16 times per week; in same period, target candidate's support dropped six percentage points). As of March 5, 2012, 54 percent of money spent in the 2012 presidential election (over $35 million) was spent on negative attack ads. The Restore Our Future PAC supporting Mitt Romney spent 97 percent of its $31 million in spending on negative ads against Rick Santorum and Newt Gingrich. Dave Johnson, *Super PAC Hate-Spending,* Mar. 9, 2012. http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how_.html.

corruption, by expenditures or by threats and promises, associated with super PACs and (c)(4) entities. Put succinctly, the protective factors that the *Citizens United* Court invoked when it stated that independent expenditures present no risk of corruption have not materialized.

C. The Appearance of Corruption Created by Independent Expenditures is Strong.

In *Citizens United*, this Court held there could be no "appearance of corruption" associated with independent expenditures to the extent they secure only "access" and "influence," and are "not coordinated" with a candidate. 130 S. Ct. at 909-910. As shown above, these assumptions no longer hold; therefore, the Court's assessment of the potential for perceived corruption is worth reconsideration.

Americans believe that the current system of campaign finance is corrupt, and that *Citizens United*, thanks to the anonymous spending it unleashed, has made the problem worse. A recent study by the Pew Center found that 65 percent of registered voters who had heard of *Citizens United* said super PAC spending has had a negative effect on the 2012 presidential campaign.[36] There was no partisan divide on this question: 60 percent of Republicans, 63 percent of Democrats, and 67 percent of independents who had heard of the decision believe it has had a negative effect on the campaign.

---

[36] Pew Research Center for People and the Press, *Super PACs Are Having A Negative Impact, Say Voters Aware of 'Citizens United' Ruling* (Jan. 17, 2012), http://www.people-press.org/files/legacy-pdf/1-17-12%20 Campaign%20Finance.pdf

Another recent study[37] found that 80 percent of voters think there is too much "big money" spent on political campaigns and elections and that campaign contributions and spending should be limited. A large majority – including 75 percent of independents – believe that big donors and secret money[38] undermine democracy, and 62 percent said they oppose the *Citizens United* decision.

Trust in public institutions is at an all-time low, in part because of the perceived influence of money in politics. When Americans believe the campaign finance system has been corrupted, they lose faith in their democracy. The appearance that large special interest donors, including corporations and labor organizations which have the ability to manipulate the campaign finance system, hold undue sway over elected officials tarnishes our American democracy. It can lead voters to disengage from healthy political engagement. And that, in turn, compounds the problem, increasing cynicism in a vicious cycle undermining representative democracy.

Poll results should not direct Court decisions. But these results show that the Court's assessment of perceived corruption was at odds with the perception held by most Americans. Only plenary review will provide the Court with the opportunity for full inquiry into the harms to American democracy caused by the appearance and threat of corruption.

* * * * *

---

[37] Democracy Corps & Public Campaign Action Fund, *Two Years After Citizens United, Voters Fed Up with Money in Politics* (Jan. 19, 2012), http://www. democracycorps.com/wp-content/files/PCAF-memo-FINAL1.pdf.

[38] Secret money could include contributions to political campaigns that do not reach the amount threshold of current disclosure requirements.

The campaign finance system assumed by *Citizens United* is no longer a reality, if it ever was. The Court, if it grants the petition, should use this case to make clear that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriately tailored preventative legislation in response. The integrity of America's elections has long been a bulwark of our nation and a beacon to other nations, and it is a worthy exercise of this Court's attention to protect our elections from the manifest damage of its decision allowing the vast, unregulated expenditures that now darken our political landscape.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied or in the alternative granted for plenary review of the question presented.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
JUDITH E. COLEMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Counsel for Amici Curiae

May 2012

Thomas M. Susman
Director
Governmental Affairs Office

AMERICAN BAR ASSOCIATION
1050 Connecticut Avenue, NW - Suite 400
Washington, DC 20036
(202) 662-1760
FAX: (202) 662-1762

May 6, 2014

The Honorable Charles Schumer
Chairman
Committee on Rules and Administration
United States Senate
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules and Administration
United States Senate
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts:

On behalf of the American Bar Association (ABA), I write to commend you for holding the hearing entitled "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond" on April 30, 2014 and to request that this letter and its attachment be included in the hearing record.

The ABA has long been concerned with campaign finance and election issues and is a strong supporter of transparency in the political process. The overriding premise of these efforts has been to support candidate and citizen participation in the electoral process and increase public confidence through accountability and disclosure.

Most recently, we adopted policy supporting efforts to ensure consistent disclosure of political and campaign spending by entities making political expenditures, regardless of their tax status. The policy also urges Congress to require organizations not already required to do so by current law to disclose the amounts spent on electioneering communications and independent expenditures, as well as the sources of such funds. The full policy is attached for your review.

As you know, recent decisions by the Supreme Court in *Citizens United v. FEC* and *McCutcheon v. FEC* dismantled key components of our campaign finance framework, which will result in significant additional money pouring into the system and are bound to increase the public's concern over undue influence in governmental decision-making. In light of these developments, it will be critical to ensure that this additional money is not used in a way that circumvents contribution limits still in place and to ensure full and timely disclosure of all federal campaign contributions and expenditures. These actions will make our democracy more viable and strengthen our citizens' faith and trust in government.

Thank you for the opportunity to share our views. We look forward to working with the Committee on this and other important issues in the future.

Sincerely,

Thomas M. Susman

Attachment

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 11, 2013

RESOLUTION

RESOLVED, That the American Bar Association supports efforts to increase disclosure of political and campaign spending and urges Congress to require organizations that are not already required to do so by current law as interpreted and applied by the Federal Election Campaign Act to disclose (a) the source of funds used for making electioneering communications and independent expenditures as defined in federal campaign finance law, subject to such reasonable threshold limits as may be necessary to avoid infringing on any implicated Constitutional interests such as the right of free association, and (b) the amounts spent for such communications and expenditures, in public disclosure reports filed with the Federal Election Commission according to requirements under the Federal Election Campaign Act and regulations thereunder that are applied consistently without respect to the nature of the entity making the communication.

REPORT

The Supreme Court's landmark decision in *Citizens United v. Federal Election Commission*,[1] represents the most important campaign finance case in many years. The Court was presented with a non-profit corporation, partly funded by for-profit corporations, seeking to make what amounted to electioneering communications in violation of the Bipartisan Campaign Reform Act (BCRA) of 2002.[2] Invoking the First Amendment, the Court struck down several key provisions of BCRA including its ban on certain political spending by corporations and unions.

While *Citizens United* is rightly credited with fundamentally altering the campaign finance regime in this country, the Court left intact one key aspect of campaign finance regulation: the central role of disclosure. Indeed, the Court in *Citizens United* not only affirmed the constitutionality of broad disclosure requirements, it highlighted the existence of such disclosure as justification for its other holdings. But current campaign finance law – as interpreted by the Federal Election Commission (FEC) – falls far short of the disclosure practices assumed to exist by the Court. This is particularly true of the disclosure requirements applicable to 501(c)(4) non-profit corporations and some 527 political organizations. These contributions and expenditures represent an increasing portion of campaign spending, yet they remain largely hidden from public sight. This resolution addresses this gap; it does not concern the wisdom or constitutionality of direct regulation of campaign contributions and expenditures.

In focusing on the need for even-handed disclosure requirements, this resolution is of a piece with existing ABA policies.[3] Throughout the modern era of campaign finance regulation, the ABA has been an important and consistent voice in favor of thorough disclosure of campaign contributions and expenditures. The present resolution would simply apply those principles to entities that had not previously been engaged in political expenditures – but which collectively spent over $1 billion in the 2012 election cycle. Moreover, the thrust of the current resolution is not to advocate *more* disclosure per se, though that would of course be its effect. Rather, it urges *consistent* disclosure by entities making political expenditures, regardless of their tax status.

The *Citizens United* decision changed the role of money in political campaigns by opening the door to unlimited political spending by corporations and unions.[4] At the same time,

---

[1] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

[2] Pub. L. No. 107-155; 116 Stat. 81 (amending the Federal Election Campaign Act), codified at 2 U.S.C. § 431 *et seq.* BCRA is *also known as the McCain-Feingold Act.*

[3] The following ABA policies are relevant to and consistent with this resolution:

- August 1975 – Supports full and timely disclosure of campaign contributions and expenditures in excess of minimal amounts.
- August 1992 – Supports full, accurate, readily accessible, and timely disclosure of campaign contributions and expenditures.
- August 1998 – Urges that efforts be taken to ensure there is full disclosure of money spent in federal elections.
- July 2000 – Urges adoption by Congress and state and territorial legislatures of campaign finance reform legislation that strives to achieve, among other goals, full disclosure of all money raised and spent in federal, state, local, and territorial election campaigns.

[4] Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sep. 19, 2011, at A13, *available at* http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html.

eight Justices agreed that disclosure of the entities and people behind that spending was crucial to a well-functioning campaign finance system.[5] Indeed, not only did the Court uphold the disclosure requirements before it, its rationale for striking down prohibitions on spending *relied on* such requirements. As the Court 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."[6] This emphasis is in keeping with a long series of campaign finance cases, including *Buckley v. Valeo*[7] *and McConnell v. FEC,*[8] which had also endorsed and upheld disclosure requirements, and on which Citizens United expressly relied.[9]

The Court's confidence in the transparency of political speech is, unfortunately, unwarranted. The disclosure regime instituted with the Bipartisan Campaign Reform Act has proven inadequate. It turns out to be relatively simple to remain anonymous while making political contributions or expenditures; the mechanisms of choice are 501(c)(4) non-profit corporations, 527 organizations, and so-called "super PACs." It is important to understand these entities and how they are used to skirt disclosure requirements.[10]

A 501(c)(4) entity is a non-profit corporation, operated "exclusively" for the promotion of social welfare.[11] Internal Revenue Service (IRS) regulations specify that: "An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[12]

Although IRS regulations specifically exclude "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" from the category of activities that promote the social welfare,[13] a 501(c)(4) is allowed to engage in "some political activity, as long as that is not its primary activity."[14] While there is no clear test for determining when political activity becomes an organization's "primary activity,"

---

[5] *Citizens United,* 130 S. Ct. at 914.

[6] *Id. See also id.* at 917 ("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. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.").

[7] 424 U.S. 936 (1976).

[8] 540 U.S. 93 (2003).

[9] 130 S. Ct. at 913-14.

[10] Useful general discussions include Ellen P. Aprill, *Political Speech of Noncharitable Exempt Organizations after* Citizens United, 10 Election L. J. 363 (2011); Cory G. Kalanick, Note, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform,* 95 MINN. L. REV. 2254, 2261-62 (2011) [hereinafter Kalanick, *Blowing Up the Pipes*]; and Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing,* 10 Election L. J. 427 (2011).

[11] I.R.C. § 501(c)(4).

[12] Treas. Reg. § 1.501(c)(4).

[13] Treas. Reg. § 1.501(c)(4)(a)(2)(ii).

[14] *See* Rev. Rul. 81-95, 1981-1 C.B. 332 (interpreting I.R.C. § 501(c)(4) and Treas. Reg. § 1.501(c)(4)(a)(2)(ii) to allow 501(c)(4) organizations to engage in political campaign activities including financial assistance to candidates and in-kind contributions); IRS Website, Social Welfare Organizations, http://www.irs.gov/charities/nonprofits/-article/0,,id=96178,00.html.

the threshold is generally understood to be near 50% of total expenditures.[15] If an organization crosses that line, it will likely have to become a 527 entity and be subject to the rules of those organizations, described below.[16]

To the extent a 501(c)(4) engages in political campaign activities (taking care to avoid crossing the "primary activity" threshold), it is subject to some disclosure. These organizations must disclose political campaign activities on the annual 990 Form filed with the IRS, and this information is made public. However, contributions *to* a 501(c)(4) organization are not made public. Such an organization must report to the IRS contributions it receives of over $5,000, but that information does not become publicly available.[17]

The second important entity is the 527 organization. These tax-exempt "political organizations"[18] were originally designed to increase the transparency of political activity in the post-Watergate era. Since 2000, 527s have had to disclose to the IRS both contributions they receive and expenditures they make. These disclosures are extensive and can be found on the IRS web site. However, their value is significantly undercut by the fact that (a) the web site is not easily searchable and, more important, (b) the disclosure generally does not occur until *after* the relevant election.[19]

In the 2004 presidential cycle, several prominent 527s, including Swift Boat Veterans for Truth and America Coming Together, brought the 527 entity into the public consciousness. In response to the resulting pressure to classify 527s as "political committees" subject to regulation by the Federal Election Commission (FEC),[20] the Commission began reviewing these entities on a case-by-case basis.[21] The FEC decides if a 527 must register as a political committee based, in part, on a determination of whether the "major purpose" of the organization is to influence elections.[22] According to the FEC, "all political committees that register and file reports with the FEC are 527 organizations, but not all 527 organizations are required to file with the FEC."[23] The result is that some 527s fall under the FEC reporting regime, which is comparatively transparent and frequent, and some continue to fall under the IRS regime, which is neither. With the new, albeit limited, FEC involvement in 527 disclosure and the emergence of new funding mechanisms, pure 527 organizations appear to be falling out of favor.[24]

The final important entity is the super PAC. In brief, a super PAC is a 527 entity for tax purposes and a political organization for FEC purposes, subjecting it to FEC regulation. Super

---

[15] B. Holly Schadler, *The Connection*, Alliance for Justice, 2006, at 11; Kalanick, *Blowing Up the Pipes*, *supra* note 10, at 2261-62.
[16] Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, The Dark Election of 2010 and Why Tax-Exempt Entities Should be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 79 (2010-2011) [hereinafter Torres-Spelliscy, *Hiding Behind the Tax Code*].
[17] *Id.* at 81.
[18] I.R.C. § 527.
[19] Torres-Spelliscy, *Hiding Behind the Tax Code*, *supra* note 16, at 82.
[20] In contrast to 527s being classified as "political organizations" for IRS purposes.
[21] Kalanick, *Blowing up the Pipes*, *supra* note 10, at 2254, 2256-61.
[22] Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. LEGIS. 471, 481-82, 503-6 (Summer 2008) (expressing frustration with the lack of clear guidance on which 527s must register with the FEC).
[23] FEC Website, Quick Answers to General Questions, http://www.fec.gov/ans/answers_general.shtml.
[24] Kalanick, *Blowing up the Pipes*, *supra* note 10, at 2260.

PACs emerged as a result of two key court decisions, *Citizens United* and the D.C. Circuit's decision in *SpeechNow.Org v. FEC*.[25] As stated above, *Citizens United* held that corporate independent expenditures on political speech were constitutionally protected. *SpeechNow*, applying the rationale of *Citizens United*, subsequently struck down contribution limits on organizations making independent expenditures.[26] The result of these rulings was the creation of Independent Expenditure PACs ("IE-PACS"), more commonly known as super PACs, which can accept unlimited corporate or union money for the purposes of making independent expenditures, but cannot funnel that money directly to federal candidates.

Super PACs are regulated by the FEC and are subject to the same reporting requirements as other PACs. This consists mainly of quarterly or monthly reports to the FEC with detailed information regarding contributions and disbursement totals, disbursement purposes, and donor information.[27] Individual independent expenditures must be reported more frequently, usually within 48 hours of the expenditure.[28]

In practice, a donor – be it a person, a corporation, or a union – wishing to remain anonymous can make a donation to a 501(c)(4), which can then give the money to a super PAC, which can then make an independent expenditure to influence a political campaign. The super PAC will disclose *its* donor, the non-profit, in its regular FEC filings, effectively masking the true source of the funds.

These arrangements exist across the political spectrum. For example, Karl Rove and Ed Gillespie founded American Crossroads, a super PAC, which is affiliated with the conservative Crossroads GPS, a 501(c)(4); former White House Deputy Press Secretary Bill Burton founded a super PAC, Priorities USA Action, which is affiliated with a 501(c)(4), the liberal Priorities USA.[29] Comedian Stephen Colbert, who has been mining campaign finance issues for television humor, exemplified and lampooned this structure when he founded a super PAC, "Americans for a Better Tomorrow, Tomorrow," and a 501(c)(4), "Anonymous Shell Corporation," with the latter's sole function being to funnel anonymous funds to the former.[30]

The upshot of these arrangements is that the donors to the non-profit are never publicly revealed, as long as the non-profit maintains its status as a 501(c)(4) and does not slip into 527 status by allowing political activity to become its "primary activity." However, the IRS will not audit an organization while its tax year is still open -- essentially, until the organization files all appropriate paperwork for that tax year. In effect, this allows for a major lag in any reporting, especially in the first year of an organization's existence.

For example, assume a hypothetical 501(c)(4) organization was formed in July 2010,

---

[25] SpeechNow.Org v. Federal Election Commission, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).
[26] *Id.;* 2 U.S.C § 431(17) (defining "independent expenditure as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents").
[27] FEC Website, 2011 Reporting Dates, http://www.fec.gov/info/report_dates_2011.shtml#frequency.
[28] *Id.*
[29] Joshua Boak, *Enter the Era of Super PACs*, CAMPAIGNS & ELECTIONS, July/Aug 2011, at 33-4.
[30] Justin Sink, *Colbert Group Creates Shell Corporation to Lampoon Karl Rove's Groups*, THE HILL, Sep. 30, 2011, *available at* http://thehill.com/video/in-the-news/184755-colbert-creates-shell-corporation-to-lampoon-rove-money-laundering.

early enough to be involved in the 2010 midterm elections. By way of several easily obtained IRS filing extensions, the organization's first public disclosure would not be required until May 2012, with its first tax year remaining "open."[31] Once the tax year closed, the IRS would have to undertake an investigation and determine whether the organization failed the primary purpose test. By the time any investigation into the organization's purpose could be undertaken, its effect on the 2010 election would be long over and the organization itself could be dissolved.[32] In fact, it is not unreasonable to imagine a scenario where the organization's involvement in the *2012* election could have been complete before any meaningful action was taken by the IRS.

This Resolution recommends bringing disclosure into line with the ideal invoked by the Supreme Court in *Citizens United* by placing all political organizations and all political spending under the same disclosure regime, regardless of the type of organization or its tax status.[33] This can best be accomplished through two straightforward changes. First, "campaign expenditure" should be defined as any contribution, disbursement, or, importantly, transfer related to making an electioneering communication or independent expenditure. Second, any group making a campaign expenditure should be subject to the disclosure requirements that currently apply to PACs and other political committees.[34] Uniform definitions and disclosure requirements would greatly simplify the current hodgepodge of entities making political expenditures and the myriad rules that govern them. More important, these disclosure requirements would ensure actual, across-the-board transparency.

Consider the disclosures that would have occurred under this regime in the 2012 federal election cycle. All covered entities would have filed a mid-year report covering January through June 2011 on July 31, 2011, and a year-end report covering July through December on January 31, 2012.[35] Monthly filings would have commenced on February 20, 2012, with a report covering January, and would have continued through an October 20 report, which would have covered September 2012. Prior to the general election, entities would have been required to file a pre-election report on October 25, covering the first half of that month. Thirty days after the election, on December 6, 2012, a post-election report would have been due. Finally, on January 31, 2013, a year-end report would have been due.[36] Throughout the two-year cycle, any electioneering communications amounting to $10,000 in the aggregate[37] would have triggered an

---

[31] That public disclosure would consist of IRS Form 990, which would not reveal any donor information.
[32] *Id.*
[33] The "DISCLOSE Act," passed by the House in 2010 and reintroduced in 2012 by Rep. Chris Van Hollen, is the closest that Congress has come to this approach. *See* H.R. 4010, The Democracy Is Strengthened by Casting Light on Spending in Elections Act, 112th Cong. (2012), *available at* http://vanhollen.house.gov/UploadedFiles/DISCLOSE_-Bill_Text_020912.pdf
[34] Currently, PACs (including super PACs) can chose to disclose on either a monthly or quarterly basis. Selecting quarterly reporting requires additional reports before and after primary, general, and special elections, which can be onerous if a PAC operates in multiple states. Most major super PACs operating in the 2012 cycle have selected monthly reporting. Federal Election Commission, Campaign Guide: Corporations and Labor Organizations (2007), *available at* http://www.fec.gov/pdf/colagui.pdf; *see supra* notes 27-28.
[35] FEC Website, 2011 Reporting Dates, http://www.fec.gov/info/report_dates_2011.shtml.
[36] FEC Website, 2012 Reporting Dates, http://www.fec.gov/info/report_dates_2012.shtml.
[37] 2 U.S.C. § 434(f)(3) (defining electioneering communication as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the

obligation to report within 24 hours.[38] Additionally, independent expenditures[39] of more than $10,000 would have to have been disclosed within 48 hours, and within 20 days of an election, independent expenditures of $1,000 or more would have to have been disclosed within 24 hours.[40]

These disclosure requirements are meaningful and enjoy wide, bipartisan support. There is no justification for applying them only to a portion of functionally indistinguishable expenditures or practically fungible entities.

This Resolution endorses uniform disclosure rules for all entities that spend on elections. It takes no position on, and would not affect the First Amendment holdings of, *Citizens United.* Corporate, union, and non-profit money could and would still to flow to political organizations; it would simply have be disclosed to the FEC and the public in timely and uniform fashion. This is precisely the world envisioned by the Court in *Citizens United*, one in which "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[41]

The resolution also does not take a view on whether, consistent with the First Amendment, Congress could mandate the disclosure of all individual contributions, regardless of size, to any sort of entity that engages in some amount of political activity. In deference to those who believe that potential freedom of association concerns may be implicated by such legislation,[42] the resolution recommends that disclosure requirements be "subject to such reasonable threshold limits as may be necessary to avoid infringing on any implicated Constitutional interests such as the right of free association."

Respectfully submitted,
James W. Conrad, Jr.
Chair, Section of Administrative Law and Regulatory Practice
February 2013

---

candidate; and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate").

[38] FEC Website, 2012 Reporting Dates,http://www.fec.gov/info/report_dates_2012.shtml#ec.

[39] *See supra* note 26.

[40] FEC Website, 24 and 48 Hour Reports of Independent Expenditures for 2012, *available at* http://www.fec.gov/info/charts_ie_dates_2012.shtml.

[41] *Citizens United*, 130 S. Ct. at 916.

[42] *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that associational rights of members of nonprofit organization would be impermissibly infringed by state requiring disclosure of membership list in order to conduct business within the state).

Joint Statement of

David Keating
President, Center for Competitive Politics

and

Bradley A. Smith
Chairman, Center for Competitive Politics
Josiah H. Blackmore II/Shirley M. Nault Professor of Law
Capital University Law School

Submitted to the Committee on Rules and Administration
United States Senate
April 30, 2014

Mr. Chairman and members of the Committee, thank you for the opportunity to present our views on the hearing titled, "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond." We respectfully request that our statement be entered into the public record.

The recent Supreme Court decision in *McCutcheon v. Federal Election Commission*[1] struck down an aggregate limit on how much an individual could give to all federal political candidates and party committees in an election cycle. For this, the decision has actually been called the "worst decision since Dred Scott."[2] Yes, worse than *Buck v. Bell*,[3] or *Plessey v. Ferguson*.[4]

Yet, less than forty years ago, there were no limits at all on individual contributions to candidates, except for limited restrictions on government employees and contractors. The Committee should keep in mind that without limits on speech, voters elected FDR, Truman, Eisenhower, Kennedy, and Johnson as president. Was major legislation such as the Voting Rights Act, Medicare, and the Civil Rights Act the product of a corrupt system, given that individual contributions were not only unlimited in the aggregate, but unlimited to any one candidate? Of course not.

[1] 572 U.S. __, No. 12-536 (Apr. 2, 2014).
[2] Rebecca Shabad, "McCain predicts 'major scandal' on campaign finance," *The Hill*. Retrieved on April 28, 2014. Available at: http://thehill.com/blogs/ballot-box/campaign-committees/204228-sen-mccain-on-campaign-finance-rulings-i-predict-a-major (April 23, 2014). ("[McCain] said the two recent Supreme Court rulings on the issue — one released earlier this month and one from 2010 — were 'the worst since Dred Scott.'") (discussing *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that African-Americans, whether they were slaves or free, were not U.S. citizens)).
[3] 274 U.S. 200 (1927) (upholding a law providing for forced sterilization of "imbeciles").
[4] 163 U.S. 537 (1896) (upholding segregation laws).

Consider the role of this system that allowed unlimited contributions to candidates and its impact on the 1968 Democratic primary and the debate on the Vietnam War. In late November 1967, Minnesota Senator Eugene McCarthy decided to challenge President Lyndon Johnson for the Democratic nomination. At first, people thought McCarthy's campaign would be quixotic. But with no contribution limits, Senator McCarthy assembled a well-funded campaign from a small number of rich donors who shared his opposition to the Vietnam War. McCarthy concentrated on New Hampshire's primary, and the number one issue in his campaign was to end the war.

His rich backers gave the equivalent of almost $10 million in today's dollars to fund the campaign, an enormous amount at the time. As a result of his showing in New Hampshire, McCarthy forced President Johnson out of the race, a feat not duplicated since the enactment of contribution limits.

Attached is a copy of an article by *Washington Post* columnist Richard Cohen that describes what happened in the McCarthy campaign in more detail.

Today, at least a dozen states, including many of the least corrupt[5] and best managed[6] states in the nation, have no limits on individual contributions to candidates or parties. Seen in this light, the attention and the tone of response to *McCutcheon* is rather remarkable. Moreover, even before *McCutcheon,* the substantial majority of U.S. states, including several represented by members of this Committee, placed no aggregate limit on individual giving to political candidates and committees. Yet, this was so uncontroversial that even Americans who closely follow campaign finance would have been hard pressed to name any of these states. There is no evidence that states without aggregate limits are more poorly governed, suffer more political corruption, or that their citizens sense a greater "appearance of corruption," than any of their neighbors. In fact, the evidence seems to indicate that the states without aggregate limits have less corruption and better management.[7]

The Committee has expressed some interest in using this hearing to explore new disclosure requirements for spending on politics and public affairs, and with that in mind, it is worth noting that the *McCutcheon* ruling is disclosure's friend. By freeing donors to contribute more directly to candidates and party committees, one likely effect of *McCutcheon* will be to

---

[5] Adriana Cordis and Jeff Milyo, "Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?" Mercatus Center at George Mason University. Retrieved on April 28, 2014. Available at: mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (April 2013); Matt Nese and Luke Wachob, "Do Lower Contribution Limits Decrease Public Corruption?," Center for Competitive Politics' Issue Analysis No. 5. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf (August 2013).

[6] Matt Nese and Luke Wachob, "Do Lower Contribution Limits Produce 'Good' Government?," Center for Competitive Politics' Issue Analysis No. 6. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (October 2013); Matt Nese, "Do Limits on Corporate and Union Giving to Candidates Lead to 'Good' Government?," Center for Competitive Politics' Issue Analysis 7. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf (November 2013).

[7] Matt Nese, "Aggregate and Proportional Limits in the States: Have they Reduced Corruption or Promoted Better Government?," Center for Competitive Politics' Issue Analysis No. 9. Retrieved on April 29, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/02/2014-04-24_Issue-Analysis-9_Aggregate-And-Proportional-Limits-In-The-States-Have-They-Reduced-Corruption-Or-Promoted-Better-Government.pdf (April 2014).

encourage donors to give directly to candidates and party committees, where their contributions are subject to the most rigorous compulsory disclosure rules, rather than to organizations that may have fewer disclosure requirements. So, *McCutcheon* is good for disclosure advocates.

The alleged disclosure problem itself, as we will outline below, is routinely overstated. Data from the Federal Election Commission and the Center for Responsive Politics show that just four percent of political expenditures in 2012 were financed by groups that did not itemize their donors. And in all cases, the name of the group making the expenditures was disclosed (at least if they were operating legally).

Any legislative response to *McCutcheon,* and new laws regulating the discussion of public affairs generally, must be grounded in a realistic understanding of what the law actually is; it must be based on a realistic assessment of the effects it has in practice; and it must take into account the actual costs and benefits of added compulsory disclosure, eschewing loaded terms like "dark money" that to do little to enlighten and much to obscure those costs and benefits.

McCutcheon v. FEC

I. Understanding the rationale behind the Court's plurality opinion in McCutcheon *is crucial to understanding the implications of the decision.*

McCutcheon invalidated the federal aggregate limit on contributions by individuals to candidate campaigns and political committees. In his controlling opinion, Chief Justice Roberts summarized: "we conclude that the aggregate limits on contributions...intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'"[8]

McCutcheon is just the most recent in a long line of cases holding that contribution limits implicate fundamental First Amendment interests.[9] When Congress first created substantial regulation of campaign finance in the 1970s, the unanimous Supreme Court in *Buckley v. Valeo* identified campaign contributions as a component of the "right to associate," and therefore determined that limits must be subject "to the closest scrutiny."[10] In *McCutcheon*, the Chief Justice simply noted that these "rights are important regardless whether the individual is, on the one hand, a 'lone pamphleteer[] or street corner orator[] in the Tom Paine mold,' or is, on the other, someone who spends 'substantial amounts of money in order to communicate [his] political ideas through sophisticated' means."[11]

Aggregate contribution limits are a substantial restraint on the rights of speech and association. The opinion explains: "An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a 'modest restraint' at all. The Government may no more restrict how many candidates or causes a donor may support than it

[8] *McCutcheon*, slip op. at 39-40 (Roberts, C.J. for the plurality) (quoting .*Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).
[9] *Id.* at 7 (Roberts, C.J. for the plurality); *see also Buckley*, 424 U.S. at 14.
[10] *Buckley*, 424 U.S.at 25 (1976) (citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)).
[11] *McCutcheon*, slip op. at 14-15 (Roberts, C.J. for the plurality) (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)) (brackets in *McCutcheon*).

may tell a newspaper how many candidates it may endorse."[12] The Chief Justice continues: "To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights."[13]

Let's take a hypothetical close to home. There are nine members from the Democratic Party, and one member who caucuses with the Democrats on the Senate Rules Committee: Senator Schumer from the Empire State (NY), Senator Feinstein from sunny California, Senator Durbin from Illinois (the Land of Lincoln), Senator Pryor from the Land of Opportunity and Hope (AR), Senator Tom Udall from the Land of Enchantment (NM), Senator Warner from the Commonwealth of Virginia, Senator Leahy from the Green Mountain State (VT), Senator Klobuchar from the Land of Ten Thousand Lakes (MN), Senator Angus King from the Pine Tree State (ME), and Senator Walsh from Big Sky Country (MT). A contributor may think all ten are doing a fantastic job on the Senate Rules Committee – overseeing elections and insuring the integrity of the Upper House. Therefore, this person may wish to give the maximum they can by law to those re-election campaigns.

But what if this contributor also likes Senator Mary Landrieu's work on energy issues? Why must this contributor choose supporting good governance of the Senate over energy? Giving to Senator Landrieu in the same manner as giving to Senator King will not corrupt either. Yet the law used to make such a contributor choose which was more important to our contributor. The Supreme Court in *McCutcheon* recognized the absurdity of this limitation and held that it could not withstand "the closest scrutiny."

Some have attempted to dismiss the First Amendment interests at stake by arguing that relatively few Americans can afford to contribute the legal maximum to more than a handful of candidates. Leaving aside that constitutional rights may not be abrogated simply because they have an immediate application to a minority of citizens, it seems fair to say that far more Americans have the financial wherewithal to make political contributions than own newspapers or broadcast outlets. Would any member of this committee support the hypothetical law suggested by the *McCutcheon* Court – a limit on the number of candidates a newspaper or broadcast station could endorse – on the grounds that very few Americans own newspapers or broadcast stations?

II. For those who worry about political contributions to 501(c) groups, the McCutcheon *decision will actually result in increased contributions to primarily political organizations including candidates and political parties.*

Those who have expressed concern about disclosure of political spending should be pleased with the *McCutcheon* decision. The likely effect of *McCutcheon* will be to place more money into the compulsory disclosure system. By allowing for more limited contributions to candidate campaigns and political parties, *McCutcheon* will direct money away from organizations with fewer disclosure obligations than those imposed on candidate committees and

[12] *Id.* at 15 (Roberts, C.J. for the plurality).
[13] *Id.* at 16 (Roberts, C.J. for the plurality) (citing *Davis v. Federal Election Comm'n*, 554 U. S. 724, 739 (2008)).

political parties.[14] While the *McCutcheon* Court acknowledged that "disclosure requirements burden speech," a proper disclosure regime is less burdensome than limits on contributions.[15] *McCutcheon's* effect will be to drive money previously going to independent spenders to campaigns and parties, where "modern technology" provides "massive quantities of information [that] can be accessed at the click of a mouse."[16]

Websites like OpenSecrets.org and FollowTheMoney.org amass the data from candidate contribution reports and make it searchable, and thereby easily accessible.[17] By pushing political spending back towards direct contributions, *McCutcheon* will encourage more disclosure as contributors give directly to candidates, parties, and PACs, rather than using alternative avenues such as 501(c) organizations.[18] America will know exactly who supports each of you, should you seek re-election.

III. Worries over campaign contributions in the absence of an aggregate limit are misguided given existing law and historical trends.

It is important to remember that the ban on corporate and union contributions to candidates remains in place after *McCutcheon*.[19] Likewise, the limits on how much a contributor may give to a PAC, candidate, or party committee remain in place.[20] Nor can someone create multiple PACs to serve as conduits for their political spending.[21] Anti-earmarking laws and regulations still have full effect.[22] The *McCutcheon* Court saw all of these as protections that made the aggregate limits obsolete.[23] Indeed, the Chief Justice agreed with Acting Assistant Attorney General Mythili Raman that we should "anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted."[24]

Before proclaiming the doom of American democracy, it must again be emphasized that historically the United States has placed no limits at all – aggregate or otherwise – on individual contributions to candidates and parties. Broad federal limits on individual contributions to candidates were not imposed until 1974.[25] The specific aggregate limits struck down in *McCutcheon* were a creation of *this* millennium.[26] A person born in the year those aggregate

---

[14] As the Chief Justice explained, "disclosure of contributions minimizes the potential for abuse of the campaign finance system...by exposing large contributions and expenditures to the light of publicity." *McCutcheon*, slip op. at 35 (Roberts, C.J. for the plurality).
[15] *Id.* at 35-36.
[16] *Id.* at 36.
[17] *Id.*
[18] *See id.*
[19] 2 U.S.C. § 441b.
[20] 2 U.S.C. § 441a(a)(1)(C).
[21] 2 U.S.C. § 441a(a)(5); *see also* 11 C.F.R. § 100.5(g)(4).
[22] 2 U.S.C. § 441a(a)(8); *see also* 11 C.F.R. §§ 110.6(b)(1) (broadly defining earmarking) and 100.1(h) (regulating earmarking).
[23] *McCutcheon*, slip op. at 12-13 (Roberts, C.J. for the plurality).
[24] *McCutcheon*, slip op. at 26 n. 9 (Roberts, C.J. for the plurality) (quoting Statement of Mythili Raman, Hearing on Current Issues in Campaign Finance Law Enforcement before the Subcommittee on Crime and Terrorism of the Senate Committee on the Judiciary, 113th Cong., 1st Sess., 3 (2013)).
[25] Federal Election Campaign Act of 1974 Pub. L. 93-443 § 101, 88 Stat. 1263 (1974).
[26] Bipartisan Campaign Reform Act Pub. L. 107-155 § 307(b), 116 Stat. 93, 102-103 (2002) (codified at 2 U.S.C. § 441a(a)(3)).

contribution limits were enacted is not even old enough to drive a car.[27] Aggregate limits are a recent, radical addition to our election laws, and the Court found they could not be justified under the closest scrutiny.

IV. Contribution limits have lagged inflation and should be increased.

On an inflation-adjusted basis, current contribution limits to campaigns, parties, and PACs are substantially lower than the first caps on individual giving imposed in 1974. The Federal Election Campaign Act Amendments of 1974 limited what an individual could contribute to a candidate to $1,000 per election.[28] Using the Department of Labor's Bureau of Labor Statistics inflation calculator, $1,000 in 1974 is equal to $4,792.96 today.[29] Yet, today the individual base contribution limit sits at *barely half* (54 percent) its value in 1974 – just $2,600.[30] Likewise, in 1974, an individual could contribute $5000 to a PAC, and PACs could contribute $5,000 to a candidate.[31] Neither number has ever been adjusted for inflation. Were they adjusted for inflation, an individual could contribute $23,964.81 to a PAC, and a PAC could contribute that same amount to a political party.[32] Also unadjusted for inflation is the 1974 limit of $15,000 on PAC contributions to political parties. Adjusted for inflation, this number now ought to be $71,894.42.[33] In other words, at every level, the amount that may be contributed directly to a candidate or campaign is today substantially lower than the original limits imposed in 1974.[34] The substantial effective decline in the ability of individuals to contribute to parties and candidates has not alleviated either the reality or the appearance of corruption, but it undoubtedly has required officeholders and candidates to spend more time fundraising, and driven more money into channels with less onerous disclosure requirements. Limits on individual giving are, in fact, disclosure's enemy. Despite this substantial decline in the ability of a contributor to associate with a candidate, the *McCutcheon* Court upheld the base individual contribution limits.[35]

---

[27] An earlier system of aggregate limits was first imposed in the 1974 FECA Amendments. That limit was $25,000 in total political contributions per year, but contributions made in connection with an election were considered made in the year of the election. Adjusted for inflation, $25,000 would have allowed annual contributions of $119,824 in 2014, roughly double the total cap imposed in the Bipartisan Campaign Reform Act of 2002, although some of that amount would have to go to party activities not directly in connection with an election.

[28] Federal Election Campaign Act of 1974 Pub. L. 93-443 § 101, 88 Stat. 1263 (1974).

[29] "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1000&year1=1974&year2=2014 (2014).

[30] 2 U.S.C. § 441a(a)(1)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, Federal Election Commission, 78 Fed. Reg. 8530, 8532 (Feb. 16, 2013)).

[31] Federal Election Campaign Act of 1974 § 101, 88 Stat. at 1263.

[32] "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5000&year1=1974&year2=2014 (2014).

[33] "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=15000&year1=1974&year2=2014 (2014).

[34] There is a scenario where the post-McCutcheon contribution limits increased over what was available in 1974. A joint fundraising committee made up of the three principle components of the Democratic Party – the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee – can now jointly raise $97,200. If we were under the 1974 limits, adjusted for inflation, it would be $95,859.23. That's a difference of $1,340.77. In the large sums spent on elections, $1,341 spread over three arms ($446.92) of the national party is hardly corrupting.

[35] *McCutcheon*, slip op. 4-5 (describing with approval the limits); slip op. at 37 (referring to the anticorruption interest of the base limits) (Roberts, C.J. for the plurality). At some point, excessively low contribution limits will invite litigation to strike those limits down. *See also Randall v. Sorrell*, 548 U.S. 230 (2006) (holding that Vermont's state limits were unconstitutionally low, in that they prevented candidates and parties from raising funds needed to effectively spread their messages). A Congress that seeks to preserve contribution limits in some form would do well to note the warning of *Randall v. Sorrell*.

Campaign Finance Disclosure and the Hyperbolic Rhetoric of "Dark Money"

I. An understanding of existing campaign finance disclosure regulations highlights an already over-regulated area of the law and downplays the need for additional disclosure.

In the wake of the *McCutcheon* decision, those who wish to further regulate political speech have renewed calls for even more mandatory disclosure, continuing a pattern established after the decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*,[36] and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission*.[37] However, to assess these demands, it's crucial to examine current campaign finance disclosure regulations as well as the recent opinions of the High Court on the issue.

The claim by those demanding more regulation has been that the public lacks information on the sources of vast amounts of political independent spending. This concern, while serious if true, has been artificially ramped up by many mistaken comments in the media about "secret" contributions to campaigns, as well as a widely held, but mistaken belief that under *Citizens United*, corporations and unions may now contribute directly to candidate campaigns. In any case, information about political donors, it is believed, can help guard against officeholders becoming too compliant with the wishes of large spenders, and provide information that might be valuable to voters in deciding for whom to vote and how to evaluate political messages.

In particular, there have been concerns that non-profit organizations formed under Section 501(c)(4) of the Internal Revenue Code have been engaging in extensive political campaigns using "dark money." This issue, however, is not new. Express advocacy in favor of or against candidates was allowed for certain types of 501(c)(4) organizations even before *Citizens United*, as a result of the Supreme Court's ruling in *Federal Election Commission v. Massachusetts Citizens For Life ("MCFL")*.[38] That decision allowed qualified non-profit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the *Citizens United* decision and included groups such as the League of Conservation Voters and NARAL.

In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates. For example, in 2000, the NAACP Voter Action Fund, a non-profit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

> *Renee Mullins (voice over):* I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged miles to his death, all beeause he was black. So when Governor George W. Bush refused to support hate-crime legislation, it

[36] 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds).
[37] 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits).
[38] 479 U.S. 238 (1986).

> was like my father was killed all over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election.[39]

This ad was perfectly legal to run at any time prior to 2003, with no donor disclosure, and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*.[40] In short, political spending by 501(c) organizations is nothing new, and those organizations have never been required to disclose the names of their donors and members unless donors gave specifically to support a particular independent expenditure.

It should also be noted that neither the *Citizens United* nor *SpeechNow.org* decisions struck down any disclosure laws; nor has Congress or the FEC loosened any disclosure rules in place at the time those two decisions were issued in the spring of 2010. There has been no change in the laws governing disclosure of political spenders and contributors.

Despite heavy media focus in 2012 on "dark money," "secret money," and "undisclosed spending," in fact, the United States currently has more political disclosure than any time in its history. Candidates, political parties, PACs, and Super PACs disclose all of their donors beyond the most *de minimis* amounts. This disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and the amount given.[41] Indeed, these entities also report all of their expenditures.

Current federal law also requires reporting of all independent expenditures over $250, and of "electioneering communications" under 2 U.S.C. § 434(f). 501(c)(4) social welfare organizations, such as the National Rifle Association and the Sierra Club, must disclose donors who give money earmarked for political activity. All of this information is freely available on the FEC's website.

II. Current law requires disclosure of the spender on all campaign advertising.

Furthermore, all broadcast political ads (like, in fact, all broadcast ads, political or not) must include, within the ad, the name of the person or organization paying for the ad. Thus, it is something of a misnomer to speak of "undisclosed spending." Rather, more precisely, some ads are run with less information about the spender, and contributors to the spender, than some might think desirable. This recognition is important to understanding the scope of the issue and the importance of particular measures that seek to require more disclosure.

---

[39] *See* Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).
[40] 551 U.S. 449 (2007).
[41] *See* 2 U.S.C. §434(b) and (c).

According to the FEC, approximately $7.3 billion was spent on federal races in 2012. Approximately $2 billion, or less than 30 percent, was spent by "outside groups" (that is, citizens and organizations other than candidate campaign committees and national political parties).[42] According to figures from the Center for Responsive Politics, approximately $311 million was spent by organizations that did not disclose their donors.[43] That is just under 4.3 percent of the total. $311 million sounds like a lot of money – four percent of total spending on federal races doesn't sound like much money at all.

Moreover, that four percent tends to overstate the issue because many of the largest 501(c) spenders are well-known public groups. Only 28 organizations that did not publicly disclose all of their donors spent more than $1 million on all independent expenditures in 2012. Most of these were well-known entities, including the U.S. Chamber of Commerce, the Humane Society, the League of Conservation Voters, NARAL Pro-Choice America, the National Association of Realtors, the National Federation of Independent Business, the National Rifle Association, and Planned Parenthood. Several of these groups also spent substantial funds on issue ads or express advocacy under the *MCFL* exemption, even before *Citizens United*, suggesting that the growth in "undisclosed" spending is even less than many who favor more regulation lead the public to believe.

Even many spenders that are not historically well-known organizations on the list are quite familiar to anyone who remotely follows the news, such as Crossroads GPS and Americans for Prosperity. Indeed, many of these organizations' funders are well-known, even as the organizations themselves do not formally disclose their names. Does anyone on this Committee not know that Tom Steyer provided substantial funding to NextGen Climate Action, a 501(c)(4)? If not, a Google search of the organization's name will provide that information in a matter of seconds.[44]

Furthermore, data from the Center for Responsive Politics shows that the percentage of independent spending by organizations that do not disclose their donors appears to have declined substantially (by approximately 25 percent) in 2012 from 2010. This is not surprising. Because 501(c) organizations may not have political activity as their primary purpose, they must conduct their activities to stay within the IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is political activity faces the effective equivalent of an over 50 percent tax on his or her political donations by giving to a 501(c) organization rather than to a "Super PAC," which fully discloses its donors. This is because the group must primarily spend its funds on programs other than political activity, as defined in Section 527 of the tax code. As a result of this inefficiency, it is doubtful that spending by 501(c) organizations will increase

[42] Jake Harper, "Total 2012 election spending: $7 Billion," Sunlight Foundation. Retrieved on April 28, 2014. Available at: http://sunlightfoundation.com/blog/2013/01/31/total-2012-election-spending-7-billion/ (January 31, 2013); Jonathan Salant, 2012 Elections Cost Will Hit $7 Billion, FEC Chair Weintraub Says," *Bloomberg*. Retrieved on April 28, 2014. Available at: http://go.bloomberg.com/political-capital/2013-01-31/fec-head-weintraub-says-2012-elections-cost-will-hit-7-billion/ (January 31, 2013).

[43] "Outside Spending by Disclosure, Excluding Party Committees," Center for Responsive Politics. Retrieved on April 29, 2014. Available at: http://www.opensecrets.org/outsidespending/disclosure.php.

[44] Nicholas Confessore, "Financier Plans Big Ad Campaign on Climate Change," *The New York Times*. Retrieved on April 29, 2014. Available at: http://www.nytimes.com/2014/02/18/us/politics/financier-plans-big-ad-campaign-on-environment.html?_r=0 (February 17, 2014).

substantially as a percentage of independent or total spending. Furthermore, if the group does not conduct its activities in a manner consistent with IRS regulations, it could possibly be reclassified as a Section 527 organization by the Agency and be forced to publically disclose its donors on nearly the same schedule as a political committee, except that the reports are on IRS Form 8872 and listed on the IRS website.

Lastly, it bears repeating that, contrary to claims by many, the Supreme Court's ruling in *Citizens United* did not change the prohibition on political activity by non-resident aliens and foreign corporations. Specifically, according to 2 U.S.C. § 441(e), any "partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country" is prohibited from contributing in elections. Indeed, despite the President's expressed fear that the decision would allow "foreign corporations"[45] to make expenditures in elections, not only did *Citizens United* specifically not address that longstanding prohibition, but the Supreme Court has summarily reaffirmed that ban since.[46]

III. According to Justice John Paul Stevens in McIntyre, *"[a]nonymity is a shield from the tyranny of the majority."*

The 1995 decision in the case *McIntyre v. Ohio Elections Commission,* where the U.S. Supreme Court upheld the claim of a right to anonymously publish and distribute pamphlets opposing a school tax that was on the ballot, illustrates how disclosure can impact First Amendment freedoms.[47] Justice John Paul Stevens wrote the majority opinion in *McIntyre*, including this statement: "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular."[48]

This opinion explains several of the many benefits to free speech from anonymity:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S., at 64. Great works of literature have frequently been produced by authors writing under assumed names. [footnote omitted] Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. [footnote omitted] Accordingly, an author's decision to

[45] President Barack Obama, "Remarks by the President in State of the Union Address," The White House, Office of the Press Secretary. Retrieved on April 28, 2014. Available at: http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (January 27, 2010).
[46] *See Bluman v. Federal Election Commission,* 132 S. Ct. 1087 (2012).
[47] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).
[48] *Id.* at 357.

> remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[49]
>
> The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.*, at 64. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. *Id.*, at 64-65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in Talley related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. [footnote omitted] This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.[50]

IV. Added disclosure rules will have significant costs and would often lead to junk disclosure.

Given that non-itemized donor expenditures are such a small part of the whole, why not require disclosure of that four percent of spending? The answer is that disclosure does impose costs, and such disclosure will also mislead the public. Any public policy finds its costs increasing and its benefits decreasing as it aims for 100 percent achievement of its goal. To take one example, some increase in spending on police, prisons, and courts is likely to reduce crime, but eliminating all crime – with police on every corner and prisons stuffed with petty offenders – is not worth the cost.

When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, unions, and trade associations. As a result, if a group decides to make

[49] *Id.* at 341-342.
[50] *Id.* at 342-343.

political expenditures as a small part of the organization's multiple activities, many of its donors could potentially be made public, regardless of whether their donations were earmarked for a political expenditure. People give to membership organizations and trade associations not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their views. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleads the public. It is "junk disclosure" – disclosure that serves little purpose other than to provide a basis for official or private harassment, and that may actually misinform the public.

There are also serious practical problems. As one of us has explained in an academic publication:

> Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a $100,000 dues payment to the National Business Chamber ("NBC") in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises $350,000 specifically for political activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers $1 million – the $350,000 it raised specifically for political activity, the $350,000 from the NBC, and another $300,000 from general dues – to the Committee for a Better State ("CBS"), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves $200,000 for its own direct spending, and then transfers $800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends $3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?
>
> What should be immediately obvious to any observer is that the question of "disclosure" is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme's initial payment to NBC?... By the time we reach Acme Industries, is the information useful – or even truthful? Would it be truthful to say that Acme Industries is "responsible" or "endorses" messages on a state ballot initiative made by the State Jobs Alliance far down the road?[51]

[51] Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

V. The Supreme Court minority's views on campaign finance law pose a significant threat to the First Amendment.

Having commented on the Supreme Court majority opinions in recent campaign finance cases, a few words are in order as regards the dissenting opinion in *Citizens United.* While this brief discussion only scratches the surface, it serves as a warning as to what might occur were the current minority view emerge as a majority view.

The primary dissent in *Citizens United*, authored by Justice John Paul Stevens, said it was "profoundly misguided"[52] to consider the cases under the First Amendment because corporations do not retain First Amendment rights and interests. This is remarkable in light of how the case came before the Court. Initially, the case was centered on a ban on speech by corporations, as part of the Bipartisan Campaign Reform Act (BCRA).[53] At the original oral argument, a hypothetical arose that asked whether one line of express advocacy in a book published by a corporation could trigger regulation and possible censorship as an electioneering communication.[54] When the answer from the United States government came back as "yes," the concerned Court ordered new briefing and argument.[55]

Even with that admission, after re-hearing, four members of the Court dissented from the judgment. It is important to note that they did not concur in the judgment on more narrow grounds, or on the basis of an as-applied exception on the particular facts of the case. Rather, four justices of the United States Supreme Court explicitly held that the federal government may ban the production, airing, and distribution of a documentary film about a major political figure during an election year, when a corporation is involved in the financing, production, or distribution of the film – even when the corporation is a non-profit organization. This is surely one of the most radical interpretations of the First Amendment ever endorsed by any Justice of the Court.

VI. The IRS Harassment Scandal and subsequent proposed rulemaking governing the permissible activities of 501(c)(4) organizations illustrates the dangers of calls for increased disclosure.

This concern over so-called "dark money" and push for increased disclosure requirements comes at a time when Americans' confidence in government has been rocked by information that the IRS systematically targeted groups based on their political beliefs. A number of Senators, including some on this Committee, specifically urged the IRS to investigate conservative non-profit groups.[56] Such pressure on the Agency appears to have been a major

[52] *Citizens United v. FEC*, 558 U.S. 310, 393-94 (2010) (Stevens, J. dissenting). ("All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided").
[53] Bipartisan Campaign Reform Act, Pub. L. 107-155 § 203, 116 Stat. 81, 91 (2002).
[54] Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 10 (2012).
[55] *Id.*
[56] On October 11, 2010, Senator Durbin writes the IRS, asking the Agency to "quickly examine the tax status of Crossroads GPS and other (c)(4) organizations that are directing millions of dollars into political advertising." (U.S. Senator Richard J. Durbin, "DURBIN URGES IRS TO INVESTIGATE SPENDING BY CROSSROADS GPS," Office of Senator Richard J. Durbin. Retrieved on April 29, 2014. Available at: http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99 (October 12, 2010).) Several months later, on February 16, 2012, Senators Schumer and Udall (NM), along with Senators Bennet, Franken, Merkley, Shaheen, and Whitehouse write the IRS, asking the Agency to investigate tax-

factor in creating the current IRS scandal, which will have longstanding repercussions for the Agency's reputation and the voluntary compliance of citizens with the tax system.

These demands of the IRS by members of Congress are reminiscent of the rejected "DISCLOSE Act," which would have mandated disclosure of donations not related to the election or defeat of political candidates. The bill was about politics and silence as much as "disclosure." As Chairman Schumer said when the first bill was introduced, "the deterrent effect [on citizens' speaking out] should not be underestimated."[57] It appears the ultimate aim of such proposals is to force trade associations and non-profits to publicly list all their members along with their dues and contributions. Such lists can be used by competing groups to poach members and, more ominously, to gin up boycotts and threats to the individuals and corporate members of the groups – indeed, this has already occurred. Further in the background lies the thinly veiled threat of official government retaliation.

VII. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

The purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. We recognize that this distinction can dissolve in practice. For example, if we demand public disclosure of who gave money to a public official, in order to monitor that official, we will necessarily give the government the tools to monitor us. But as a first principle for thinking about what type of disclosure is proper, it provides a good starting point.

Indeed, the Supreme Court has recognized the careful balance between allowing citizens the tools to monitor the government and balancing that consideration with the realization this publicly available personal information can be used by individuals and organizations to threaten and intimidate those that they disagree with.

This evidence is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[58] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of

---

exempt organizations' political activities. In an accompanying press release by Senator Bennet, he opines that "operations such as Mr. [Karl] Rove's [Crossroads GPS] should not be allowed to masquerade as charities." (U.S. Senator Michael Bennet, "Senators Call for IRS Investigations into Potential Abuse of Tax-Exempt Status by Groups Engaged in Campaign Activity," Office of Senator Michael F. Bennet. Retrieved on April 29, 2014. Available at: http://www.bennet.senate.gov/newsroom/press/release/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity (February 16, 2012).) Nearly two years later, on February 13, 2014, echoing the prior calls of Democratic Senators before the IRS scandal revelations in May 2013, Senator Pryor publicly prods the IRS to regulate 501(c)(4) organizations more aggressively: "That whole 501(c)(3), 501(c)(4) [issue], those are IRS numbers. It is inherently an internal revenue matter. There are two things you don't want in political money, in the fundraising world and expenditure world. You don't want secret money, and you don't want unlimited money, and that's what we have now." (Alexander Bolton, "Vulnerable Dems want IRS to step up," *The Hill*. Retrieved on April 29, 2014. Available at: http://thehill.com/homenews/senate/198298-vulnerable-dems-want-irs-to-step-up (February 13, 2014).)

[57] Jess Bravin and Brody Mullins, "New Rules Proposed On Campaign Donors," *The Wall Street Journal*. Retrieved on April 29, 2014. Available at: http://online.wsj.com/article/SB10001424052748703382904575059941933737002.html (February 12, 2010).

[58] *NAACP v. Alabama*, 357 U.S. 449 (1958).

affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[59]

Much as the Supreme Court sought to protect those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular candidates and causes still need protection today. Events in the state of California over the past few years lend credence to this phenomenon. Many supporters of Proposition 8 faced harassment from gay-rights activists, simply because these donors' information was made publicly available through government-mandated disclosure. Indeed, in Justice Thomas' opinion in *Citizens United*, he dissented in part, noting harassment issues stemming from the disclosure of political information. In his dissent, Justice Thomas made specific reference to the experience of Proposition 8 supporters: "Some opponents of Proposition 8 compiled this [disclosure] information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result."[60] Similarly, it is hardly impossible to imagine a scenario in 2014 in which donors to controversial candidates and causes that make independent expenditures – for or against another same-sex marriage initiative; for or against abortion rights; or even persons associated with others who have been publicly vilified, such as the Koch family, Sheldon Adelson, or George Soros, might be subjected to similar threats.

Indeed, very recently, Mozilla CEO Brendan Eich was ousted from his position due to a pressure campaign orchestrated by those who support same-sex marriage over a $1,000 donation by Eich to the campaign for California Proposition 8 in 2008. As Eich's longtime business partner and defender of the need for his resignation, Mozilla Executive Chairwoman Mitchell Baker, noted when discovering that he gave money to the Proposition 8 campaign: "That was shocking to me, because I never saw any kind of behavior or attitude from him that was not in line with Mozilla's values of inclusiveness."[61] Ultimately, Eich was forced to resign.[62]

Worse still, as the Eich example shows, little can be done once individual contributor information – a donor's full name, street address, occupation, and employer – is made public under government compulsion. It can immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. This problem is best addressed by limiting the opportunities for harassment by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates,* and those who give to organizations whose *major purpose* is political advocacy – and not to organizations engaging in issue advocacy about a particular issue relevant to the voters, especially when that advocacy is but a part of the organization's overall mission.

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens,[63] who receive

---

[59] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.
[60] *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).
[61] Conor Friedersdorf, "Mozilla's Gay-Marriage Litmus Test Violates Liberal Values," *The Atlantic*. Retrieved on April 28, 2014. Available at: http://www.theatlantic.com/politics/archive/2014/04/mozillas-gay-marriage-litmus-test-violates-liberal-values/360156/ (April 4, 2014).
[62] *Id.*
[63] *Brown v. Socialist Workers' '74 Campaign Comm.*, 458 U.S. 87 (1982).

their information because of the forced disclosure. In short, mandatory disclosure of political activity should require a strong justification and must be carefully tailored to address issues of public corruption and to provide information of particular importance to voters.

* * *

The *McCutcheon* ruling could not be clearer: "Campaign finance restrictions that pursue other objectives [than preventing *quid pro quo* corruption]... impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern."[64] In doing so, the Court relied upon a long line of cases going back to *Buckley* in 1976.

At the time of the *McCutcheon* ruling, 32 states (of all political persuasions) already recognized the soundness of the Court's reasoning by not imposing aggregate limits on the overall political giving of their residents. Nothing suggests that these 32 states were more poorly governed, or more prone to political corruption, or that their citizens perceived government to be more corrupt, than in the minority of states that did impose some type of aggregate caps. Even before the *McCutcheon* decision, Arizona raised existing state contribution limits on the amount individuals and PACs may give to candidate campaigns, and eliminated Arizona's aggregate limits on contributions from individuals and PACs to statewide and legislative candidates.[65]

The First Amendment grants Americans the right to speak about politics without fear of official retribution from the government or elected officials. Although the *McCutcheon* ruling had little to do with campaign finance disclosure regulations, any attempt by Members of this Committee and others outside of Congress to connect the Court's ruling with calls for increased disclosure should be strongly considered in light of the complex and extensive disclosure already required by the federal government. In consideration of the seriousness of the potential for harassment and threats stemming from personal information made public by compulsory government disclosure, members of this Committee should think twice before advocating policies that will further stifle civic engagement and subject citizens to political intimidation and harassment for exercising their First Amendment rights.

We hope that this Committee recognizes the sound reasoning of the Supreme Court in *McCutcheon* and has gained greater clarity about the overblown rhetoric of "dark money" in light of the our current, heavily regulated campaign finance disclosure regime. Thank you for considering our comments.

---

[64] *Id.* at 3 (Roberts, C.J. for the plurality) (citing and quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. ___, No. 10-238 slip op. at 25 (2011)).

[65] Cristina Silva, "Brewer increases Arizona campaign finance limits" *Arizona Capitol Times*. Retrieved on April 28, 2014. Available at: http://azcapitoltimes.com/news/2013/04/12/jan-brewer-increases-arizona-campaign-finance-limits/ (April 12, 2013).

The Washington Post

A defense of big money in politics

By Richard Cohen, Published: January 16, 2012

Sheldon Adelson is supposedly a bad man. The gambling mogul gave $5 million to a Newt Gingrich-loving super PAC and this enabled Gingrich to maul Mitt Romney — a touch of opinion here — who had it coming anyway. Adelson is a good friend of Gingrich and a major player in Israeli politics. He owns a newspaper in Israel and supports politicians so far to the right I have to wonder if they are even Jewish. This is Sheldon Adelson, supposedly a bad man. But what about Howard Stein?

The late chairman of the Dreyfus Corp. was a wealthy man but, unlike Adelson, a liberal Democrat. Stein joined with some other rich men — including Martin Peretz, the one-time publisher of the New Republic; Stewart Mott, a GM heir; and Arnold Hiatt of Stride Rite Shoes — to provide about $1.5 million for Eugene McCarthy's 1968 challenge to Lyndon Johnson. Stein and his colleagues did not raise this money in itsy-bitsy donations but by chipping in large amounts themselves. Peretz told me he kicked in $30,000. That was a huge amount of money at the time.

That sort of donation would now be illegal — unless it was given to a super PAC that swore not to coordinate with the candidate. And until quite recently, even that would have been illegal — the limit being something like $2,400. Many people bemoan that the limit is no more, asserting that elections are now up for sale, as if this was something new. They point to the Adelson contribution and unload invective on the poor right-wing gambling tycoon. I understand, but I do not agree.

Back in 1967, a small group of men gave McCarthy the wherewithal to challenge a sitting president of the United States. The money enabled McCarthy to swiftly set up a New Hampshire operation and — lo and behold — he got 42 percent of the popular vote, an astounding figure. Johnson was rocked. Four days later, Robert F. Kennedy, who at first had declined to do what McCarthy did, jumped in himself. By the end of March 1968, Johnson was on TV, announcing he would not seek a second term.

My guess is that a lot of the people who decry what Adelson has done loved what Stein, Peretz and the others did. My guess is that they cheered Johnson's defeat because they loathed the Vietnam War and wanted it ended. My guess is that while they pooh-pooh the argument that money is speech, they cannot deny that when McCarthy talked — when he had the cash for TV time or to set up storefront headquarters — that was political speech at the highest decibel.

In the end, the 1968 campaign was won by Richard Nixon — and so was the next. Nixon was always awash in cash, huge donations from the scrupulous, the unscrupulous and the just plain weird. (Google W. Clement Stone to see what I mean.) Some of this money came from abroad and some of it funded the Watergate burglary and the cover-up. Too much money chased too

little morality. Reform was demanded and reform is what we got. It limited money and it limited speech.

History was changed by the sort of political donations that are now derided. Lyndon Johnson stepped down. The Democratic Party was ripped right up the middle. Bobby Kennedy joined the race (and was assassinated in June), and nothing — but nothing — was the same afterward. McCarthy's quixotic campaign became so real that Paul Newman came up to New Hampshire, and so did throngs of kids with long hair and incredible energy. I was there, a graduate student-cum-cub reporter, eating off the expense accounts of soon-to-be Washington Post colleagues (My God, what a life!). So when the Supreme Court says that money is speech and ought to be protected, I nod because I was in New Hampshire in 1968 and I know.

Sheldon Adelson is not my type of guy. I don't like his politics. But he has no less right to try his own hand at history than did that band of rich men who were convinced the war was a travesty-tragedy — and they were right. Since 1968, my views have changed on many matters. But my bottom line remains a fervent belief in the beauty and utility of free speech and of the widest exchange of ideas. I am comfortable with dirty politics. I fear living with less free speech.

The above article, "A defense of big money in politics," can be accessed at: http://www.washingtonpost.com/opinions/how-political-donations-changed-history/2012/01/16/gIQA6oH63P_story.html.

Submission for the Record

Fred Wertheimer, President, Democracy 21

Senate Rules Committee Hearing

Held on April 30, 2014

Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Elections and Beyond

I am Fred Wertheimer, President of Democracy 21.

Democracy 21 appreciates the opportunity to make a submission for the record in regard to the hearing held on April 30, 2014 by the Senate Rules Committee. I would also like to express our appreciation to Senator Angus King for arranging and conducting this important hearing.

I would like to focus this submission on the gaping disclosure loopholes in the campaign finance laws which resulted in more than $300 million in secret contributions being spent by outside groups in the 2012 federal elections.

Our organization has pursued multiple efforts to close these loopholes.

We have advocated for the DISCLOSE Act introduced in the in the House by Representative Chris Van Hollen and in the Senate in 2010 by Senator Charles Schumer and in the last Congress by Senator Sheldon Whitehouse.

We have represented Representative Van Hollen in a lawsuit against the FEC challenging flawed FEC regulations that gutted existing contribution disclosure requirements for outside groups making electioneering communications in federal elections. The lawsuit is currently pending in federal district court.

We have filed a petition at the IRS joined by the Campaign Legal Center, challenging flawed IRS regulations that have been used by groups to improperly claim section 501(c)(4) tax-exempt status in order to hide the donors financing their campaign activities. We also joined with Representative Van Hollen, along with other reform groups, to challenge the regulations in federal court. The lawsuit was withdrawn after the IRS announced it would undertake a rulemaking regarding these regulations. But our lawsuit will be refilled if the IRS does not issue new regulations to properly implement the law.

Democracy 21, joined by the Campaign Legal Center, has also filed complaints at the IRS against a number of groups supporting Republican, Democratic and Independent candidates. The complaints called on the IRS to deny or withdraw 501(c)(4) tax-exempt status for the groups on the grounds they are campaign organizations and not entitled to tax status as "social welfare" organizations.

For more than three decades, Republican and Democratic members of Congress alike held a consensus position that citizens have a right to know who is giving and spending money to influence their votes. But this bipartisan congressional consensus in favor of disclosing campaign finance activities ended following the *Citizens United* decision, when Republicans abandoned their previous support for campaign finance transparency.

In 2000, Congress enacted new disclosure requirements to close loopholes that resulted in a number of 527 groups not disclosing their campaign activities in federal elections. The House and Senate passed the legislation with overwhelming bipartisan votes. In the Senate, the vote was 92 to 6 and the vote in favor of the legislation by Senate Republicans was 48 to 6. Ten years later, however, not one Republican Senator voted to close the disclosure loopholes that existed for outside spending groups.

In 2010, the DISCLOSE Act sponsored by Representative Van Hollen passed the House. In the Senate, the Act sponsored by Senator Schumer received 59 votes, one vote short of breaking a filibuster and being enacted. The legislation received no Republican votes. In 2012, the DISCLOSE Act, sponsored in the Senate by Senator Sheldon Whitehouse received 53 votes but again fell short of the 60 votes needed to break a filibuster. Again no Republican Senator voted for the legislation.

Democracy 21 believes that it is essential to enact new disclosure laws to ensure that the American people receive timely campaign finance information about who is financing the expenditures made in federal elections. We continue to support the comprehensive DISCLOSE Act, which would require outside spending groups to disclose the donors financing their campaign expenditures. I would like to submit for the record a letter sent by reform groups to Senators in support of the DISCLOSE Act. [Submissions are enclosed below.]

We also support the Real Time Transparency Act recently introduced by Senator Angus King and the Senate Campaign Disclosure Parity Act introduced by Senator Jon Tester. These bills would provide for immediate disclosure of large campaign contributions and electronic disclosure of campaign finance reports filed by Senate candidates.

The Supreme Court by an 8 to 1 vote in the *Citizens United* case strongly supported the importance and constitutionality of disclosure requirements for outside groups making expenditures in federal elections. Nevertheless, opponents of campaign finance disclosure have made various inaccurate claims about the effort to enact new disclosure requirements.

I would like to submit for the record a Q and A prepared by Democracy 21 that responds to the inaccurate claims being made. I would also like to submit for the record an article that I prepared in response to the claims made by a spokesman for the Koch Brothers that they were entitled to remain anonymous in making contributions to influence federal elections and an article I prepared in response to a speech given by Senator McConnell in opposition to disclosure of the contributions used by groups to make expenditures in federal elections.

Again, I would like to thank the Committee for the opportunity to make this submission for the record and I would like to express our appreciation to Senator King for holding this hearing.

July 13, 2012

Dear Senator,

The 156 undersigned national, regional and local organizations support S. 3369, the DISCLOSE Act of 2012, sponsored by Senator Sheldon Whitehouse.

The legislation would provide the public with basic information about campaign expenditures made by outside groups that are influencing federal elections and the donors financing these expenditures. The legislation would also provide timely disclosure by Super PACs and require outside groups which make campaign expenditures to take responsibility for their campaign ads.

It is a cardinal rule of campaign finance laws that citizens are entitled to know the identities of the donors financing campaign expenditures to influence their votes, and the amounts they gave. This basic right to know has long been recognized by disclosure laws enacted by Congress and by Supreme Court decisions upholding the constitutionality of these laws.

In the *Citizens United* decision, the Supreme Court by an 8 to 1 vote upheld the constitutionality of disclosure requirements for outside groups making campaign expenditures. The Court 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.

Polls show citizens strongly support disclosure by outside spenders.

The DISCLOSE Act of 2012 only contains disclosure requirements and does not contain special exceptions for any groups. The legislation is effective, fair and constitutional and deserves the support of Senators. Congress should enact the bill and provide citizens with the information they are entitled to know about who is giving and spending money to influence their votes.

We urge you to vote for S. 3369 and to take all steps necessary for its

enactment.

Sincerely,

National Organizations

Alliance for a Just Society
Americans for Campaign Reform

Brennan Center for Justice at New York University School of Law
Campaign Legal Center
Center for Media and Democracy
Citizens for Responsibility and Ethics in Washington
Center for the Study of Democratic Societies
Citizen Works
Coalition for Accountability in Political Spending
Coffee Party USA
Common Cause
Consumer Watchdog
Corporate Ethics International/ Business Ethics Network
Credo Action Network
Democracy 21
Democracy for America
Dēmos
Earth Friends Conservation Fund
Free Speech for People
Global Democracy Project
Greenpeace
Harrington Investments, Inc.
Heartland Democracy
League of Women Voters
Main Street Alliance
MapLight
National People's Action
New Progressive Alliance
People for the American Way
Public Citizen
Rootstrikers
Sunlight Foundation
Trillium Asset Management, LLC
Union of Concerned Scientists
United Republic
Walden Asset Management, a division of Boston Trust
& Investment Management
Wolf-PAC
Working Families Party
Zevin Asset Management, LLC

Regional and Local Organizations

30th LD Democrats of Washington
Adamas Instrument Corporation
aGREATER.US
Alerms International the Abraham Company
Alliance for Progressive Values

American Indian Community Center, Spokane, Washington
American Voices Abroad Berlin
Andell Enterprises, Ltd.
Angel & Cowboy's Creations
Artivista Consulting
ASAP Handyman Service
Asheville Geothermal Inc.
Auburn Area Democratic Club
Aurora Recording
Aztlan Media Kollective
Back to Democracy
BitJazz Inc.
C P Technology
C. Wolfe Software Engineering
California Clean Money Campaign
Center for Family Farm Development
CEO Pipe Organs/Golden Ponds Farm
Chicago Media Watch
Coffee Party Savannah
Colorado Common Cause
Committee on the Affairs of the 2 Percent
Connecticut Common Cause
CORE (Citizens Organizing for Resources and Environment)
Documents International
Domini Social Investments
Eagle Yachts, Inc.
Earthhome.us
Eastern CT Pain Treatment Center
El Paso Grassroots
Emerald City Green Painting LLC
Financial Alternatives
GETpackaged productions
Greater Lafayette (IN) Rebuild the American Dream
Hanging Rock Animal Hospital, Inc
Health Education Network
Homeowners Against Deficient Dwellings
HomeShare Florida, Inc.
Humanists and Freethinkers of Cape Fear
Ideas, Ink.
Imago Dei
Iowa City Area NOW
Joan Butcher, M.D., LLC
Judith E. Anthony, M.A., counselor and therapist
Kansas City Criminal Justice Task Force
Kickapoo Peace Circle
Knox County IL Progressives

Latinos & Media Project
Laura M. Miranda Attorneys At Law PLLC
Lindsay Suter, Architects
Lora Schlesinger gallery
Louisiana Common Cause
Massachusetts Common Cause
Maule Website and Design
Michigan Campaign Finance Network
Michigan Common Cause
Mid-Peninsula American Dream Council
Military/Veterans Advocacy Group
Minnesota Common Cause
Mississippi Common Cause
MobilizeUs
Move to Amend Greater Chicago
NC Center for Voter Education
Nebraska Common Cause
Neverland Designs
New Mexico Common Cause
North Shore Move to Amend, MA
Northern Illinois Jobs with Justice
Occupy Berkshires
Occupy Des Moines
Ohio Citizen's Action Money & Politics Project
Oregon Common Cause
Oregon PeaceWorks
Pacific Patent Partners
Peace Action Montgomery
Pennsylvania Common Cause
Philly Neighborhood Networks
Pinellas NOW Florida
PLC Repair
Prema Music
Prestige Hauling, Inc.
Psychology Associates
R.U.F.F. -- Retirees Unite For the Future
Regional Solutions
ResearchWorks
Rhode Island Progressive Democrats of America
RK Photography
Rune's Furniture Store
Schumacher Financial Consulting
Share the Wealth Productions
Sheff Law Offices, P.C.
South Coast ESD Education Association
Southeast Kansas Chapter/National Organization for Women

Still Point Zen Center
Strictly Tango NYC
The Ave Project
The Hummer Group Inc.
The Professionals, insurance and financial advisers
The Writing and Editing Company
theCounselors.com
Therapists for Peace & Justice
Transformation Travel LLC
TunaFisch Fantasies: Art from the Heart
UBU Ministries
Vermont Common Cause
Washington Public Campaigns
We the People of Kansas
Wisconsin Common Cause
Wisconsin Democracy Campaign
Women's International League for Peace and Freedom, San Jose Branch
WonderOrganizations
WOW (Women on the Watch)
WV Citizen Action Group

Q and A on DISCLOSE Act of 2012 Introduced by Senator Sheldon Whitehouse

Q. Is it constitutional to require outside groups that make campaign-related expenditures to disclose their donors?

A. Yes. In *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the Supreme Court by an 8-1 majority upheld the provisions of federal law which require outside spending groups to disclose their expenditures on electioneering communications, including the donors funding these expenditures. Justice Kennedy, writing for the Court, noted that disclosure provisions "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." 130 S.Ct. at 914.

Citing its prior landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court in *Citizens United* said tbat disclosure laws serve the important governmental interest of "providing the electorate with information about the sources of election-related spending" in order to help citizens "make informed choices in the political marketplace." *Id.* The Court specifically noted that it had earlier upheld disclosure laws to address the problem that "independent groups were running election-related advertisements while hiding behind dubious and misleading names." *Id.*

The Court in *Citizens United* praised the fact that "modern technology" makes disclosure "more effective" because it is "rapid and informative." *Id.* at 916. The Court said, "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 . . . [D]isclosure 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.*

Q. Are disclosure requirements limited only to ads which contain express advocacy or the functional equivalent of express advocacy?

A. No. In *Citizens United*, the Supreme Court rejected precisely this argument. The Court upheld a disclosure requirement for a broadcast ad that did not contain express advocacy and was instead intended to publicize a documentary, where the ad had only a commercial, not political, intent. The Court said that "we reject Citizens United's contention that the disclosure

requirement must be limited to speech that is the functional equivalent of express advocacy." *Id.*

Q. Doesn't requiring disclosure of donors to groups that make campaign-related expenditures threaten unconstitutionally to chill donations to those groups?

A. No. The Supreme Court considered and rejected this argument in *Citizens United* as a basis for invalidating disclosure requirements in general. A disclosure requirement might be unconstitutional as applied to a specific organization but only if that organization could show "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed." *Citizens United,* 130 S.Ct. at 916. Absent such a showing by a specific organization, a disclosure requirement is not invalid because of a general and theoretical concern about chilling donations.

Furthermore, the legislation has a number of built-in protections for donors to an organization. A group can set up a separate bank account for its spending on campaign-related disbursements and use only these funds for such expenditures. Under these circumstances, only those donors of $10,000 or more to this separate account established to make campaign-related expenditures must be disclosed. All other donors to the organization would not be disclosed. In addition, *any* donor can restrict his or her donation to the organization from being used for campaign-related disbursements. If the group agrees to the restriction and segregates the money, the identity of the donor is not disclosed. By these measures, groups and donors can ensure that donors whose funds are not used for campaign-related expenditures are not subject to any disclosure.

Q. Doesn't the donor disclosure requirement mean that groups will have to disclose their membership lists in violation of the Supreme Court's ruling in the *NAACP* case?

A. No. First, the legislation requires disclosure only of donors who give $10,000 or more in a two-year election cycle to a group which engages in campaign-related spending. That will exclude the vast majority of donors to and members of most membership organizations, and require disclosure only of very large donors to such groups. Second, the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), rejected the argument that campaign finance disclosure was similar to the disclosure of membership lists that was struck down in the *NAACP* case. The Court said, "In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosure." Id. at 198. Absent a showing by a specific organization of "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed," campaign finance disclosure requirements are constitutional.

Q. Does the contribution disclosure requirement impose an unreasonable burden on groups which want to spend money on campaign-related ads?

A. No. First, a group is required to disclose only its donors of $10,000 or more over a two-year election cycle. For most membership organizations, this will require the reporting of only a relatively small number of donors. Second, any group that wants to limit the scope of its disclosure obligations can set up a separate account from which to make all of its campaign-related disbursements. If it does so, the group is required to disclose only the donors of $10,000 or more to that separate account, not all of the donors to the organization.

Q. Does the disclosure requirement violate the privacy rights of a donor to an organization that makes campaign-related expenditures?

A. No. Any donor to an organization is permitted by the legislation to "restrict" his or her donation from use for campaign-related expenditures. If the recipient organization accepts the restriction and segregates the money, the identity of the donor is not subject to disclosure. By this means, any donor concerned about privacy can take steps to ensure that his or her identity is not disclosed.

Q. Is the "electioneering communications" disclosure provision unconstitutionally overbroad in requiring disclosure of broadcast ads for the election year in the case of congressional races, and for the period from 120 days before the first primary through the general election in the case of presidential races?

A. No. The post-*Citizens United* experience shows that tax-exempt organizations and other groups are running broadcast ads to influence federal elections throughout the course of the election year, and even earlier, particularly in presidential elections. The calendar year of an election is an appropriate period to cover because broadcast ads to influence voters are run by outside groups throughout the period and campaigns are in full swing.

Even if the broadcast ads mentioning candidates also discuss issues, the ads run during this period can and will influence voters. Accordingly, citizens are entitled to know the identity of the groups spending money on those ads, and the donors funding the expenditures. The provisions do not restrict any campaign-related expenditures but just require that they be disclosed to the public. The Court in *Citizens United* in upholding the disclosure requirements noted that "[t] he 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).

Justice Scalia wrote in a concurring opinion that upheld disclosure requirements in a case about petition signers for ballot measures:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously *(McIntyre)* and even

exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Q. Is the $10,000 contribution disclosure threshold too high in light of the $200 contribution disclosure requirement for candidates and PACs? Does that high threshold discriminate against business groups?

A. No. The $200 threshold for candidates and PACs reflects the fact that they are in the business of raising and spending campaign contributions. By definition, their "major purpose" is to influence elections. Groups covered by the DISCLOSE Act, such as "social welfare" organizations, labor groups and business trade associations have a major purpose *other than to influence elections*. When these groups make campaign-related expenditures, however, they should disclose those expenditures and the source of the funds being used to pay for them.

By requiring disclosure only of substantial donors to such groups, the $10,000 threshold balances the interests of non-campaign groups in privacy for their donors versus the public interest in knowing who is financing campaign-related expenditures. This does not discriminate for or against any particular kind of group, but rather provides citizens with important information about substantial donors who are financing campaign-related expenditures by groups that are not political organizations.

Q. Will the exemption for internal transfers among affiliated groups provide the opportunity to mask the actual donors of funds being spent on campaign activities and doesn't it discriminate in favor of unions?

A. No. This provision applies across the board and treats a labor organization and its affiliated groups the same as a business trade association and its affiliated groups. The provision eliminates the need to file a lot of unnecessary and meaningless disclosure reports about money moving back and forth between affiliates within an organization -- information that is irrelevant to the goals of the disclosure provisions. At the same time, it protects against a donor funneling money through an affiliate to an affiliated organization in order to mask the actual source of the funds spent by the affiliated organization for campaign-related ads. Thus, if a donor gives $50,000 to a state affiliate which transfers money to a national organization that then makes campaign expenditures, the legislation requires the national organization to disclose the identity of the $50,000 donor to the state organization and the amount given.

Q. Won't this law require a group to disclose a $1 million donor who is giving the money to a group in order to support the group's work on the protection of whales or on educating on the use of firearms, even if the donor has no interest in supporting any candidate?

A. No. Any donor can be exempt from any disclosure by an agreement with the recipient organization that the donor's contribution will not be used to make campaign-related expenditures. Alternatively the organization can establish a separate bank account from which it makes all of its campaign-related expenditures, and then raise money from donors who contribute directly to that account. In this circumstance, only donors to the bank account established for campaign-related expenditures will be disclosed. The bottom line is any organization can ensure that donors who do not want to have their money used for campaign-related expenditures are not disclosed.

Q. Does the legislation address the problem that Super PACs supporting 2012 presidential candidates did not disclose their donors until after the key nominating events in Iowa, New Hampshire, South Carolina and Florida had already occurred?

A. Yes. The problem arose because Super PACs, which are federally registered political committees, were able to use the FEC's current reporting requirements to delay reporting their donors for the entire second half of 2011 until the end of January, 2012. This legislation fixes this problem by requiring all outside spending groups, including Super PACs, to report their donors within 24 hours after each expenditure of more than $10,000 is made on campaign-related expenditures.

Q. Is it constitutional to require disclaimers to be part of ads?

A. Yes. In *Citizens United*, the Court by an 8-1 majority explicitly upheld a requirement that electioneering communications include disclaimers. Disclaimers, the Court said, "provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking." 130 S.Ct. at 915.

Q. Isn't it unfair to require that up to six seconds of any campaign-related TV ad run by an organization be used to list the organization's top five donors in the ad? Won't this hamper the ability to run the traditional 30 second TV ads?

A. No. Under the provision, the organization can run the list of top donors as a crawl at the bottom of the TV ad without taking any time away from the content of the actual ad.

Q. Isn't it unduly burdensome to require the head of an organization to appear in a campaign-related ad?

A. No. Candidates are required to appear in their campaign ads as an accountability measure to take responsibility for the content of their ads. Similarly, the head of an organization running a campaign-related ad should take public responsibility for his or her organization's ads. In the 2012 campaign, campaign-related ads by third party groups have been almost completely negative. The head of an organization should take responsibility and be accountable for campaign-related ads run by the organization.

A Response to the Koch Brothers Claim of Entitlement to Anonymous Political Giving

By: Fred Wertheimer

March 28, 2014

An online column by Tom Edsall on the *New York Times* website (March 18), entitled "In Defense of Anonymous Political Giving," presents the arguments made by the Koch brothers to justify keeping "anonymous" the untold millions of dollars they are giving to groups to spend on campaign ads and other political activities to influence federal elections.

In his column, Edsall cites a spokesman for the Koch brothers and their company on why anonymous political giving is constitutionally protected. According to the spokesman:

The rationale behind donor anonymity, which is a form of First Amendment speech, is to protect against the threat of retaliation when someone or some group takes a stand, espouses their point of view or articulates a position on issues that may (or may not) be popular with the general public or the political party in majority power. There are many precedents to this: the Federalist Papers were published under pseudonyms and financed anonymously, out of fear of retribution.

The spokesman for the Koch brothers cites two Supreme Court decisions, *NAACP v. Alabama* (1958), and *McIntyre v. Ohio* (1995), to support their claim for anonymous political giving.

The only problem is that the cases don't support the Koch brothers claim.

In reality, the Koch brothers have no constitutional basis and no policy basis to justify secretly injecting untold millions of dollars into federal elections. The Supreme Court and Congress have long recognized that voters have a basic right to know information about political money being given and spent to influence their votes.

Both of the Supreme Court cases cited by the Koch brothers' spokesman are irrelevant to the constitutional issue involved here -- whether it is constitutionally permissible to require disclosure of money given and spent to influence candidate elections. And the Koch brothers' spokesman ignores the directly relevant, and recent, Supreme Court cases which have upheld such disclosure laws.

The Edsall column says that disclosure "remains the losing position" in the courts.

In fact, this is backwards. Just the opposite is true.

For nearly 40 years, campaign finance disclosure requirements have been consistently upheld as constitutional by the Supreme Court -- starting with the Court's landmark Buckley decision in 1976 and continuing as recently as the Court's Citizens United decision in 2010.

In Buckley, the Supreme Court held that the federal campaign finance disclosure laws were constitutional because they provide "the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office."

The Court in Buckley also upheld the disclosure laws on the grounds that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."

In Citizens United, the Supreme Court, in an eight to 1one decision, upheld political giving and spending disclosure requirements for corporations, including nonprofit corporations, making independent expenditures. The Court said:

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.

The Supreme Court noted in Citizens United that it had upheld disclosure laws in earlier cases to address the problem that "independent groups were running election-related advertisements while hiding behind dubious and misleading names."

Even though the Court upheld the disclosure law in Citizens United, however, citizens have not ended up with effective disclosure. Instead they have ended up with hundreds of millions of dollars in secret contributions being laundered into federal elections.

The disclosure problems we now have do not stem from constitutional issues but rather from flawed FEC and IRS regulations that were used by outside groups to spend more than $300 million in secret contributions in the 2012 federal elections.

The two Supreme Court cases cited by the Koch brothers' spokesman to justify anonymous political giving do not support his claim.

The first case, *NAACP v. Alabama*, involved an attempt by Alabama to subpoena the NAACP's membership lists at a time when the organization was fighting for civil rights and when its members were the targets of murders, violence and serious physical harassment.

The Supreme Court reviewed the circumstances facing the NAACP and held that the organization was entitled to anonymity for its members.

It is beyond ironic for the Koch brothers, who are among the richest people in the world, to try to claim moral equivalence for their anonymous giving of political money with the life and death threats faced by members of the NAACP during the civil rights battles of the 1950s.

The Supreme Court was fully aware of its NAACP decision in 1958 when it upheld disclosure requirements for political giving and spending in its Buckley decision in 1976. In fact, the Court

cited the NAACP case a number of times in its Buckley decision but did not find that the case undermined the constitutionality of the campaign finance disclosure requirements.

The Court said in Buckley that a group can seek an exemption from the campaign finance disclosure requirements if it can make a showing that disclosure would subject it to "threats, harassment, or reprisals." But the Court also made clear the exemption was exceedingly narrow.

The Court said that threats and harassment must create an actual -- not speculative -- burden on a group's freedom to associate in order to warrant exemption from disclosure laws.

In 2003, the Supreme Court in the McConnell case again rejected an analogy to its NAACP decision regarding campaign finance disclosure requirements.

The second case relied on by the spokesman for the Koch brothers is similarly irrelevant to the constitutionality of candidate-related disclosure requirements.

In *McIntyre v Ohio Elections Commission*, the Supreme Court held unconstitutional a requirement to disclose spending by an individual on some leaflets commenting on a bond referendum for local schools.

In striking down the disclosure requirement that applied to a referendum campaign, the Supreme Court explicitly distinguished the case from the kind of disclosure requirements for candidate-related spending that the Court upheld in the Buckley decision.

Moreover, the Supreme Court was fully aware of its McIntyre decision in 1995 when the Court upheld the constitutionality of candidate-related disclosure requirements in its Citizens United decision in 2010.

Justice Kennedy wrote in Citizens United that campaign finance disclosure requirements provide voters with the information they need to make "informed decisions and give proper weight to different speakers and messages."

The Koch brothers may each be worth $40 billion but their enormous wealth does not entitle them to any special treatment when it comes to the right of the American people to know about the political money being given and spent to influence federal elections.

Democracy 21 President Fred Wertheimer Refutes Senator McConnell's Misguided and Meritless Attack on Campaign Finance Disclosure in Speech Today at AEI

Senate Republican Leader Mitch McConnell today attempted to turn the world upside down in a speech he gave at AEI that attacked the very idea of campaign finance disclosure, which has been the cornerstone of campaign finance laws for many decades.

Senator McConnell conveniently forgets that secret campaign money was at the heart of the Watergate scandals that began 40 years ago on June 17, 1972 and were the worst political and campaign finance scandals of the 20th century.

In his speech, Senator McConnell describes campaign finance disclosure as an effort by the left and the Obama administration to stifle free speech.

Senator McConnell fails to mention in his speech that the Supreme Court in *Citizens United* by an 8 to 1 majority – including four of the five conservative Justices -- upheld as constitutional the campaign finance disclosure requirements for outside spending groups.

What is really going on here is that Senator McConnell is cloaking his partisan opposition to disclosure in the rhetoric of free speech.

Senator McConnell does not have a constitutional or policy leg to stand on.

Senator McConnell's speech today is about protecting the ability of groups, like the Chamber of Commerce and Crossroads GPS, to keep secret from the American people the identities of the donors who are financing their campaign expenditures.

The Supreme Court said in *Citizens United* that disclosure requirements are constitutional because they serve important governmental interests in "providing the electorate with information about the sources of election-related spending," in order to help citizens "make informed choices in the political marketplace."

The Court also said in *Citizens United* that it had earlier upheld disclosure laws to address the problem that "independent groups were running election-related advertisements, while hiding behind dubious and misleading names."

In his speech, Senator McConnell also ignores the powerful support for disclosure provided by Justice Scalia. In *Doe v. Reed (2010)*, Justice Scalia stated, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."

Senator McConnell, no doubt, sees a big partisan stake in protecting the ability of secret money to be laundered into federal elections. Outside spending groups supporting Republican

congressional candidates, such as the Chamber of Commerce and Crossroads GPS, currently have raised the bulk of secret contributions that are being spent in federal elections. These groups do not want to disclose to the American people the identities of the donors whose money they are spending on ads to influence the voters.

For example, Crossroads GPS has disclosed on its tax returns that there are 23 donors who have each given $1 million or more to finance their campaign activities. However, the identities of these donors have not been disclosed because Crossroads GPS claims status as a section 501(c)(4) group, even though its overriding purpose is to influence elections.

Senator McConnell's speech also serves the purpose of offering cover for his Senate Republican colleagues who are expected to have to vote next month on the DISCLOSE Act sponsored by Senator Sheldon Whitehouse.

Until 2010, there was consensus support among Democrats and Republicans alike regarding campaign finance disclosure, although not from Senator McConnell. That changed in 2010 following the *Citizens United* decision when outside spending groups started spending large amounts of money provided by secret donors to support Republican congressional candidates.

Senator McConnell's claim that secrecy in campaign finance activities is needed in order to protect against harassment is a bogus argument that has been repeatedly rejected by the Supreme Court, except in limited circumstances.

The Court has said that a disclosure provision would be unconstitutional as applied to a specific organization *only* if the organization could establish "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed."

In these circumstances, the Supreme Court has said that even where a specific group could show such a "reasonable probability" of harassment, the remedy would be to exempt that specific organization from disclosure; not to strike down the disclosure requirements for all groups.

The notion that groups may come under public scrutiny and criticism for their campaign activities has never been viewed by the Supreme Court as constituting the kind of "threats, harassment or reprisals" that would justify overturning campaign finance disclosure requirements.

Senator McConnell's protestations notwithstanding, the Supreme Court has rejected the argument that disclosure requirements stifle speech and the Court has repeatedly upheld such requirements as serving important governmental purposes in providing voters with information they have a right to know about those who are trying to influence their votes.

Dēmos

AN EQUAL SAY AND AN
EQUAL CHANCE FOR ALL

Testimony of Liz Kennedy, Counsel at Demos
Submitted to the United States Senate Committee on Rules and Administration
"Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond"
April 30, 2014

Chairman Schumer, Senator King, Ranking Member Roberts, and Members of the Committee, thank you for the opportunity to submit this testimony for this hearing on the harm of secret political spending, the impact of the Supreme Court's recent decision in *McCutcheon v. FEC*, and solutions to address the problem of improper influence of money in politics in America today.

Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Our current system of campaign finance undermines both of those goals. It privileges the voices of the already privileged, and maximizes the political power of those with the most economic power. And, despite the Supreme Court's consistent affirmation of the constitutionality of disclosure laws, there is a rising tide of dark money from hidden sources that raises fundamental questions about accountability and responsibility in our democracy. The Supreme Court's "grossly incorrect"[1] decision in McCutcheon will further increase the dominance of those who make the largest donations and engage in the most spending, in derogation of the fundamental principle of political equality.[2] After all, in a democracy the size of a citizen's wallet shouldn't determine the strength of her voice or her right to representation.

Secret political spending is a threat to democracy.

The need for transparency in political spending to inform voters and prevent corruption has been uncontroversial, nonpartisan, and widely recognized for decades. In *Citizens United v FEC* the Supreme Court relied on the assumption that the true sources of political spending would be disclosed to support its decision to allow unlimited corporate money into the political process. Justice Anthony Kennedy wrote that disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[3] Unfortunately, the disclosure rules that Justice Kennedy thought would ensure transparency and accountability for political spending are not in place, and government has failed thus far to respond to protect voters and prevent corruption.

Organizations that do not disclose their donors spent over $300 million in secret political spending to affect the 2012 elections.[4] This is more than twice as much as in the 2010 mid-term

DEMOS.ORG INFO@DEMOS.ORG POLICYSHOP.NET (THE DĒMOS BLOG)

NEW YORK
220 FIFTH AVE, 2ND FLOOR
NEW YORK, NY 10001
1.212.633.1405

WASHINGTON DC
1710 RHODE ISLAND AVE NW, 12TH FLOOR
WASHINGTON, DC 20036
1.202.559.1543

BOSTON
358 CHESTNUT HILL AVE, SUITE 303
BRIGHTON, MA 02135
1.617.232.5885

elections, the first after Citizens United, when secret political spending rose dramatically from its prior levels. Groups that didn't disclose the identities of their donors reported spending over $130 million dollars in the last mid-term cycle, meaning almost half of all of the outside spending in that election was unaccountable.[5] In our report, "Auctioning Democracy: The Rise of Super PACs and the 2012 election," Demos and U.S. PIRG found that secret spending spiked dramatically right before the 2010 election, a pattern we expect to see repeated this mid-term cycle.[6] It is ironic that a decision extolling and relying upon disclosure has led to a significant reduction in the transparency of overall political spending.

The practices that allow for the wide spread dispersal of secret political spending are akin to money laundering. Donors who want to hide their identities can give to tax-exempt groups such as 501(c)(4)s and 501(c)(6)s, and those groups can spend on elections or give to other groups to spend money on elections, all without the public knowing the true source of the financial support. While political action committees including Super PACs have to disclose their donors, there is no informational value in learning the anodyne names of dark money groups (e.g., "Americans for Freedom") because these groups are opaque themselves – i.e. the financial supporters of "Americans for Freedom" remain secret.

Currently, political non-profit groups masked as social welfare non-profits can accept unlimited contributions from donors and promise anonymity to their financial supporters. Their contributors can remain anonymous because FEC regulations improperly apply the statutory disclosure requirements that exist for outside groups. FEC regulations only require disclosure of the name of a contributor to a dark money group if that donor designates their contribution specifically "for the purpose of" political spending; if there is no designation there is no disclosure. This fails to meet the reality of political spending and contributions. Since very few contributors do earmark, the result has been a proliferation of dark money groups and an explosion in the amount of dark money being spent to influence elections and through them the future of the country.

Disclosure requirements are constitutional

The Supreme Court has repeatedly upheld the government's authority to require transparency of political spending because disclosure requirements serve several compelling interests. Disclosure of political spending serves voters' interests in knowing who is funding a political message and about a candidate's financial allegiances; protects against corruption which is more likely to occur in the absence of transparency and accountability; and prevents circumvention of contribution limits and other campaign finance laws by allowing for contributions and their source to be identified.[7]

In both Citizens United and McCutcheon, the Court relied on disclosure requirements as necessary for campaign finance regulation. In McCutcheon, Chief Justice Roberts wrote that "disclosure of contributions minimizes the potential for abuse of the campaign finance system."[8] In Citizens United, Justice Kennedy 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 corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket' of so called moneyed interests.' The First 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."[9]

Voters need information in order to make educated decisions

In McCutcheon, Chief Justice Roberts opined that "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information,"[10] and noted that disclosure requirements are in part "justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending."[11] But the current disclosure regime is ineffective, and, without effective disclosure of the true sources of financial support for political spending, voters lack the tools to exercise informed judgment when evaluating the content of political messages.

Corporations can cloak their political spending by using conduit organizations to disguise their true identity and thus their true agendas. For example, the "Coalition- Americans Working for Real Change" was a business organization opposed to organized labor, and "Citizens for Better Medicare" was funded by the pharmaceutical industry."[12] When secret spending is directed through these conduits voters are denied the information they need "to make informed decisions and give proper weight to different speakers and messages."[13]

Transparency fights corruption and abuse

Voters also need to have a window into financial transactions between contributors and candidates to prevent corruption. Secret political spending breeds unaccountable political

favoritism, undermining the health of a representative democracy. Disclosure regulations can deter this corruption. The Supreme Court recognized in its seminal campaign finance case *Buckley v Valeo*, that "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that might be given in return."[14] In McCutcheon, the Chief Justice reiterated Buckley's conclusion that disclosure requirements also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[15]

While certain disclosure requirements are currently in place that cover direct contributions above a certain threshold to candidates, parties, and political action committees, there are many avenues for dark spending should people or entities seek to influence politics and policy without revealing their names. For example, foreign companies are currently prohibited from spending in U.S. elections. But absent effective disclosure requirements it is near impossible to monitor and determine if foreign money is being illegally used to fund political spending to influence federal elections.

Free speech does not mean freedom from response, criticism, or accountability for political spending

People and groups should not be allowed to engage in and yet conceal their political spending in order to avoid controversy. Those who choose to use their financial resources to influence elections should not be isolated from the legitimate scrutiny that such activities may receive. The First Amendment was never intended to prevent political actors from being held accountable for their actions in the political marketplace. As a federal judge explained in refusing to exempt the groups who supported the passage of Proposition 8 from California's disclosure laws:

> Plaintiff's exemption argument appears to be premised . . . on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. Just as contributors [] are free to speak in favor of the initiative, so are opponents free to express their disagreement through proper legal means.[16]

Even Justice Scalia, not overly fond of other campaign finance laws and provisions, wrote, in a Supreme Court decision upholding disclosure requirements, that:

> requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . .campaigns anonymously [] and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[17]

Government has a responsibility to act to ensure transparency for political spending

Huge, bi-partisan majorities of Americans support transparency for political spending. Eighty-one percent of Americans believe that corporations should only spend money on political campaigns if they disclose their spending immediately; this included 77 percent of Republicans and 91 percent of liberals. Eighty-six percent of Americans agree that prompt disclosure of political spending would help voters, customers, and shareholders hold companies accountably for political behavior; support for that statement ranged from 83 percent to 92 percent across all political subgroups.[18]

There are several opportunities for government to respond to the growing crisis of dark money in our democracy and protect the interests of voters in knowing who is behind political messages meant to influence their votes and elections, and the interests of citizens in seeing their government business conducted in an above board and accountable manner.

Congress should pass comprehensive disclosure legislation

The Citizens United Court relied upon transparency and accountability for political spending as a protection when it unleashed unlimited amounts of money to be spent to impact elections, so in 2010 Congress tried to fix our broken disclosure system with the DISCLOSE Act. Large majorities of both houses of Congress voted for it - it passed the House and received 59 votes in the Senate, but it failed to overcome a filibuster when no Republican would vote for cloture.[19] The DISCLOSE Act was reintroduced in 2012, and continues to be an important solution to achieve disclosure for outside spending. In addition, the "Real Time Transparency Act of 2014" would require 48-hour disclosure of campaign contributions of $1,000 or more to candidates, committees, and parties, including transfers from joint fundraising committees, which would help bring us a little closer to the Supreme Court's dream of prompt disclosure.[20]

Disclosure for political spending is supported by huge, bi-partisan majorities of Americans.[21] In the past it had bi-partisan support in Congress as well. In 2000, for example, when a disclosure loophole was allowing certain 527 groups to use secret political spending to influence federal elections, a Republican-controlled Congress closed the loophole; that

legislation passed with overwhelming majorities of 385 to 39 in the House and 92 to 6 in the Senate.[22] Comprehensive disclosure legislation remains a vitally important goal to ensure that voters receive the information that they need, and to prevent the corruption that hidden access and influence can engender.

The Securities and Exchange Commission should require disclosure of corporate political spending

Citizens United changed the game by suddenly allowing new corporate political spending into elections, but the rules haven't kept up with the current conditions. The Court assumed the new corporate political spending would be transparent – presumably as a result of federal law or regulation - and therefore subject to accountability, since "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."[23]

The SEC has the authority and the responsibility to require that publicly traded companies disclose their direct and indirect political spending. On the heels on Citizens United, a bipartisan committee of prominent corporate law professors filed a petition requesting that the SEC engage in this rulemaking.[24] This petition has received unprecedented support, including from six state treasurers acting as fiduciaries, founder and former CEO of Vanguard Jack Bogle, the Council of Institutional Investors, and a global coalition of investors managing more than $690 billion in assets.[25] Many Members of Congress have spoken out in favor of the rule.

It is entirely proper for the SEC to act to act here. The SEC already has two regulations that regulate campaign finance where it interacts with markets. In 1994 it moved to prevent pay to play in the municipal bond market with Rule G-37, after finding that contracts in the profitable municipal bond market were being awarded to investment companies that made contributions to the state and local officials making the contract decisions. And in 2010, the SEC issued Rule 206(5)4, which restricts campaign contributions from investment advisors to the public officials responsible for making investment decisions for public pension, in order to stop pay to play in the public pension fund market after several scandals. Significant similar concerns arise in the context of secret corporate political spending.

The Internal Revenue Service must stop the abuse of social welfare designations by political nonprofits

501(c)(4) "social welfare" organizations have become the primary vehicle for individuals and corporations that want to keep secret the donors financing their campaign expenditures.

501(c)(4)s were responsible for $256 million in secret political spending in the 2012 election – 85 percent of the $300 million of dark money spent that cycle (501(c)(6) trade associations spent another $55 million without disclosing their donors).[26] Though Section 501(c)(4) of the Internal Revenue Code provides tax exemption to "civic leagues of organizations not organized for profit but operated exclusively for the promotion of social welfare," the IRS current test only requires that in order to qualify for 501(c)(4) status, a group has to have the "primary purpose" of engaging in "social welfare" activities.

Even ignoring the conflict between "exclusively" and "primarily", if a group spends more than 49 percent on political activities, it shouldn't be eligible for 501(c)(4) status. But engaging in political spending supporting or opposing candidates does not qualify as "social welfare" activity – IRS regulations specify that "the promotion of social welfare does not include direct or indirect participation in political campaigns on behalf of or in opposition to a candidate for public office." So if a group wants to spend millions of dollars to support or oppose a candidate, it could still engage in that political spending but it should have to disclose its donors like any other political committee.

The IRS should be applauded for recognizing the need for guidance to clarify federal rules governing political activity by tax-exempt organizations. Currently, tax exempt organizations and regulators lack a clear definition of candidate related political activities or a clear threshold for how much political activity is permissible. While there are significant issues with the IRS's first attempt to promulgate new rules,[27] we look forward to continuing to work with the agency to meet its responsibilities to regulate tax-exempt organizations to make sure they aren't abusing their tax-exempt status to engage in political spending while shielding their donors from accountability and hiding crucial information from voters.

President Obama should issue an executive order requiring disclosure of political spending by government contractors

Disclosure of political spending is particularly important when it is by those who seek to do business with the government. Without transparency for political spending by those competing for government contracts, the public cannot detect if potential contractors are providing financial support to those in charge of the government's business decisions in order to increase the likelihood of receiving public contracts. Corruption in contracting can lead to sweetheart deals that benefit the recipient of the contract and the recipient of the political contributions at the expense of tax-payers.

In the face of legislative intransigence it is critically necessary and entirely appropriate that the executive exercise the full extent of its more limited authority by requiring disclosure

of political spending by those seeking to do business with the government. An executive order would close the loopholes that allow government contractors to spend political money with only private gratitude but without pubic accountability. Those seeking to spend money to influence elections and curry favor with elected officials must do so in the light of day.

McCutcheon v FEC will further increase the domination of politics and policy making by the elite donor class, silencing the majority of Americans and damaging our democracy

In addition to addressing disclosure, the Committee has invited testimony on the Court's recent decision in *McCutcheon v. FEC* and how it is likely to affect our electoral process.

With the Court's decision striking down aggregate contribution limits in McCutcheon, wealthy donors may now contribute more than $3.5 million to a single party's candidates and party committees (plus a virtually unlimited amount to supportive PACs).[28] Demos projects that this will result in more than $1 billion in additional campaign contributions through the 2020 election cycle.[29] The $123,200 limit was already twice the income of the average American household. Without an aggregate limit we estimate that in 2012 just 1,219 elite donors would have contributed nearly 50 percent more to candidates and parties than President Obama and Mitt Romney combined raised from more than 4 million small donors.[30]

This new de-regulatory attack on common sense rules for money in politics will shift the balance of power even further toward wealthy donors and away from ordinary citizens. In his dissent, Justice Stephen Breyer wrote that the McCutcheon "decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."[31] We risk having our politics and public policy debates devolve into a disagreement between rich people, while the rest of Americans are relegated to the sidelines, their voices unable to be heard above those who can afford to buy million dollar megaphones.

Still in place, at least for now, are limits on the amount an individual may contribute to a particular federal candidate and party committee. A wealthy individual may contribute up to $2,600 per election ($5,200 per election cycle) to a federal candidate, $5,000 per calendar year to a political action committee (PAC) that supports federal candidates, $10,000 per calendar year to a state or local party committee, and $32,400 per calendar year to a national party committee.[32] But "joint fundraising committees" will allow members of Congress and party officials to solicit much larger checks from big money donors who can contribute to many candidates or parties at once.

In his opinion, Justice Roberts characterized the First Amendment as protecting only an individual's right to "speak" by spending as much he or she can. But the First Amendment promotes more than just self-expression—one of its primary functions is to promote the accountability and responsiveness of government officials to the public as a whole, the hallmarks of a healthy democracy.[33] Justice Breyer wrote in dissent that the "First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*. . . . Where enough money calls the tune, the general public will not be heard."[34]

After McCutcheon, even more big money will come from an even smaller number of elite donors. Our elected representatives will be even more dependent on – and thus responsive to - the donor class than ever before. This is largely because an elite "donor class" funds a substantial portion of campaigns. In the 2012 elections, for example, U.S. Senate candidates raised 64 percent of their funds in contributions of at least $1,000—from just 0.04 percent of the population.[35] This means that even the best-intentioned candidates often spend most of their time contacting a narrow set of wealthy donors and hearing about their concerns and priorities.[36]In describing the four to six hours of fundraising calls and events he's required to do per day, Connecticut Senator Chris Murphy noted that he wasn't calling anyone "who could not drop at least $1,000," who he estimated make at least $500,000 to $1 million per year. He acknowledged that this meant he was hearing far more about the concerns of the affluent than from people who worked in factories.[37]

Already, recent research confirms that the U.S. government responds differently to the preferences of the donor class, even when those preferences run counter to those of the general public.[38] When the views of the richest 10 percent differ from the rest of us, the 10 percent trumps the 90 percent.[39] This research also shows that the very wealthy have starkly different policy priorities than the general public, especially on economic issues.[40] Americans across the political spectrum believe that money in politics is the reason their representatives are more responsive to private interests with financial resources than to the public interest.[41]

The differing policy preferences of the wealthy as compared to the general public would not present a challenge to the democratic vision of a representative government if the active influence of the wealthy on public policy accorded with their numbers. But the degree to which a small cohort of Americans that contribute large sums to federal campaigns exerts a strong influence on the political process and public policy outcomes should be sobering to anyone concerned with the health of our democracy.

The Supreme Court has consistently cited the danger that interdependent relationships between elected officials and financial supporters pose to representative government. They upheld previous campaign finance laws because they understood that corruption of

government is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors."[42] The possibility that legislators will "decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder" is a more subtle form of corruption than straight *quid pro quo* transactions, but is "equally dispiriting."[43]

The current Roberts' majority has taken a dangerously deregulatory direction, and has struck down almost every campaign finance laws the Court has considered. A prior Supreme Court, in upholding the Bipartisan Campaign Reform Act, recognized that "[t]ake away Congress' authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic government."[44] Indeed, two thirds of Americans say they trust government less because big donors have more influence than regular voters; a quarter of Americans say they are less likely to vote because big donors have so much more influence over elected officials than average Americans.[45] A new poll has found that the percentage of young voters who say they will definitely vote in the upcoming elections just dropped precipitously; according to the polling director "there's an erosion of trust in the individuals and institutions that make government work - and now we see the lowest level of interest in any election we've measured since 2000."[46]

Already confidence in Congress is at all time lows, and an influx of more big money from special interest and elite donors will continue to undermine faith in our democracy.[47] Legitimacy is essential for a functioning democracy, and it rests on the belief by the people that they are fairly represented. But Americans know that financial supporters currently have an improper influence on our politics, and they understand that this is a corruption of democratic government.[48] Elected representatives have a duty to act with care and integrity in the interests of their constituents and the country as a whole, and not to favor the positions of their financial supporters.

<u>We can respond by empowering average Americans and reclaiming our democracy</u>

Though the Court has severely hampered our ability to protect our democratic politics and policy making there is much we can still do, in addition to ensuring transparency, to democratize the influence of money in politics. In response to McCutcheon, there are several campaign finance measures that could help fight corruption, such as banning or restricting joint fundraising committees, adopting strong anti-coordination rules and solicitation rules,

Invest in government so it responds to the people

To counter the influence of big money we need to encourage a lot more small donors to get involved by incentivizing representatives to reach out to them. The Fair Elections Now Act (S. 2023) and the Government By the People Act (H.R. 20) would provide a multiple matching fund on small contributions from a public fund. Candidates could raise substantial funds from their regular constituents, which will decrease their need to depend on big donors. This means candidates will spend more time hearing from average voters, rather than dialing for dollars from the elite donor class.

Investing in small donor democracy through public financing is the best policy we can currently enact to democratize the influence of money in politics, and has been shown to work successfully. It has worked well in New York City, where a successful matching funds system has led to candidates relying much more heavily on small donors and a more diverse donor pool.[49] Since Connecticut's system took effect in 2008 more people are running for office and contributing to campaigns, the influence of lobbyists has decreased, and elected representatives have responded to the public will by passing popular programs such as paid sick days and a higher minimum wage.[50]

Reclaim our democratic constitution

McCutcheon has been characterized by retired Supreme Court Justice John Paul Stevens as "grossly incorrect,"[51] but it is just the most recent case in which the Court has fundamentally misread the Constitution and used the First Amendment to remove common sense rules that are necessary to protect government from domination by the elite donor class. As noted by First Amendment scholar and former University of Chicago Law School dean Geoffrey Stone in a column entitled "the First Amendment doesn't protect the right to buy the American government:"

> That these five justices persist in invalidating these regulations under a perverse and unwarranted interpretation of the First Amendment is, to be blunt, a travesty. These decisions will come to be counted as among the worst decisions in the history of the Supreme Court.[52]

There is powerful, widespread disagreement with the Court's current approach, which has only grown since Citizens United; 150 rallies protesting the decision occurred in 41 states the day the McCutcheon decision was announced. We can work through the courts to

overcome the current misunderstanding of the relationship between political speech, money in politics, and the constitution. Even while following precedent, courts have criticized the Supreme Court's money in politics jurisprudence and suggested it is only a matter of time until it is changed. For example, leading Second Circuit Judge Guido Calabresi has written that "all is not well with this law" because:

> The ability to express one's feelings with all the intensity that one has—and to be heard—is a central element of the right to speak freely. It is, I believe, something that is so fundamental that sooner or later it is going to be recognized. Whether this will happen through a constitutional amendment or through changes in Supreme Court doctrine, I do not know. But it will happen. Rejection of it is as flawed as was the rejection of the concept of one-person-one-vote. And just as constitutional law eventually came to embrace that concept, so too will it come to accept the importance of the antidistortion interest in the law of campaign finance.[53]

Just this month in a decision striking New York's Super PAC contribution limits, Judge Paul A. Crotty of the Southern District of New York lamented the influence of big money in politics and wrote that voices of regular citizens "are too often drowned out by the few who have great resources."[54] Judge Nelson of the Montana Supreme Court felt the Citizens United decision dictated that Montana could no longer ban corporate political spending in its state elections, but wrote a scathing critique in which he characterized the Supreme Court's reasoning on campaign finance as "smoke and mirrors," saying further:

> To my knowledge, the First Amendment has never been interpreted to be absolute and gloriously isolated from other fundamental rights and values protected by the Constitution. Yet, *Citizens United* distorts the right to speech beyond recognition. Indeed, I am shocked that the Supreme Court did not balance the right to speech with the government's compelling interest in preserving the fundamental right to vote in elections.[55]

This won't be easy, but there are historical examples where the Court has recognized the fundamental error of past decisions and changed course, for example on racial segregation, marriage equality, and regulation of minimum wage and hour laws.

Finally, our founders provided the people with the tools to amend our governing document should our branches of government fail to correctly protect the interests of the

people. Popular anger over the Court's money in politics decisions and the domination of government by the elite donor class has led to a movement for a constitutional amendment. A strong amendment would overturn Buckley, McCutcheon, and Citizens United, and give government the authority to regulate money in politics appropriately. Hundreds of local governments and 16 states have passed resolutions calling on Congress to submit a constitutional amendment to the states for ratification. 36 Senators and 114 Representatives support a constitutional amendment so far in the 113th Congress.

Conclusion

McCutcheon is the latest case in which the Supreme Court misread the Constitution to strike basic protections against the dominance of concentrated wealth on public policy. In the long term we must reclaim our constitution as a tool for democratic self-government, so that we're able to regulate money in politics to serve the fundamental American values of political equality, accountable government, and fair representation for all regardless of wealth. And while the current Court strikes down many limits, we can build up a system that brings people in to the process by empowering small donors with public matching funds.

But in this moment, even if these Supreme Court decisions have damaged our ability to prevent big money and special interest donors from dominating the political discourse and silencing the rest of us, there is an urgent need to require that this political spending at least be transparent and accountable. If the voices of the wealthiest are those being heard by our government, at least the rest of us will know who our government is listening to if they're required to disclose their identities. Congress, the SEC, the IRS, the FEC, and President Obama should all take immediate action to bring an end to the scandal of secret political spending in the interests of voters and our free democratic society.

---

[1] Burgess Everett, John Paul Stevens to testify on 'dark money', POLITICO, April 27, 2014, http://www.politico.com/story/2014/04/john-paul-stevens-testify-dark-money-106066.html.

[2] See Robert A. Dahl, Polyarchy: Participation and Opposition 1 (1971) (Dahl argues that democracy signifies "the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.")

[3] *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010).

[4] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014).

[5] PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF CITIZENS UNITED ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 10 (2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf.

[6] ADAM LIOZ, DEMOS, & BLAIR BOWIE, U.S. PIRG, AUCTIONING DEMOCRACY: THE RISE OF SUPER PACS & THE 2012 ELECTION 5 (2012), http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election.
[7] *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).
[8] *McCutcheon*, 134 S. Ct. at 1459.
[9] *Citizens United*, 130 S. Ct. at 916.
[10] *McCutcheon*, 134 S. Ct. at 1460.
[11] *Id.* at 1459 (quoting *Citizens United*, 588 U.S., at 367) (internal punctuation and citations omitted).
[12] *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 128, 197 (2003).
[13] *Citizens United*, 130 S. Ct. at 916.
[14] *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (*per curiam*)
[15] *McCutcheon*, 134 S. Ct. at 1459 (quoting *Buckley*, 424 U.S. at 67).
[16] *Protectmarriage.com v. Bowen*, 830 F. Supp 2d 914, 932 (E.D.Cal., 2011).
[17] *Doe v. Reed*, 130 S. Ct. 2811 (2010) (Scalia, J., concurring).
[18] LIZ KENNEDY, DEMOS, CITIZENS ACTUALLY UNITED: THE OVERWHELMING, BI-PARTISAN OPPOSITION TO CORPORATE POLITICAL
SPENDING AND SUPPORT FOR ACHIEVABLE REFORMS 5 (2012), http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf.
[19] Editorial, *Keeping Politics in the Shadows*, N.Y. TIMES, July 28, 2010, at A22, *available at* http://www.nytimes.com/2010/07/28/opinion/28wed2.html
[20] Lisa Rosenberg, *Real time transparency bill a real time response to McCutcheon*, SUNLIGHT FOUNDATION, April 2, 2014, http://sunlightfoundation.com/blog/2014/04/02/real-time-transparency-bill-a-real-time-response-to-mccutcheon/
[21] Kennedy, *supra* note xvii, at 5.
[22] TESTIMONY OF FRED WERTHEIMER, PRESIDENT OF DEMOCRACY 21, BEFORE THE SENATE RULES COMMITTEE, ON THE DISCLOSE ACT OF 2012 5 (2012), http://www.democracy21.org/uploads/DISCLOSE_ACT_OF_2012_SENATE_RULES_COMMITTEE_TESTIMONY_3_26_12.pdf.
[23] *Citizens United*, 130 S. Ct. at 916.
[24] Letter from the Committee on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Sec'y, U.S. Securities and Exchange Commission (Aug. 3, 2011), *at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf.
[25] *See* Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities [File No. 4-637], U.S. Securities and Exchange Commission, *at* https://www.sec.gov/comments/4-637/4-637.shtml (last visited Apr. 29, 2014).
[26] Outside Spending – 2012, OpenSecrets.org, http://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012.
[27] *See* Letter from Independent Sector to Amy F. Giuliano, Internal Revenue Service (Feb. 27, 2014), *at* http://www.citizen.org/documents/Independent_Sector_Comments_on_Proposed_Regulations.pdf
[28] ADAM LIOZ, DEMOS, & BLAIR BOWIE, U.S. PIRG, MCCUTCHEON MONEY: THE PROJECTED IMPACT OF STRIKING AGGREGATE CONTRIBUTION LIMITS 1 (2013) http://www.demos.org/sites/default/files/publications/McCutcheonMoney-2013.pdf
[29] *Id.*

[30] *Id.* at 2.
[31] *McCutcheon*, 134 S. Ct. at 1467
[32] *See* FEDERAL ELECTION COMMISSION, CONTRIBUTION LIMITS 2013-14, http://www.fec.gov/pages/brochures/contriblimits.shtml (last visited Apr. 29, 2014).
[33] *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 401-02 (2000) (Breyer, J., concurring);
[34] *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).
[35] BLAIR BOWIE, U.S. PIRG, & ADAM LIOZ, DEMOS, BILLION DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS 23 (2013), http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_1.pdf.
[36] *See* Paul Blumenthal, *Chris Murphy: 'Soul-Crushing' Fundraising is Bad for Congress*, HUFFINGTON POST, May 7, 2013, http://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html
[37] *Id.*
[38] MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012)
[39] *Id.* at 83-84.
[40] See Benjamin I. Page, Larry M. Bartels, & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 Pers. On Pol. 51, 55-56 (2013) *available at* http://faculty.wcas.northwestern.edu/~jnd260/cab/CAB2012%20-%20Page1.pdf.
[41] LIZ KENNEDY, DEMOS, STOP THE NEXT CITIZENS UNITED: MCCUTCHEON V FEC AND THE CRISIS OF CONFIDENCE IN AMERICAN DEMOCRACY 3 (2013), http://www.demos.org/sites/default/files/publications/McCutcheon-document.pdf.
[42] *Nixon v. Shrink Missouri PAC*, 528 U.S. 377 (2000).
[43] *McConnell v. FEC*, 540 U.S. 93 (2003).
[44] *McConnell*, 540 U.S. at 144 (internal citations omitted).
[45] BRENNAN CENTER FOR JUSTICE, NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY: AMERICANS' ATTITUDES ABOUT THE INFLUENCE OF SUPER PAC SPENDING ON GOVERNMENT AND THE IMPLICATIONS FOR OUR DEMOCRACY (2012) http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/SuperPACs_Corruption_Democracy.pdf
[46] Igor Bobic, *Poll: Percentage of Young Americans Who Say They'll Vote in 2014 Drops*, TALKING POINTS MEMO, April 29, 2014, http://talkingpointsmemo.com/livewire/young-americans-midterms
[47] Kennedy, *supra* note xxxvii.
[48] *Id*, at 2.
[49] *See* Angela Migally & Susan Liss, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE, BRENNAN CENTER FOR JUSTICE (2010); Michael Malbin et. al., *DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS*, BRENNAN CENTER FOR JUSTICE AND THE CAMPAIGN FINANCE INSTITUTE (2012).
[50] *See* J. Mijin Cha & Miles Rapoport, FRESH START: THE IMPACT OF PUBLIC CAMPAIGN FINANCING IN CONNECTICUT, DEMOS (April 2013)
[51] Burgess Everett, John Paul Stevens to testify on 'dark money', POLITICO, April 27, 2014, http://www.politico.com/story/2014/04/john-paul-stevens-testify-dark-money-106066.html
[52] Geoffrey R. Stone, *The First Amendment Doesn't Protect the Right to Buy the American Government*, The Daily Beast, April 5, 2014, http://www.thedailybeast.com/articles/2014/04/05/the-first-amendment-doesn-t-protect-the-right-to-buy-the-american-government.html
[53] *Ognibene v. Parkes*, 671 F.3d 174,199 (2d Cir. 2012)
[54] *New York Progress and Protection PAC v. Walsh*, S.D.N.Y., No. 13-6769, April 24, 2014.

[55] *Western Tradition Partn. V. Attorney General*, 2011 MT 328, 363 Mont. 220, 271 P.3d 1 (2011), summarily reversed *sub nom. American Tradition Partn. v. Bullock*, 132 S. Ct. 2490 (2012); *See also* Liz Kennedy, TOP 10 NELSON TAKE-DOWNS OF CITIZENS UNITED, DEMOS, January, 19, 2014, http://www.demos.org/publication/top-10-nelson-take-downs-citizens-united

May 7, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
U.S. Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Via email to record@rules.senate.gov

Re: Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond (Apr. 30, 2014)

Dear Senator King and Ranking Member Roberts:

Please accept Free Speech For People's attached written comments into the record for the Committee's April 30, 2014 hearing regarding campaign finance. As explained in detail within the comments, Free Speech For People believes that the Supreme Court's decisions in *Citizens United v. FEC* and *McCutcheon v. FEC* must be addressed through a constitutional amendment to overturn those rulings, and the 1976 *Buckley v. Valeo* ruling, to allow Congress and the states to regulate campaign spending.

Free Speech For People is a national nonpartisan organization founded in January 2010 on the day of the Supreme Court's *Citizens United* decision, and it has helped to catalyze and lead the growing grassroots movement to amend the Constitution to overturn *McCutcheon*, *Citizens United*, and *Buckley* and to restore republican democracy to the people.

Respectfully submitted,

Ronald Fein, Legal Director
Free Speech For People
48 North Pleasant Street, Suite 304
Amherst, MA 01002
(413) 253-2700
rfein@freespeechforpeople.org

May 7, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
United States Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Testimony of Ronald Fein, Free Speech For People

Campaign finance policy is a vexing problem. All efforts by Congress or state or local legislatures must balance a wide range of competing interests to develop a system that allows voters to have a fair chance of a slate of candidates that have not been pre-screened by wealthy donors or outside interests; candidates, whether wealthy or not, to run vigorous but fair races without becoming beholden to funders; elected officials to focus their time on legislation and constituent service, not fundraising; and parties, associations, and other groups of citizens to engage in the political process in a manner proportionate to their numbers and intensity of interest, not available funds. A legislature developing a campaign finance regulatory system must also anticipate that unforeseen loopholes will be exploited, and frequently refine the system to address changes in technology, political and social organization, and campaigns that render old assumptions obsolete. And of course, it must be politically feasible in today's often rancorous politics.

Developing campaign finance laws that address these challenges would be daunting for any legislature just given the constraints described above. But the task has been made far more difficult by a series of Supreme Court decisions—beginning with *Buckley v. Valeo*,[1] and continuing through April's *McCutcheon v. FEC*[2]—that impose artificial limits on how "we the people" choose to organize our political campaigns.

Worse yet, the Court has created an artificially cramped discussion by focusing entirely on the very small group of people and corporations that contribute and spend money in politics. By treating their money as worthy of constitutional protection, but essentially ignoring the far broader interests of voters in a fair political system in which candidates are not pre-screened by wealthy donors, the Court has forced the discussion into terms under which it is difficult, if not impossible, for common-sense campaign finance reforms to succeed.

The resulting system pleases very few, and frustrates elected officials, candidates, voters, small donors, and non-voting citizens and residents who must live under the system the Court has created. It even frustrates many wealthy individuals or

[1] 424 U.S. 1 (1976).
[2] 134 S. Ct. 1434 (2014).

corporations that would frankly prefer not to be political contributors and would welcome collectively-imposed reforms that would limit their ability to spend in politics, and therefore give them an excuse to decline solicitations.[3]

Many worthy proposals have been offered to address the campaign finance problem within the confines of the limits that the Supreme Court has imposed, and Free Speech For People endorses such efforts. But to address directly the problem and the threat it poses to our democracy, we must revisit the central assumptions that have guided the Court since 1976—that the paramount interests to be considered are those of donors, rather than voters; that money is, or deserves the same protections as, speech; and that the *only* basis on which the American people can seek to stem the flow of money into the political system is "corruption" (and in the Court's even narrower current interpretation, only "*quid pro quo*" corruption).

Instead, we need to return to the following core principles:

One person, one vote. More than fifty years ago, the Supreme Court declared that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[4] Few dispute this principle today. But our present system of campaign finance, in which a small number of wealthy donors have far greater influence on most politicians than the vast majority of ordinary Americans, subverts this principle. To be sure, at an official voting station, a captain of industry has the same vote as any other citizen. But in the period *before* Election Day—and, in today's era of "permanent campaigns," it is *always* before the next Election Day—wealthy donors (many of whom are not even constituents) exert far greater influence than ordinary voters.

Money is not speech. Money *amplifies* speech. Consider the difference between a person delivering a short speech on a street corner; delivering that short speech to a camera phone and posting it on YouTube; and delivering that same speech to a professional camera crew and paying for it to blanket TV for weeks. The difference between these is not speech; the speech is the same. Rather, the difference is how much money is available to *amplify* that speech. And just as the Supreme Court long ago held that society can limit the volume of sound trucks on the public streets,[5] it does not abridge anyone's freedom of speech to place limits (without discrimination) on how "loudly" they can drown out all other voices.

---

[3] Indeed, the 1907 Tillman Act, which banned corporate political contributions in federal elections, was welcomed by corporate leaders for just this reason: it ended an era of extensive political solicitation of corporate contributions. *See* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1131-38 (2002).
[4] *Gray v. Sanders*, 372 U.S. 368, 381 (1963).
[5] *Kovacs v. Cooper*, 336 U.S. 77 (1949).

Corporations are not people. Corporations are artificial legal entities, created by the state, and they are not entitled to the same rights as people. As Chief Justice Marshall wrote in 1819:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. . . . But this being does not share in the civil government of the country, unless that be the purpose for which it was created.[6]

Corporations are not citizens, let alone voters, and they are not identical to the actual people (employees and shareholders) who are associated with them. There is no reason to allow them to exert influence in our elections, any more than we allow foreign nationals to exert influence in our elections.[7]

To restore these principles and our democracy, Free Speech For People supports a constitutional amendment to overturn *Buckley*, *Citizens United*, and *McCutcheon*, and clarify that the American people, through their representatives in Congress and the states, can devise a campaign finance system that could include limits on political campaign spending and contributions from people and corporations. Justice Stevens proposed such a bill in his testimony. We have endorsed Senator Udall's amendment bill, S.J. Res. 19, and applaud Senator Schumer's announcement that the Senate will hold a floor vote this year on that bill.

Notably, these amendment bills do not commit Congress or the states to any *particular* campaign finance reform scheme—they simply clear away the obstructions that the Supreme Court has set in the path. Once an amendment has passed, then Congress (and each state) may begin the difficult but important work of negotiating, drafting, and revising campaign finance legislation. Surely there will be difficult political compromises involved. And wealthy donors and corporate leaders will be allowed to voice their views in that process, just as they can today. The difference will be that, once the difficult work of passing bipartisan campaign finance legislation has been completed, displeased donors will not be able to seek a second bite of the apple from an activist court.

---

[6] *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).
[7] *Bluman v. Fed. Election Comm'n*, 132 S. Ct. 1087 (2012).

May 1, 2014

Mr. Jeff Johnson, Clerk
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Johnson,

Please find the enclosed statement from Fund for the Republic in reference to the Senate Rules Committee's April 30, 2014 hearing, "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond." I ask that you ensure these documents are included in the public record.

Thank you,

Nick Penniman
Executive Director
Fund for the Republic

11 Dupont Circle NW | Suite 350 | Washington, D.C. 20036 | www.fundfortherepublic.org

Statement from Nick Penniman Regarding the Senate Rules Committee Hearing
Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance will Affect the 2014 Elections and Beyond

On behalf of Fund for the Republic (FFR), a nonprofit grantmaking organization dedicated to reducing the influence of money in politics, I want to express my gratitude to Senator King for convening this hearing on such an important issue, especially given the Supreme Court's recent decision in *McCutcheon v. FEC*. Much like the *Citizens United* ruling in 2010, *McCutcheon* has sparked an important discussion about the health of our democracy and has gotten people across the political spectrum thinking about how we can repair a system that most Americans agree is fundamentally broken.

Now our shared challenge is to find common ground on an issue that has been viewed solely along party lines for the last several years. Our elected officials must face the fact that more than four-fifths of the electorate, regardless of party affiliation, believe campaign contributions and expenditures should be publicly disclosed.[1]

In his testimony before the Committee on April 30, FFR advisor and former Republican FEC Chairman Trevor Potter quoted conservative justices Roberts and Scalia, who both argue that disclosure has important and positive effects on voters and democracy as a whole. Senator Ted Cruz seems to have adopted a similar viewpoint, calling for immediate disclosure in his statement before the Committee to help empower individual citizens. I can only hope this is an indication of a new status quo—where congressional leaders, regardless of party, can not only acknowledge that their constituents want disclosure, but also stand up to the wealthy donors, who are the *true* beneficiaries of a cloaked system.

However, disclosure on its own will not stave off the corrupting influence of money in our political system. Justice Stevens said as much when he argued for a constitutional amendment that would "impose reasonable limits on the amount of money that candidates for public office or their supporters may spend on election campaigns." As Senator Cruz himself pointed out, under the current system, lawmakers must maintain such an intense focus on fundraising that they're completely unable to focus on the job they were elected to do: represent their constituents and solve the real problems of the American people.

A December 2012 poll by Greenberg Quinlan Rosner, which asked respondents to name the two factors that have the most influence on how members of Congress vote, showed that *both* Democrats and Republicans think political donors, special interests and lobbyists have the most influence over our nation's leaders, and their own conscience and views of their constituents matter the least. Any effort to curb corruption and restore confidence in our uniquely American form of government will require consideration of a number of solutions, including limits on expenditures, lobbying reforms, reducing conflicts of interest for members of Congress and finding new ways to finance campaigns that enhance the power of small donors. Only then can we pass common-sense solutions that will balance power in our democracy among all people, not just those who can

---

[1] According to a survey conducted by Clarus Research Group from June 21-25, 2012 on behalf of Common Good

afford to give the maximum amount to as many candidates as they like. The American people agree. We urge our elected officials to act accordingly.

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1156 15TH STREET, NW SUITE 915 · WASHINGTON, DC 20005 · P (202) 463-2940 · F (202) 463-2953
E-MAIL: WASHINGTONBUREAU@NAACPNET.ORG · WEB ADDRESS WWW.NAACP.ORG

April 29, 2014

The Honorable Charles Schumer
Chairman
Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

The Honorable Pat Roberrts
Ranking Minority Member
Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

RE: "HOW UNDISCLOSED MONEY AND POST-MCCUTCHEON CAMPAIGN FINANCE WILL AFFECT 2014 AND BEYOND" / HEARING SCHEDULED FOR 4-30-2014

Dear Chairman Schumer and Ranking Member Roberts:

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots-based civil rights organization, I am writing to express our association's thoughts on campaign financing in a post-McCutcheon world. Put frankly, the U.S. Supreme Court's decision in *McCutcheon v. FEC* will lead to the domination of our political system and our government by the wealthiest among us, who can now increase their ability to influence politicians, politics, which issues are debated, and how those issues are resolved. Losers will be the rest of us, who can no longer afford to express our voice and our preferences through the political process, and who risk being alienated even further.

As we all know, on April, 2, 2014, the United States Supreme Court issued a decision in *McCutcheon vs. FEC* in which a narrow 5-4 majority struck down the limit on the total amount that one wealthy donor is permitted to contribute to all federal candidates, parties, and political action committees (PACs) combined. In fact, an individual can now donate up to $3.5 million to an individual campaign, political party, or political organization, instead of the prior cap of $123,200. The former "aggregate contribution limit" of $123,200 over a two-year election cycle was in fact more than twice the average income for an American household.

The influence of money in politics is ever increasing, informing who stands for office, who wins, and, most critically, the eventual public policy Congress enacts. Big money is the main reason Congress is increasingly out of step with the interests of everyday Americans, particularly on issues of economic insecurity, and particularly with racial and ethnic minorities and low-income Americans.

In order to offer a balance to misguided court decisions such as *McCutcheon v. FEC* and to restore some sanity to politics, the NAACP supports legislation such as the *Government By the People Act* (HR 20) and the *Fair Elections Now Act* (S 2023) which would boost the influence of small donors and help millions more Americans, rather than just a few big donors, play a central role in determining who runs for Congress, who wins elections, and what issues make it onto the agenda in Washington. Both the *Government By the People Act* and the *Fair Elections Now Act are* carefully crafted to withstand constitutional scrutiny, and would establish a competitive alternative to our big-money dominated campaign finance system. The NAACP also supports constitutional remedies to restore the authority of Congress and the states to effectively regulate the amount of money that candidates for public office and others may spend in election campaigns.

In short, the NAACP supports actions to empower our communities to have a voice in their government, electing better representatives, enacting better policy, and achieving a better, more representative democracy.

The McCutcheon decision is another blow to our ability to defend our democratic government from further domination by the wealthiest among us, who can now increase their ability to influence politicians, politics, which issues are debated, and how those issues are resolved. Conversely, it will have the impact of further drowning out the voices of ordinary Americans, who cannot afford to donate $3.5 million.

Thank you for taking the concerns of the NAACP into account. I welcome your questions or comments, and I can be reached at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director, NAACP Washington Bureau &
Senior Vice President for Policy and Advocacy

cc: Members,
Senate Committee on Rules and Administration

April 30, 2014

The Honorable Charles E. Schumer
Chairman
Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts,

Public Campaign is pleased that the Senate Committee on Rules and Administration is holding today's hearing to discuss "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond." I respectfully request that this letter and the accompanying documents be included in the hearing record.

Public Campaign is a non-profit, non-partisan organization dedicated to sweeping reform that aims to dramatically reduce the role of big special interest money in American politics.

Respectfully Submitted,

Nick Nyhart
President and CEO

1133 19th Street NW, 9th Floor | Washington, D.C. 20036 | Tel 202-640-5600 Fax: 202-640-5601 | info@publicampaign.org
www.publicampaign.org

TESTIMONY FILE FOR THE HEARING RECORD OF THE SENATE COMMITTEE ON RULES AND ADMINISTRATION

STATEMENT OF
NICK NYHART, PRESIDENT AND CEO, PUBLIC CAMPAIGN,
FOR THE HEARING RECORD OF

SENATE COMMITTEE ON RULES AND ADMINISTRATION HEARING ON
"DOLLARS AND SENSE: HOW UNDISCLOSED MONEY AND POST-MCCUTCHEON CAMPAIGN FINANCE WILL AFFECT 2014 AND BEYOND"

April 30, 2014

Senator King, Chairman Schumer, Ranking Member Roberts, and distinguished members of the committee.

Thank you for the opportunity to submit testimony today on an issue of extraordinary importance to the American public and the health of our democracy. In *McCutcheon v. Federal Election Commission (FEC)*, the Supreme Court struck another blow to our campaign finance system by invalidating the long-standing limits on aggregate contributions. By striking down these limits, the court has continued down the path of *Citizens United* by placing our elections more squarely in the hands of an elite few, and further isolating everyday Americans from the political process.

Already, party fundraisers are taking advantage of the decision. One joint fundraising committee will allow one donor to write a $98,800 check to be distributed to various candidates.[1] Another party committee will allow a $97,200 check to be written.[2]

People that can make donations that large—more than most families make in a year—aren't like everyday Americans and they further skew our political system toward the wealthy. In the 2012 election, the list of people who got close to, met, or exceeded the "aggregate limit" included 67 billionaires. A quarter work on Wall Street, and they live in some of the wealthiest neighborhoods in America.[3]

What the Roberts Court has left us with is a campaign funding system that will make it harder for the voices of everyday Americans to compete with the megaphones of mega donors. *McCutcheon* was about more than just legal principle and precedent, it was about power. In striking down the aggregate limits, the court sided with the money over the many. In this and other decisions it has essentially created a new right – one that was

[1] Huffington Post, "Republicans Launch Second Post-McCutcheon Supercommittee To Tap Megadonors," April 23, 2014.
[2] Washington Post, "Republicans set up first "max-PACs" in wake of McCutcheon decision," April 22, 2013.
[3] Public Campaign, "Country Club Politics," October 2013.

never imagined by our founders or contemplated in the constitution – to engage in the functional equivalent of bribery.

It's a system with very real consequences for a representative democracy. According to a new study by Professors Martin Gilens of Princeton and Benjamin Page of Northwestern, U.S. government policies reflect the desires of the wealthy and special interest groups more than the average citizen. The professors noted, "not only do ordinary citizens not have uniquely substantial power over policy decisions; they have little or no independent influence on policy at all."[4]

These findings are echoed in the numerous recent polls that show voters ranking themselves last in consideration – below contributors, political parties, and lobbyists – when Congressional lawmakers decide how to vote.[5] Although the study paints a bleak picture of a democracy fraught with growing inequality tied to political fundraising reliant on America's wealthiest, there is hope.

Dr. Gilens believes this trend of policy outcomes tied to the whims of the wealthy is reversible and that "meaningful campaign finance reform is the single, most promising avenue" to change the system.[6] So while the court has chosen plutocracy over democracy, Congress can respond by putting into place a small donor based citizen funded elections system, and shining a light on dark money. This solution would end the dependence on big money and put power back into the hands of millions of American citizens. It is for these reasons that we support the bicameral effort on small donor driven elections represented by S. 2023, the Fair Elections Now Act, introduced by Senator Dick Durbin, and H.R. 20, the Government By the People Act, introduced by Congressmen John Sarbanes.

The Fair Elections Now Act would help restore confidence in the Congressional election process by providing qualified candidates for Congress with grants, matching funds, and media vouchers which would amplify the voices of small donors, and replace the need to rely on the wealthy and special interests to fund campaigns. In exchange, participating candidates would agree to fund their campaigns by donations limited to $150. The bill would also establish a "My Voice Tax Credit" to encourage individuals to make small donations to fund campaigns.

Congress can enact these legislative solutions today, and they would save our democratic system from being captured by private wealth. They would shift the paradigm so that candidates can turn to "we the people" to fund campaigns and not a small pool of wealthy donors. We applaud Senator King for chairing this hearing and his sentiment that "it's far past time we shine a bright light on the dark money dominating campaigns." We also know that disclosure alone will not be able to stem the tide of unfettered wealth pouring

---

[4] Martin Gilens and Benjamin Page, "Testing theories of American politics: elites, interest groups, and average citizens," April 9, 2014.
[5] Public Campaign Action Fund, "Voters say members of Congress listen to donors more than constituents or their own conscience," December 17, 2013.
[6] The Agenda on Sirius XM, April 18, 2014.

into our system, and urge the Senate to consider additional reform proposals to put elections back in the hands of everyday Americans.

It is possible to improve our system, but we must do it together. Although our highest court has fundamentally undermined our representative democracy, we can act. We can restore faith in the system of government that our founders intended, where the average voter and not the deepest pocket donors set the agenda. Together we can empower everyday Americans, revive confidence in our government, and create a system that's truly of, by, and for the people.

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

April 30, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
U.S. Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Sen. King and Ranking Member:

Public Citizen is pleased that the Senate Committee on Rules & Administration is holding a hearing on April 30, 2014, to examine the influence of undisclosed money on elections in the wake of the Supreme Court's 2014 *McCutcheon v. Federal Election Commission* decision. Please accept these written comments discussing the damage to our elections caused by the *McCutcheon* decision and the Court's earlier decision, *Citizens United v. Federal Election Commission* (2010), two sweeping court rulings that set the stage for today's loss of reasonable limits and disclosure of money in politics.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen played an important role in the Supreme Court proceedings in both the *Citizens United* and *McCutcheon* decisions as amicus curiae on behalf of congressional leaders.

Respectfully Submitted,

Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen
215 Pennsylvania Avenue SE
Washington, D.C. 20003
cholman@citizen.org
202-454-5182

April 30, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
U.S. Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Testimony of Craig Holman, Public Citizen[1]

"Dark Money" and the McCutcheon Decision: Harms and Potential Remedies

A sharply divided U.S. Supreme Court once again struck down regulations on money in politics on April 2, 2014, when five justices ruled that the long-standing "aggregate contribution limits" of the Federal Election Campaign Act of 1971 (FECA) are now unconstitutional on First Amendment grounds. *McCutcheon v. Federal Election Commission*, 572 U.S. __ (2014).

Prior to the *McCutcheon* decision, an individual could contribute up to a total of $123,200 per election cycle to all federal candidates and committees combined, with sub-limits of $48,600 to all candidates and $74,600 to all political committees and parties. This meant that a wealthy donor could give a maximum individual contribution to 9 candidates and seven political committees.

Aggregate contribution limits were originally established in the 1974 amendments to FECA in response to the Watergate scandals that involved allegations of laundered campaign funds, illegal corporate contributions, "bought" ambassadorships by wealthy individuals and secret campaign cash. The aggregate contribution limits were upheld by the Supreme Court in the 1976 *Buckley v. Valeo* decision[2].

In 2014, the Roberts Court overruled these holdings, reversing some 40 years of established campaign finance law. The *McCutcheon* decision expands the rights only of a handful of millionaires and billionaires capable of making campaign contributions in excess of $123,200. While the ruling on its face may not be as sweeping as the *Citizens United* decision, it has the potential of being more dangerous. Citing itself as precedent, the majority of the Roberts Court changed the legal standard for upholding campaign finance laws, holding that the interest in preventing "corruption or the appearance of corruption," which had previously included using money to buy unfair influence over or access to public officials, could support only laws aimed at what the Court perceives as a genuine risk of *quid pro quo* corruption.

The Court, however, has repeatedly upheld campaign-finance disclosure laws, most recently and notably in *Citizens United* itself. Reflecting the Justices' lack of experience in real-world campaigns, the Roberts Court in *Citizens United* naively assumed that in the Internet age there is

[1] Craig Holman, Ph.D., Government Affairs Lobbyist, Public Citizen, Washington, D.C.
[2] Buckley v. Valeo, 424 U.S. 1 (1976).

full disclosure of money in politics, reaffirmed the public's right to know, and even partly justified lifting campaign finance regulations on the grounds of transparency.

In *Citizens United*, Justice Kennedy wrote for the majority:

> "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."[3]

In *McCutcheon*, Justice Roberts reiterated the Court's confidence in disclosure:

> "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information... Today, given the Internet, disclosure offers much more robust protections against corruption... Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time Buckley, or even McConnell, was decided."[4]

But Kennedy and Roberts are gravely mistaken about the real world of campaign finance disclosure. Transparency of money in politics today is sorely lacking. Because of weak enforcement policies at the Federal Election Commission, and excessive ambiguity in the tax laws, many corporations and wealthy special interests have been able to spend record-breaking sums on campaign ads and conceal their identities. Donors can easily sidestep disclosure by funneling money through nonprofit organizations – and they do. Well over $300 million was spent in "dark money" in just the 2012 federal elections from anonymous sources.

There are significant steps Congress and regulatory agencies can take to address the dark money plague and rein in some of the damage caused by the *Citizens United* and *McCutcheon* decisions. Options for congressional responses to the decisions fall into three general categories: transparency, regulation and constitutional change. Since these two Court rulings are substantively distinct, appropriate congressional responses vary for each decision.

Responses that Congress can and should pursue that specifically target *McCutcheon* include:

- Turn the imaginary Internet disclosure systems envisioned by Kennedy and Roberts into reality by passing the "Real Time Transparency Act of 2014," which would require 48-hour disclosure of campaign contributions to candidates, parties and committees, as well as transfers from joint fundraising committees.

---

[3] Citizens United, 588 U.S. at 370.
[4] McCutcheon, 572 U.S. _ at 24.

- Ban or restrict "joint fundraising committees," which under *McCutcheon* are likely to become the preferred fundraising vehicle for major donors and the greatest potential source of corruption.
- Strengthen the ban on direct candidate solicitations of contributions in excess of candidate limits and extend the ban to include prohibiting candidate appearances (and appearances by representatives of candidate committees) at any fundraising event in which contributions in excess of candidate limits are being solicited. This would apply to both super PACs and joint fundraising committees.
- Press for constitutional change to reverse *McCutcheon*.

Broader congressional responses that would address both the *Citizens United* and *McCutcheon* decisions include:

- Encourage the Securities and Exchange Commission (SEC) to adopt rules mandating disclosure of corporate political spending by publicly-held companies, and the Internal Revenue Service (IRS) to move ahead with rulemaking that would clearly define political intervention by nonprofit organizations and enforce the current law prohibiting 501(c)(4) nonprofit organizations from making more than de minimis political expenditures.
- Approve legislation that would enhance transparency of money in politics, such as the Bright Lines Project legislative proposal that clearly defines political intervention for nonprofit organizations so as to reduce the discretion of the IRS in such evaluations; the Shareholder Protection Act; and the DISCLOSE Act.
- Empower citizens through effective presidential and congressional public financing systems that offset spending by outside groups and incentivize small dollar donations.
- Submit to the states for ratification a constitutional amendment that clarifies for the Supreme Court what the First Amendment really means.

Fading Disclosure and the Dramatic Rise in Outside Campaign Spending

Fading disclosure of the sources of electioneering funds has plagued nearly all federal and state elections in the United States at an alarming rate since the U.S. Supreme Court's *Citizens United v. Federal Election Commission* decision. The problem may well grow worse in a post-*McCutcheon* world. This was not the intent of the Court.

The *Citizens United* decision marked a radical break by the Roberts Court from long-standing American political tradition and court precedents. On January 21, 2010, the Supreme Court unleashed a flood of corporate money into federal, state, judicial and local elections by announcing that, contrary to long-standing political tradition, corporations have a constitutional right to spend unlimited amounts of money to promote the election or defeat candidates.

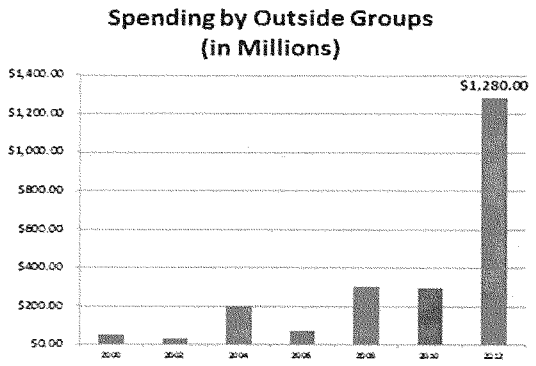
The Roberts Court explicitly overruled two existing Supreme Court decisions. In the 1990 *Austin v. Michigan Chamber of Commerce* decision,[5] the Court previously held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. The 2003 *McConnell v. Federal*

[5] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

Election Commission decision[6] applied that principle to uphold the federal Bipartisan Campaign Reform Act's restrictions on "electioneering communications," that is, its ban on corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. *Citizens United* overruled *Austin* and *McConnell*. The *Citizens United* decision also effectively negated parts of the same Court's 2007 ruling in *Federal Election Commission v. Wisconsin Right to Life.*[7]

By overruling these decisions, the Roberts Court opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

Immediately after *Citizens United*, outside spending in federal elections increased 427 percent in the 2010 elections over the previous 2006 congressional elections, and increased another four-fold in the 2012 presidential election cycle.[8]



But the Roberts Court never intended disclosure to be one of its victims. Even as the court struck down the limitation on corporate-funded campaign expenditures in the *Citizens United* opinion, the Roberts Court upheld the constitutionality of BCRA's disclosure requirements relating to the funders of electioneering communications.

---

[6] McConnell v. Federal Election Commission, 540 U.S. 93 (2003).
[7] Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449 (2007).
[8] Data on outside spending in federal elections provided by the Center for Responsive Politics, analyzed by Public Citizen.

In addition, Justice Kennedy, who wrote the majority opinion, appeared to rely on the existence of strict disclosure laws as a rationale for lifting the ban on corporate-funded campaign expenditures.

> "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. 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."[9]

Such disclosure, Kennedy wrote, would enable citizens to "see whether elected officials are 'in the pocket' of so-called moneyed interests."[10]

However, contrary to the Supreme Court's promise that voters would be able to "give proper weight to different speakers and messages," voters were left completely in the dark about who funded about half the messages that were blasted into their living rooms in the elections following *Citizens United.*

At the federal level, the initial fading of campaign finance disclosure began from an errant rulemaking by the Federal Election Commission. In response to the 2007 *Wisconsin Right to Life* decision, the FEC revised the disclosure rule by exempting groups that made electioneering communications from disclosing contributors' identities except in special cases in which donors specifically earmarked money for that purpose.[11] A similar earmarking requirement for disclosure has also been applied to independent expenditures.

Because few donors are apt to attach such specific instructions to their contributions, the effect has been to gut the disclosure requirement enshrined in BCRA – despite the fact that the federal statute calls for full donor disclosure.

According to an analysis by Public Citizen,[12] among groups broadcasting electioneering communications in federal elections, nearly 100 percent disclosed their funders in the 2004 and 2006 election cycles (the first two election cycles after BCRA created this category of campaign ads). In the 2008 elections, the first after *Wisconsin Right to Life*, the share of groups disclosing their funders plummeted to less than 50 percent. In 2010, barely a third of electioneering communications groups disclosed their funders.

---

[9] Citizens United, 588 U.S. at 370 (internal citations omitted).
[10] Id.
[11] 11 C.F.R. §104.20(c)(9).
[12] Taylor Lincoln and Craig Holman, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (2011), available at: http://www.citizen.org/documents/Citizens-United-20110113.pdf

Disclosure by Groups Making Electioneering Communications, 2004-2010

Year	# of Groups Reporting ECs	# of Groups Reporting the Donors Funding ECs	Pct. of Groups Reporting the Donors Funding ECs
2004	47	46	97.9
2006	31	30	96.8
2008	79	39	49.3
2010	53	18	34.0

Source: Public Citizen's analysis of Federal Election Commission data.

Among groups making independent expenditures (expenditures expressly intended to influence elections) in federal elections, disclosure of donors fell from 90 percent in 2004 and 97 percent in 2006 to only 70 percent in 2010.

Disclosure Among Top 30 Groups Making Independent Expenditures, 2004-2010

Year	Groups Disclosing Funders	Groups Not Disclosing Funders	Pct. Of Groups Reporting the Donors funding IEs
2004	26	3	89.7
2006	29	1	96.7
2008	25	5	83.3
2010	21	9	70.0

Source: Public Citizen's analysis of data from the Federal Election Commission and the Center for Responsive Politics

Combining the loss of donor disclosure behind electioneering communications with the loss of donor disclosure behind independent expenditures, the sources of only about half the funds spent by outside groups in the 2010 federal elections were disclosed to the public. There was a modest up-tick in donor disclosure in the 2012 elections, due almost entirely to the new prevalence of "super PACs," which are registered political committees subject to federal disclosure laws. According to the Center for Responsive Politics, 24 percent of outside spending groups provided no donor disclosure, another 24 percent provided partial disclosure, and only about 52 percent of outside spending groups provided full disclosure of their funding sources.[13] But the total amount of "dark money" in the 2012 elections – at least $310 million – exceeded the amount of undisclosed money in any previous election.[14]

The problem of dark money is likely to worsen under the *McCutcheon* decision. Candidates, parties and committees are expected to create a plethora of joint fundraising committees under the direction of congressional and party leaders, who will then collect huge contributions and

[13] Center for Responsive Politics, analysis of disclosure of donors by outside spending groups in the 2012 federal elections, available at: http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D

[14] Center for Responsive Politics, at: https://www.opensecrets.org/outsidespending/disclosure.php

distribute the funds. These transfers are supposed to be transparent, but the actual sources of the funds can be difficult to trace and monitor, and these disclosures tend to be slow in coming.

How *McCutcheon* Changes the Political Landscape

By a 5-to-4 ruling on April 2, 2014, the U.S. Supreme Court struck down the aggregate contribution limit of $123,200 that any individual may make to all federal candidates, committees and parties combined in an election cycle, but left intact—so far—the "base limits" on contributions to each candidate ($2,600 per election), political action committees ($5,000 per calendar year), state parties for federal elections ($10,000 per calendar year) and national party committee ($32,400 per calendar year). The plurality opinion written by Chief Justice John Roberts was supported by a concurring opinion from Justice Clarence Thomas who wrote that he would go further and reverse the 1976 *Buckley v. Valeo* decision in its entirety, invalidating all contribution limits.

The Roberts opinion noted that Congress may regulate campaign contributions to protect against corruption, but then changed the established definition of corruption that had been used previously into a very narrow *quid pro quo* definition of corruption. Citing its earlier *Citizens United* decision, the court said that making contributions in order to buy "[i]ngratiation and access … are not corruption." Instead, government "must instead target what we have called *quid pro quo* corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money."[15] Aggregate contribution limits, argued Roberts, impermissibly attempt to curtail an overly broad concept of corruption involving favoritism and undue influence, as well as indirectly preventing circumvention of the base limits, rather than preventing direct *quid pro quo* exchanges.

The dissenting opinion, written by Justice Stephen Breyer, accused the court majority of creating a huge new loophole in campaign finance law, contradicting historic court precedents, and ignoring concerns about declining public confidence in the political process. Treating corruption as only "an act akin to bribery" is "inconsistent with the Court's prior case law." Such a narrow definition of corruption "is virtually impossible to reconcile with this Court's decision in McConnell, upholding the Bipartisan Campaign Reform Act of 2002 (BCRA)."[16]

Breyer concluded:

> "In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions….
>
> "Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a

[15] McCutcheon, Roberts opinion, 572 U.S. __ at 2-3.
[16] McCutcheon, Breyer's dissent, 572 U.S. __ at 4.

> democratic order in which collective speech matters.... Where enough money calls the tune, the general public will not be heard."[17]

An analysis by Public Citizen shows exactly how much wealthy individuals may drown out the voices of the general public. In a post-*McCutcheon* world, a wealthy donor may contribute up to $3.6 million in an election cycle to the candidates and committees of a single party, and up to $5.9 million if officeholder leadership PACs are included in the calculation.[18]

In addition to drowning out the voices of the general public in the political process, the *McCutcheon* decision dangerously raises the specter of actual corruption. It would be quite a bit of tedious work for a wealthy donor to hand out separate checks to hundreds of candidates, but that is not how campaign fundraising tends to work in the real world. Fundraising for groups of candidates and party committees is done through a single "joint fundraising committee," usually run by a congressional leader or party boss. The person heading a joint fundraising committee receives a single large check from a wealthy donor and then doles the money out to participating candidates and party committees in accordance to the base limits.

Joint fundraising committees originally were envisioned as useful fundraising tools in which a couple of candidates joined resources to stage an affordable fundraising event. Joint fundraising committees were few in number and generally accounted for modest donations. But they quickly grew in number and significance since the presidential elections of 2000. Presidential candidates began making extensive use of joint fundraising committees to collect checks from wealthy donors by joining their campaign committees with state and federal party committees, the latter of which already had high base limits of $25,000 or more depending on the year. By the 2012 presidential election, presidential joint fundraising committees, such as the Obama Victory Fund, could receive checks as large as $75,800 from a single donor – the maximum amount allowed under the aggregate contribution limits of that year –which was then disbursed to the presidential campaign and party committees dedicated to support the presidential campaign.

Presidential joint fundraising committees became so prolific and capable of raising massive amounts of funds from wealthy donors that they rendered the presidential public financing program an insignificant, if not irrelevant, source of presidential campaign funds. The newly destructive nature of joint fundraising committees in presidential elections prompted legislative proposals to restrict such fundraising committees to candidates only, excluding party committees.[19]

Congressional leaders and party bosses took note of the massive campaign funds that could be raised through joint fundraising committees and followed suit. The number of presidential and

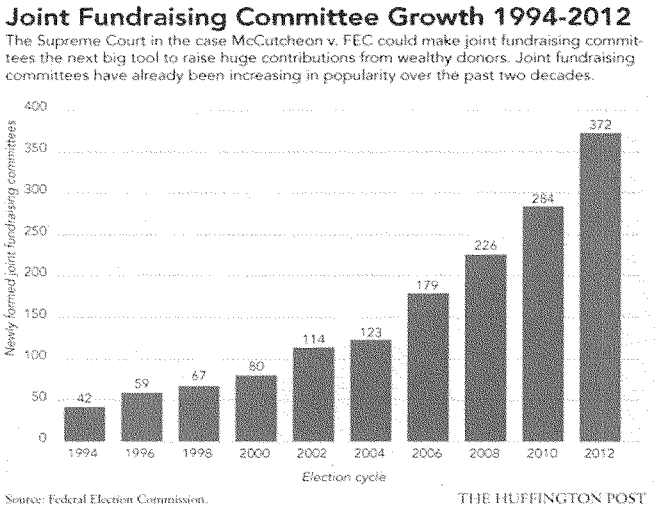
---

[17] Id, at 4-6.

[18] Adam Crowther, Beware of a Naïve Perspective (Part 1 of 2), Public Citizen (Jan. 7, 2014) at 7, available at: http://www.citizen.org/mccutcheon-campaign-finance-analysis-report

[19] For legislation restricting the size of joint fundraising committees to cover only candidates and exclude party committees, see for example, "Empowering Citizens Act" (H.R. 270), sponsored by Rep. David Price, 113th Congress.

congressional joint fundraising committees rose from 80 in 2000 to 372 in 2012. (*See* below "Joint Fundraising Committee Growth, 1994-2012."[20])



Following the *McCutcheon* decision, joint fundraising committees are expected to explode in number and significance for financing all federal campaigns. Without aggregate contribution limits, the sky's the limit for these entities, which will be run by a congressional leader or party boss. A wealthy individual who seeks to curry favor with the Speaker of the House or Senate Majority Leader now has a legal avenue to hand over a single multi-million dollar check to that officeholder.

To make matters worse, transfers between candidates and parties will make evasion of even the base limits very likely. While joint fundraising committees are required under FEC regulations to create a distribution formula for divvying up their largess among participating candidates and party committees,[21] the recipient candidates and party committees are not so bound. They may make large and, in the case of candidates to parties, unlimited transfers of those funds. As a result, candidates in noncompetitive elections may participate in a joint fundraising committee, receive an allocated contribution through the committee from a donor who maxed out to the national party committees, and then transfer those funds directly to the national party committees, indirectly but legally sidestepping the base limits for that donor.

---

[20] Paul Blumenthal, "McCutcheon v. FEC's Other Threat: Case Could Super-Size Fundraising Committees," *Huffington Post* (Oct. 7, 2013).

[21] FEC rules governing the operations of joint fundraising committee are at 11 CFR 102.17.

A Public Citizen analysis found that in the post-*McCutcheon* world of no aggregate limits, joint fundraising committees could readily enable candidates to transfer more than $74 million to the national party committees combined. Each donor to a joint fundraising committee would effectively be contributing more than $1.8 million to party committees, or more than 24 times the legal base limit.[22]

Just a few weeks after the *McCutcheon* decision, Republican leaders have already established three new joint fundraising committees: the Republican Victory Fund, a joint fundraising agreement among the Republican National Committee (RNC), National Republican Senate Committee (NRSC), and National Republican Congressional Committee (NRCC); and the 2014 Senators Classic Committee, a joint fundraising effort linking 19 Republican senate candidates; and a joint fundraising committee established under the direction of House Majority Leader Eric Cantor.

Democratic party and congressional leaders will soon be following in the footsteps of their Republican counterparts. House Minority Leader Nancy Pelosi declared that Democrats are "not going to unilaterally disarm," even as they objected to the *McCutcheon* decision.[23]

The post-*McCutcheon* world of no aggregate limits will produce a huge infusion of new money into politics, but coming from a very small number of donors. Of 310 million Americans nationwide, only 0.4 percent of Americans made contributions in the 2012 elections of $200 or more. Among this small pool, a mere 646 people maxed out at the overall aggregate limit to both candidates and committees in the 2012 election.[24] The *McCutcheon* decision has instilled a new right for only those people who can afford to give even more.

The *McCutcheon* decision may not immediately be as sweeping in scope as the Citizens United decision, but it is another devastating blow to reasonable limits on money in politics and it may portends the death of what remains of laws restricting campaign contributions. Joint fundraising committees under the direct control of presidential candidates, congressional leaders and party bosses are likely to proliferate and dominate campaign fundraising, providing a small number of wealthy donors the means to endear themselves with political leaders. Though the Supreme Court in both *Citizens United* and *McCutcheon* preserved the constitutionality of disclosure of money in elections, and even spoke of disclosure as the counterpoint to the expected changes to the system caused by the decisions, an effective disclosure regime does not currently exist.

Three Powerful Ways to Respond to *McCutcheon*

Three general categories of policy options to rein in the damage caused by *McCutcheon* as well as *Citizens United* are available to Congress. These include *enhanced transparency*, *regulation of campaign fundraising*, and a *constitutional amendment* and political pressure on the Supreme Court to reverse its campaign finance decisions.

---

[22] Adam Crowther, Beware of a Naïve Perspective (Part 2 of 2), Public Citizen (Jan. 14, 2014).
[23] Shane Goldmacher, "Are Democrats Repeating their Post-Citizens United Mistake?" *National Journal* (April 22, 2014).
[24] Center for Responsive Politics, McCutcheon's Multiplying Effect, available at: http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why.html

The *McCutcheon* decision primarily affects hard money in elections, and so direct hard money remedies are discussed first in each of the three policy categories. The *Citizens United* decision has a broader reach on both hard money of regulated entities and soft money of outside groups, but remedies to this ruling will help rein in the damage of *McCutcheon*, and so these are also discussed.

1. **Enhance Transparency.** In both the *McCutcheon* and *Citizens United* decisions the court stood firmly behind the constitutionality of disclosure requirements. Yet, the institutional framework for an effective transparency regime is not currently in place. Transparency of money in politics can be achieved through either legislative or regulatory actions, and Congress is in a position to influence both.

   - **Real Time Transparency Act of 2014.** The Court correctly understands part of the disclosure equation: in this era of the Internet, there is no excuse for not having full and instant transparency of money in politics, accessible to everyone at the click of a mouse. In fact, candidates and outside electioneering groups are required under current law to file electronic disclosure reports of their financial activity within 48 hours or 24 hours of each significant expenditure in the last few weeks of an election. Electronic filing and disclosure software are already developed by the FEC and federal candidates and electioneering groups generally know how to use these programs. With these easy-to-use electronic programs, instant electronic filing requirements pose little extra burden on campaign entities.

     Now that the *McCutcheon* decision is going to result in vast new sums of hard money flowing into campaigns, especially through joint fundraising committees, it has become more important than ever to require instant disclosure of significant contributions and transfers of funds by candidates, parties and committees. The "Real Time Transparency Act of 2014" – S. 2207 sponsored by Sen. Angus King (I-Maine) and H.R. 4442 by Rep. Beto O'Rourke (D-Texas) – does precisely that.

   - **SEC Petition for Transparency Rulemaking**. On August 3, 2011, several law professors submitted a petition for rulemaking to the Securities Exchange Commission (SEC) requesting that the agency promulgate rules to require publicly-held corporations to disclose their political spending to the public and shareholders. (Petition File No. 4-637) The petition has received a record-breaking 750,000 public comments in support. Transparency of corporate money in elections would go a long way toward mitigating the damage caused by *Citizens United*. The SEC, like the IRS, is heavily influenced by cues from Congress on whether to proceed. Members of Congress should weigh in and encourage the agency to address the issue by placing it on their next regulatory flexibility agenda.

   - **Bright Lines Project.** On November 29, 2014, the Treasury Department issued a Notice of Proposed Rulemaking (NPRM) to clarify the definition of political intervention for 501(c)(4) social welfare organizations. In the wake of thousands of comments, Treasury is debating revising the proposal. For more than four years, a coalition of tax lawyers and

nonprofit organizations led by Public Citizen, known as the Bright Lines Project, have developed extensive recommendations to clarify the definition of political intervention that would both encourage civic engagement by nonprofits and yet protect against abuse. (The recommendations are available at: http://www.brightlinesproject.org/.) Members of Congress again should weigh in, urging the agency to proceed with rulemaking, expand the rulemaking to cover all nonprofit organizations along the guidance offered by the Bright Lines Project, and set limits on the quantity of permissible political intervention.

- **Transparency Legislative Remedies**. The disclosure regulations under consideration by the SEC and the IRS also have legislative vehicles for achieving the same transparency results. Members of Congress should join as cosponsors and help promote the "Shareholder Protection Act" (S. 824), sponsored by Sen. Robert Menendez (D-NJ). The recommendations of the Bright Lines Project should also be introduced as a legislative vehicle, complete with hearings that would publicize the problems of abuse of the tax code by electioneering nonprofit groups and the IRS, and the solutions that are available. Congress should consider legislation to explicitly extend the existing limit on permissible electioneering activity by 501(c)(4) groups to other tax exempt entities to distinguish a genuine nonprofit organizations from Section 527 political organization subject to disclosure. And, of course, the DISCLOSE Act must remain a priority of Congress, a measure that would achieve full transparency of corporate and nonprofit political donations and expenditures in one swoop.

2. **Regulation of Campaign Fundraising**. Both *McCutcheon* and *Citizens United* have fundamentally transformed the nature of campaign fundraising, the former by allowing wealthy donors to cut huge and potentially corrupting checks to congressional leaders and party bosses, and the latter by allowing the flow of corporate and union treasury funds into elections. The changed nature of campaign fundraising calls for Congress to make significant changes in the law.

   - **Ban or Restrict Joint Fundraising Committees**. Joint fundraising committees are authorized by statute[25] and subject to FEC regulations.[26] Prohibiting or restricting joint fundraising activities will likely require legislation, though the operations of such committees could be subject to further FEC regulations. Joint fundraising committees could be banned altogether, limited in size to a small number of participating committees, restricted in the amounts of funds that could be transferred to candidates, or even defined as a single PAC subject to contribution limits applicable to its donors ($5,000 per year). The idea of restricting joint fundraising committees to just candidates, as has been proposed in recent legislation, pre-dates the *McCutcheon* decision and would not achieve a useful purpose in the post-*McCutcheon* world where such committees could receive checks up to $3.6 million from a single donor.

     There is no certainty in how the Roberts Court would treat legislative restrictions on joint fundraising committees. However, Roberts specifically stated in *McCutcheon*'s plurality opinion that restrictions on transfers of funds involving joint fundraising committees, or

[25] 2 U.S.C. 432(e)(3)(A)(ii), and 2 U.S.C. 441a(a)(5)(A).
[26] 11C.F.R. 102.17.

limits on the size of joint fundraising committees, may be appropriate legislative responses.

Roberts wrote: "One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Such a solution would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees)."[27]

- **Extend the Ban on Direct Candidate Solicitations of Excessive Contributions.** Currently, officeholders and candidates are prohibited from soliciting contributions in excess of FECA limits, though they may make appearances at such "soft money" fundraising events according to FEC regulations. Legislation should be introduced that prohibits any officeholder or candidate from soliciting contributions in excess of the maximum that could be given to that candidate in an election cycle, or, if that limit proves politically unworkable, that amount plus the maximum that could be given to a single national party committee in that cycle. This restriction should be expanded to also include prohibiting an officeholder or candidate from even making an appearance at any fundraiser in which contributions in excess of these limits are being solicited.

- **Consolidate the Limits to Party Committees.** An unwieldy aspect of the current campaign finance law is that donors are allowed to make multiple contributions to a political party through several committees of the same party. The contribution limit to a national political party committee is set at $32,400 per year, but an individual may give that maximum amount each to the national committee of the party, the senate campaign committee of the party and the congressional campaign committee of the party – and then another $10,000 to the federal campaign accounts of each of the 50 state parties. Congress should establish one single contribution limit for all committees combined of a political party. Treating party committees as a single entity for the purposes of contribution limits would go a long way toward reining in the damage caused by lifting aggregate contribution limits under *McCutcheon.*

- **Establish Public Financing of Congressional and Presidential Campaigns.** A strong public financing program for campaigns could address many of the problems posed by *McCutcheon* and *Citizens United.* The "Fair Elections Now Act" (S. 2023) sponsored by Sen. Richard Durbin (D-IL), or the "Government By the People Act" (H.R. 20) sponsored by Rep. John Sarbanes (D-Md.), would incentivize small dollar donations, provide candidates with substantial public funds to offset special interest money, and set the framework for voluntary agreements by participating candidates to accept only small contributions from donors and reject joint fundraising activities.

---

[27] McCutcheon, Roberts opinion, at 34.

3. **Sway Court Opinion through a Constitutional Amendment or Dissent.** It is important to keep in mind that neither *McCutcheon* nor *Citizens United* are decisions written in stone. First of all, both decisions were made by a sharply and narrowly divided Court. One change of vote could reverse these decisions. Secondly, if the Court is not inclined to change its vote or composition anytime soon, a constitutional amendment over-rides the Court.

   - **Constitutional Amendment.** A constitutional amendment reversing *McCutcheon* and *Citizens United* would completely rein in the damage to campaign finance regulations done by the Roberts Court. Public Citizen does not take amending the Constitution lightly, but there have been times in American history when amendments were needed and achieved. Since 1789, 35 amendments had been submitted to the states by Congress and 27 of these amendments were ratified.

     The movement for a constitutional amendment to reverse *Citizens United* and now *McCutcheon* has gained incredible momentum. Hundreds of local governments and 16 states have passed resolutions calling upon Congress to submit a constitutional amendment to the states for ratification granting Congress the authority to regulate money in politics. Public opinion is overwhelmingly in support of reversing the *Citizens United* decision (and no doubt the *McCutcheon* decision as well, once polling is conducted on this ruling), with poll after poll showing vast majorities of Americans – Democrats, Republicans and Independents alike – supporting regulating money in politics and expressing dismay at the campaign finance decisions of the Roberts Court.

     McCutcheon is fueling this drive. Several thousand people took coordinated action in protest of the McCutcheon decision the same day it was issued in 150 rallies held across 41 states. Pictures of these rallies are available at: https://www.flickr.com/search/?q=%23mccutcheonrapidresponse

     So far, 36 Senators and 114 Representatives have signed onto a constitutional amendment to overturn *Citizens United* and *McCutcheon* in the 113th Congress.

   - **Disagreement.** The five Justices of the Roberts Court that have invalidated campaign finance laws appear increasingly isolated from public opinion that overwhelmingly supports reasonable campaign finance laws. As the disagreement of the four Justices in the minority and many other respected jurists throughout the nation indicates, the view of the Court's current majority is hardly the only, or the most plausible, reading of our Constitution and the precedents of past Courts. Disagreement with the Court's views is entirely legitimate and, in these circumstances, called for. In an unusually frank opinion, for example, a U.S. district court judge in New York struck down the state's contribution limits for a super political action committee (PAC) while noting that he disagrees strongly with the Supreme Court rulings requiring him to do so.[28] The U.S. Supreme Court faced a similar challenge from the Montana Supreme Court, which upheld that state's ban on corporate spending in Montana elections despite the *Citizens United*

[28] New York Progress and Protection PAC v. Walsh, S.D.N.Y., No. 13-6769, 4/24/14.

decision (which the U.S. Supreme Court by the same 5-to-4 vote struck down).[29] Montana's challenge was supported by 22 states and the District of Columbia.

Legislation is expected to be introduced in the U.S. House of Representatives reinstating the aggregate contribution limits, in defiance of *McCutcheon*. The Senate should consider a similar response, or at a minimum a resolution expressing disagreement with the Court's decision. Justices on the Supreme Court read newspapers and follow political events, and on occasion are susceptible to a change of mind. Alternatively, such continuing expression of legitimate disagreement with the Court's decision could influence future appointments to the Court.

Conclusion: Several Options for a *McCutcheon* Response are Available

Congress must move swiftly and decisively to mitigate the damage to our democratic system of governance posed by the *Citizens United* and *McCutcheon* decisions. A number of targeted options are available for a congressional response to *McCutcheon*, and several broader options are available for responding to both *Citizens United* and *McCutcheon*.

Targeted *McCutcheon* responses include instant on-line disclosure of large campaign contributions and transfers proposed in the "Real Time Transparency Act of 2014"; banning or restricting joint fundraising committees; extending the ban on candidate solicitations of excessive contributions to apply to joint fundraising committees as well as super PACs; creating a single contribution limit for all party committees combined; and challenging the Court majority on its campaign finance jurisprudence. Broader responses that would address both *Citizens United* and *McCutcheon* include enhancing disclosure of all money in politics through legislation and regulatory actions; promoting the Bright Lines Project for defining political intervention by nonprofit organizations; establishing public financing of campaigns; and pursuing a constitutional amendment to clarify for the Supreme Court what the First Amendment really means.

Public Citizen encourages Congress to pursue all appropriate options.

---

[29] American Tradition Partnership v. Bullock, 132 S.Ct. 2490 (2012).

Senator Sheldon Whitehouse
Statement for the Record
Hearing: "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond"
Senate Committee on Rules and Administration
April 30, 2014

Senator King, Chairman Schumer, and Ranking Member Roberts, thank you for convening this hearing on the Supreme Court's recent decision in *McCutcheon v. FEC* and the epidemic of dark money in politics. You have assembled an outstanding group of expert witnesses to provide invaluable insight into the current state of campaign finance law and the need for reform. I am especially grateful for the presence and testimony of Justice Stevens, whose persuasive dissent in *Citizens United v. FEC* may one day pave the way for the restoration of reasonable limitations on election spending.

In the meantime, the Supreme Court's decision in *McCutcheon* represents a continuation of the conservative justices' efforts to dismantle our country's campaign finance laws and eliminate all checks against excessive and potentially corrupt influence. By striking down limits on how much an individual can give to all candidates and party committees in an election cycle, the Court once again chose to privilege wealthy and powerful interests while ignoring precedent and public consensus on the corrupting nature of money in politics.

The decision represents a continuation of the disastrous course set by the Court's decision in *Citizens United* to allow unlimited corporate independent expenditures. As Justice Stevens wrote in dissent, the *Citizens United* decision represented "a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."

McCutcheon compounded the damage done by *Citizens United* by extending *Citizens United*'s holding that Congress can only regulate campaign finance to address *quid pro quo* corruption to the realm of direct contributions to candidates and parties. This cramped and woefully insufficient definition of corruption shows a Court dramatically out of touch with the realities of electoral politics.

The reliance on *Citizens United* is particularly troubling given that the years since that decision have shown it to be based on fundamentally flawed assumptions. As Sen. John McCain and I pointed out to the Court in an *amicus* brief filed in *American Tradition Partnership v. Bullock*, *Citizens United* was premised on false assertions: among them, that "independent expenditures" would be truly independent, and that there would be full disclosure of political spending.

With regard to independent expenditures, the Court in *Citizens United* assumed that anti-coordination rules "substantially dimish[]" the "potential for abuse" of independent expenditures. This claim has been proved resoundingly false by the use of candidate-specific PACs operated for the benefit of a single candidate, and by the formation of Super PACs run by close associates

of candidates, which openly coordinate many aspects of their fundraising and advertising with the candidates.

The Court's claims regarding disclosure have proven similarly false. The majority claimed that "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." Yet as Sen. McCain and I noted in our *amicus* brief, "super PACs, 501(c)(4) organizations and political campaigns are knitted into a fundraising web that allows unlimited, non-independent and anonymous (to the public) political donations for the benefit of a specific candidate." In the 2012 election cycle, independent expenditures from undisclosed sources topped $310 million – a dramatic increase from the corresponding figure of $69 million in 2008, the most recent previous presidential election cycle. When money cannot be traced, politicians cannot be held accountable and individual voters lack necessary information to fully and effectively participate in our democracy.

This failure of disclosure is due in large part to vague and permissive Treasury and IRS rules regarding political spending by 501(c)(4) social welfare organizations. The vast majority of 501(c)(4) groups are legitimate organizations that operate to promote social welfare. However, public documents point to the inescapable conclusion that some groups are abusing that status to evade campaign finance disclosure laws.

In some cases, these groups have gone as far as to claim on IRS forms that they were not spending money on political activity, while at the same time reporting millions of dollars in election spending to the Federal Election Commission, a subject covered at length during a Crime and Terrorism subcommittee hearing that I chaired last year. As discussed at that hearing, making a material false statement to a federal agency is a crime, and yet there has been no evidence that any such false statements have ever been referred for investigation.

There has been much discussion of the IRS scandal surrounding groups being singled out for scrutiny based on words in their names suggesting that they were politically active. This scrutiny was clearly inappropriate. Yet the failure to enforce limitations on political spending, or even statutes prohibiting false statements about such spending, represents a greater scandal.

I commend Treasury and the IRS for proposing new rules to clarify the limitations on spending by 501(c)(4) groups, and would urge them to follow through on the rules in the face of loud but baseless allegations that they are attacking free speech or targeting groups based on their political affiliations. As I and fifteen other Senators wrote to the IRS in connection with the Notice of Proposed Rulemaking, "[n]ew IRS regulations must put an end to the use of 501(c)(4) status as a means of evading campaign finance disclosure requirements. In particular, the new rules must make clear that it is impermissible for political operatives to create what are for all practical purposes PACs, obtain 501(c)(4) status for those PACs, and then spend essentially unlimited money to influence elections without disclosing their donors, as is now common practice."

While IRS action would help to address the problem, it would not be sufficient. Since *Citizens United*, I and many others have supported passage of disclosure legislation such as the DISCLOSE Act, which would require organizations spending large sums on elections to disclose

their largest donors. This legislation would help ensure that billionaire donors and multi-national corporations (including foreign donors and corporations) cannot pour unlimited money into elections while using legal loopholes to evade campaign finance disclosure requirements. A leading expert and witness at this hearing, Republican former FEC Chairman Trevor Potter, called the Act "appropriately targeted, narrowly tailored, clearly constitutional and desperately needed."

Once again, I thank the Rules Committee for holding this important hearing, and I will continue to work with reform advocates inside and outside of the Senate to repair our campaign finance system.

April 30, 2014

Ciara Torres-Spelliscy
Assistant Professor of Law
Stetson University College of Law
1401 61st Street South
Gulfport, FL 33707

Honorable Senator Angus King
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Re: Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond Hearing

Dear Senator King,

Thank you for holding today's hearing on dark money in American elections. While this problem started before *Citizens United v. FEC*, this case has certainly accelerated the problem of political money from unnamed sources.

I am also encouraged that you will focus not just on the problem of dark money, but also on its solutions. There can be both Legislative and Executive Branch solutions to the problem of dark money.

Congress

There are a few solutions to undisclosed money in politics that Congress could address. 1. Congress needs to mandate that money that is spent on political advertisements in federal elections is fully disclosed regardless of the tax status of the entity doing the spending. 2. Congress needs to clarify what a barred "foreign" source money is in the corporate context. It is clear that federal law still bars foreign *individuals* from spending in elections. What is far from clear is how federal law should treat corporations that are controlled by a foreign national. 3. In this post-*Citizens United* environment, Congress should change federal securities laws to empower shareholders with more disclosure of where and why corporations are spending in politics as well as give shareholders the ability to consent to corporate political spending.

STETSON LAW

Executive Branch
Federal agencies have overlapping jurisdiction over political spending and transparency should be increased across the board. The FCC has shown leadership in placing the political files of broadcasters on-line for the first time. But other agencies need to provide better public disclosures to the public. For example, the IRS needs to ensure that those entities which act as 527s are disclosing their underlying donors. The FEC needs to ensure that those who spend in federal elections above minimum thresholds are disclosed. And the SEC should expand reporting by publicly traded companies to include political spending.

For more information about dark money, please see the attached law review article: "Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics."

Thank you again for tackling this important topic. And please let me know if I can provide you or the Committee any additional information.

Sincerely,

Ciara Torres-Spelliscy, Esq.

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 12 FALL-WINTER 2012 NUMBER 2

Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics

CIARA TORRES-SPELLISCY[†]

"There cannot be honest markets without honest publicity."
--U.S. House of Representatives Report, 1934.[1]

INTRODUCTION

Dante placed corrupt politicians in the Eighth Circle of Hell.[2] Centuries later, and an ocean away, loathing of political corruption still provides a formidable framework for thinking about abuses of power. For the past three years, a fear of political corruption has been a leitmotif in the scholarship about the 2010 Supreme Court case *Citizens United v. Federal Election Commission*, which allows corporations to purchase an unlimited supply of political ads in American elections.[3] In its simplest form, the

---

[†] Ciara Torres-Spelliscy is an Assistant Professor at Stetson University College of Law where she teaches Constitutional Law, Election Law, and Corporate Governance. She extends her gratitude to Professor Jennifer S. Taub, Professor Ellen Podgor, Professor Marleen O'Connor and Professor Glynn Torres-Spelliscy for their helpful feedback on an earlier draft. She would like to thank her Stetson research assistants Max Holzbaur, Andrew Graf, and Jordan Sager for their help researching this piece. The author also thanks Stetson University College of Law for the research grant it provided to her to enable her to complete this piece.

[1] SEC v. Tex. Gulf Sulphur Co., 401 F. 2d 833, 858 (2d Cir. 1968) (quoting H.R. REP. NO. 1383, 73d Cong., (2d Sess. 1934)).

[2] DANTE ALIGHIERI, THE DIVINE COMEDY INFERNO, Canto XXII (written between 1308 and 1321) (published in 1555).

[3] Matthew A. Melone, Citizens United *and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 98 (2010) (concluding that Citizens United "will usher in a new era of corporate political dominance"); Monica Youn, *Small-Donor Public Financing in the Post-*Citizen United *Era*, 44 J. MARSHALL L. REV. 619, 631 (2010-2011) ("Independent political spending, of the type that has been unleashed by *Citizens United*, can also create substantial risks of corruption."); Ronald Dworkin, *The Decision That Threatens*

argument is that corporations will have the ability to corrupt democratically elected politicians in the United States.[4] In recent legal scholarship, less time has been dedicated to the potential corruption of the capital markets that could be generated by corporate political spending.[5] This piece analyzes one aspect of this relatively unexplored territory: how a lack of transparency may impact capital markets. This article argues that the Securities and Exchange Commission ("SEC" or the "Commission") should act to bring greater disclosure to this opaque area of the law in order to mitigate some of the deleterious effects of the *Citizens United* decision.

The 2012 federal election in the United States was the most expensive in history with a price tag of over $7 billion.[6] Now that the election is over, what the biggest campaign spenders want from elected officials in return for their largess remains unclear. Because of flaws in campaign finance disclosure, how much of this $7 billion was funded by publicly-traded corporations is also unknown.[7]

The Supreme Court did a grave disservice to shareholders of publicly-traded companies when *Citizens United*[8] held that corporations have the

---

Democracy, N.Y. REV. OF BOOKS (May 13, 2010), http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/ ("It will sharply increase the opportunity of corporations to tempt or intimidate congressmen facing reelection campaigns."); *see also* Dylan Ratigan, *They Keep Stealing--Why Keep Paying?*, HUFFINGTON POST (June 24, 2010, 12:04 PM), http://www.huffingtonpost.com/dylan-ratigan/who-pays_b_624149.html ("The dire straits of the middle class of America has made it near impossible for our politicians to keep up the pretense that our current government truly works for the 'people'. . . . Couple this with recent protections handed by the Supreme Court to corporations to directly influence elections and it can make things seem hopeless for those not on Wall Street or their chosen politicians.").

[4] Tom Udall, *Policy Essay: Amend the Constitution To Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 Yale L. & Pol'y Rev. 235, 246 (Fall 2010) ("the Supreme Court has opened the floodgates to vast new risks of corruption.").

[5] Marvin Ammori, *Corruption Economy*, BOSTON REVIEW, September/October 2010, *available at* http://bostonreview.net/BR35.5/AMMORI.PHP ("*Citizens United* does the same, though in a slightly different way. By laundering protection of the status quo through corporate expenditures, *Citizens United* acts as a Lochneresque bulwark against redistribution of economic power from the established giants to upstarts and consumers, no matter the costs of a corruption economy."); Anne Tucker, *Rational Coercion:* Citizens United *and a Modern Day Prisoner's Dilemma*, 27 GA. ST. U. L. REV. 1105, 1127-32 (2011) (applying a game-theory prisoner's dilemma, and concluding that "*Citizens United* has established an environment that exacerbates the pressure on corporations to participate politically through independent expenditures.").

[6] Jake Harper, *Total 2012 Election Spending: $7 Billion*, SUNLIGHT FOUNDATION, Jan. 31 2013, http://reporting.sunlightfoundation.com/2013/total-2012-election-spending-7-billion/.

[7] Recognizing this transparency problem, the America Bar Association (ABA) recently voted to urge better campaign finance disclosure. Debra Cassen Weiss, *Resolution Seeks Disclosure of Secret Campaign Donations Made through Nonprofits and Super PACs*, ABA JOURNAL, Feb. 11, 2013, http://www.abajournal.com/news/article/resolution_seeks_disclosure_of_secret_campaign_donations_made_through_/.

[8] For a discussion of the shareholder rights implicated by *Citizens United*, *see* Lucian Bebchuk & Robert Jackson, Jr., *Corporate Political Speech: Who Decides?* 124 HARV. L. REV. 83, 84 (2010) (arguing for rules that "mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation's political spending, whether made directly by the company or indirectly

right to spend unlimited corporate treasury funds in American elections.[9] Whereas previous Supreme Courts protected shareholders by keeping corporate resources out of partisan politics,[10] the *Citizens United* Court has unleashed corporate political spending into a regulatory environment rife with loopholes.[11] In short, the tax code, and corporate, securities, and campaign finance laws interact in ways that enable publicly-traded corporations in the United States to legally mask their political spending, thereby thwarting accountability to customers, shareholders, and potential investors.[12] Indeed, in the 2012 federal election, approximately $315 million in campaign expenditures originated from untraceable, anonymous sources.[13]

Moreover, the fact that investors cannot be sure if a company is paying for anonymous political spending raises valid corporate governance

---

through intermediaries."); CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 21 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550990 (arguing for shareholder disclosure and consent); Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the* Segregated *Fund Cases*, 3 ELECTION L. J. 361 (2004) (arguing "treasury funds reflect the economically motivated decisions of investors or members who do not necessarily approve of the political expenditures, while segregated funds - such as a political action committee (PAC) - raise and spend money from knowing, voluntary political contributors."); Letter from John C. Bogle, President, Bogle Financial Markets Research Ctr. to Elizabeth Murphy, Sec'y, U.S. Sec. & Exch. Comm'n. (Jan. 17, 2012), *available at* http://www.sec.gov/comments/4-637/4637-22.pdf ("I urge the Commission to stand back for a moment from the issue of full disclosure of corporate contributions to decide whether corporate shareholders should not first decide whether a corporation should make any political contribution whatsoever without the approval of its shareholders.").

[9] Citizens United v. FEC, 558 U.S. 310 (2010).

[10] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 674 n. 5, 675 (1990) (Brennan, J. concurring), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010) ("We have long recognized the importance of state corporate law in 'protect[ing] the shareholders' of corporations chartered within the State..." and "shareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object."); FEC v. Mass. Citizens for Life, 479 U.S. 238, 258 (1986) ("The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas."); Pipefitters Local 562 v. United States, 407 U.S. 385, 415 n.28 (1972) ("We are of the opinion that Congress intended to insure against officers proceeding in such matters without obtaining the consent of shareholders by forbidding all such [political] expenditures."); United States v. Cong. of Indus. Org., 335 U.S. 106, 113 (1948) (explaining Taft-Hartley was motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.").

[11] George Zornick, *Big Business: Undo the Damage of 'Citizens United'*, THE NATION (Sept. 28, 2011, 12:17 PM), http:// www.thenation.com/blog/163685/big-business-undo-damage-citizens-united ("Corporate resources that might be better spent investing in an enterprise or otherwise building shareholder value would then be diverted to political activities.").

[12] *See generally* Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J. L. & POL'Y 59 (2011).

[13] Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, at 5 (2013), http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf ("For the 2012 election cycle, 31% of all reported outside spending was 'secret spending,' coming from organizations that are not required to disclose the original source of their funds").

concerns. Growing empirical evidence that corporate political spending is bad for firms and endangers shareholder value should trouble investors.[14] Without uniform disclosures across public firms, investors cannot rationally judge which firms are effectively using the nonmarket strategy of corporate political spending.

In 2011, seeking to rectify the lack of transparency that currently prevails in corporate political spending, ten corporate law professors[15] urged the SEC to promulgate a new rule requiring transparency to reveal post-*Citizens United* corporate political spending.[16] Hereinafter, this Petition will be referred to as "Petition File No. 4-637" or simply the "Petition." At this time, a record-breaking 480,000 public comments have been filed in support of the Petition.[17] The SEC has indicated that it plans a rulemaking on this topic in 2013.[18] This rulemaking would be grounded in language from the Supreme Court in *Citizens United*, where Justice Kennedy 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 corporation's political speech advances the corporation's interest in

---

[14] Comment of Dr. Michael Hadani on Sec. Exch. Comm'n File 4-637m http://www.sec.gov/comments/4-637/4-637.shtml for the Comment; Michael Hadani & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, STRATEGIC MANAGEMENT JOURNAL (article first published online July 13 2012), http://onlinelibrary.wiley.com/doi/10.1002/smj.2006/abstract; Michael Hadani, *Institutional Ownership Monitoring and Corporate Political Activity: Governance Implications*, J. OF BUS. RES. (2011); John Coates C. IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9(4) JOURNAL OF EMPIRICAL LEGAL STUDIES 657–696 (Dec. 2012), http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2012.01265.x/abstract; Remarks of John Coates, *Can Shareholders Save Democracy*, Accountability After *Citizens United* Symposium (Apr. 29, 2011), http://www.brennancenter.org/sites/default/files/events/Accoutability%20After%20Citizens%20United%20program.pdf; Rajesh Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Donations: Investment or Agency?*, 14(1) BUSINESS AND POLITICS, Article 3 (2012).

[15] The ten are Professors Lucian A. Bebchuk, Bernard S. Black, John C. Coffee, Jr., James D. Cox, Ronald J. Gilson, Jeffrey N. Gordon, Henry Hansmann, Robert J. Jackson, Jr., Donald C. Langevoort, and Hillary Sale. *See* Letter from Comm. on Disclosure of Corporate Political Spending Petition for Rulemaking, to Elizabeth Murphy, Sec'y, U.S. Sec. & Exch. Comm'n. (Aug. 3, 2011), *available at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

[16] *Id.* For the contrary view, *see* Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 HASTINGS BUS. L.J. 103 (Winter 2012).

[17] SEC, *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities File No. 4-637*, http://www.sec.gov/comments/4-637/4-637.shtml (last visited Mar. 22, 2013).

[18] *Unified, Regulatory Agenda and Regulatory Plan* OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET (Dec. 21, 2012), http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=3235-AL36; Matea Gold, *Advocates Cheer SEC Consideration of Corporate Disclosure Rule*, L.A. TIMES (Jan. 8, 2013, 7:28 AM), http://www.latimes.com/news/politics/la-pn-sec-campaign-spending-disclosure-20130108,0,55217.story.

making profits."[19] Without SEC mandated disclosure, the type of accountability Justice Kennedy envisioned would be impossible.

At first blush, the SEC's regulation of money in politics may seem to fall outside of its jurisdiction, but this perspective is mistaken because it ignores three previous times when the SEC stepped in to curb pay to play: (1) in the municipal bond market in 1994; (2) in the public pension fund market in 2010; and (3) in investigating questionable political payments post-Watergate from 1974 to 1977. The result of the first two interventions led to new Commission rules and the third intervention resulted in the Foreign Corrupt Practices Act (a federal statute).[20]

In thinking through the role the SEC might play in today's regulatory environment, reviewing what the Commission has done before in the area of anti-pay-to-play regulations should be quite instructive. "Anti-pay-to-play" regulations attempt to prevent corrupt deals where an entity outside of the government pays campaign expenses or other gratuities in order to get a government benefit that would otherwise be awarded on the basis of merit.

When these three previous SEC interventions into the role of money in politics are examined, a principled model emerges for when the Commission's regulatory intervention is appropriate. The principled model, hereinafter known as the "Money in Politics Model," has the following characteristics: there must be (1) a potential for market inefficiencies; (2) a problem that will not self-correct through normal market forces; (3) a lack of transparency; (4) a material amount of aggregated money at stake; and (5) a high probability for corruption of the government.

The Money in Politics Model would not require the SEC to intervene to reveal every secret hidden within a public company. For example, typical trade secrets and the terms of confidential settlements should remain secret. The SEC should only be able to intervene where the money involved in the aggregate tops millions of dollars. The SEC should also reserve regulatory intervention for instances when there is a deleterious impact on the market, such that normal market discipline is thwarted in a way that is unlikely to stop on its own. Further, this model is only implicated where corruption of democratically elected officials is a real possibility.

This article will not re-canvass the larger academic debate of whether the SEC should ever impose mandatory disclosure on issuers.[21] That

---

[19] Citizens United, 130 S. Ct. at 916, 558 U.S. at ___.

[20] The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA").

[21] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1200-07 (1999) (arguing in favor of stronger mandatory SEC

debate will continue in academic circles for the foreseeable future. Realistically, in light of the economic meltdown that the United States experienced in 2008, more, not less, market regulation appears likely moving forward.

Does post-*Citizens United* corporate political spending fit the SEC's Money in Politics Model, thus meriting the SEC's intervention? This article will argue that the Model fits and that the SEC should act to adopt a new rule requiring transparency for corporate political spending from listed companies.

The SEC is not new to the inherent conflicts of interest between business and government, especially when elected officials have the ability to make private contractors in the financial services industry rich through commissions and fees. The risk of corruption is intrinsic in such a situation. Here corruption is best captured by the definition as "the misuse of public ... office for direct or indirect personal gain."[22] What is new as

---

disclosure rules in order to increase corporate social transparency); Trig R. Smith, *The S.E.C. and Regulation of Foreign Private Issuers: Another Missed Opportunity at Meaningful Regulatory Change*, 26 BROOK. J. INT'L L. 765 (2000) (arguing that although the rationale behind and effectiveness of mandatory disclosure rules is unclear, the SEC should use foreign securities issuers as a group on which to experiment with mandatory disclosure rule reform); Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 819 (2006) (arguing further that mandatory disclosure provides more benefits to investors because it "create[s] more useful public information than was ever the case under previous voluntary systems," that it "provides [investors] with roughly the same information they would bargain for if they were rational," and that it "reduces search and information processing costs for investors by requiring cheap, readily available, standardized, and relatively reliable disclosure of information"); Jesse M. Fried, *Firms Gone Dark*, 76 U. CHI. L. REV. 135, 150, 152 (2009) (noting that "that public investors' wealth increased substantially when firms were forced to enter the mandatory disclosure system," yet acknowledging this "does not prove that prior disclosure had been suboptimal"; arguing further that "the failure of. . . most gone-dark firms [firms that exit the mandatory SEC disclosure regime] to provide any information to their public investors" and the market's sharply negative reaction to going-dark announcements do cast further doubt on the claim that insiders generally can be counted on to voluntarily provide the firm-optimal level of disclosure); Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 686 (2002) (arguing that "[t]he existing SEC disclosure system can be understood as a mechanism for solving these contracting problems: . . . [f]irst, as has been recognized, it serves a standardization function, both with regard to form and quantity of disclosure, thereby aiding in the comprehension and comparison of different investment options. . . . Second, it provides a mechanism for the adjustment of reporting obligations over time. . . . Third, it provides a credible and specialized enforcement mechanism, which warrants both the comprehensiveness and quality of the information disclosed"). *But see* Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 5-6 (1999) (arguing that "[f]or many firms — and investors — the costs of one-size mandatory disclosure are unwarranted and often unwanted" and in addition, that "U.S. issuers have increasingly shunned public offerings in favor of private offerings to avoid the costs of mandatory disclosure and heightened liability"); Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 759-60 (2007) (arguing that the role of the SEC in disclosure rule making should be limited because "economic research and related legal scholarship suggest that there is less need for the SEC to protect investors than exists in the case of normal consumer protection, where advertising enjoys full status as commercial speech").

[22] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), MANAGING PUBLIC EXPENDITURE: A REFERENCE BOOK FOR TRANSITION COUNTRIES 25 (Richard Allen & Richard Tomassi, eds., 2001).

of January 2010, thanks to *Citizens United,* is the potential for every publicly-traded company to try to influence the government not just through traditional lobbying, but also through campaign expenditures.[23] This new post-*Citizens United* reality merits a new SEC intervention to reveal the campaign activities of public companies.

In Part I, this article will offer a brief overview of the SEC's regulatory authority as well as defining key terms. In Part II, this article will explore how the SEC got involved in regulating pay to play in the municipal bond market as well as the D.C. Circuit Court's approvals of this intervention. Part III will discuss how the SEC became engaged in regulating pay to play in the public pension fund market. In Part IV, this article will focus on how the SEC discovered off-the-books corporate political funds in its post-Watergate investigations and how that led to the Commission's advocacy in favor of legislation that became the Foreign Corrupt Practices Act. Part V will explain how post-*Citizens United* corporate political spending shares many of the same characteristics of the Money in Politics Model which justifies the SEC's regulatory intervention. Finally, Part VI will argue that the courts are likely to uphold a new SEC rule requiring disclosure of corporate political spending since the Supreme Court has already upheld both mandatory SEC disclosure for public companies under the 1933 and 1934 Securities Acts, in addition to campaign finance disclosure, in particular.

[23] Citizens United, 558 U.S. 310.

I. BACKGROUND EXPLANATION OF THE SEC'S REGULATORY ROLE

A. Why the SEC Can Regulate at All

To understand the SEC's historical role in regulating certain aspects of money in politics, first one must appreciate why the SEC exists at all. The motivation behind the United States federal securities laws was a desire to not repeat either the stock market crash of 1929 or the Great Depression that followed it.[24] John Kenneth Galbraith explained, "[t]he fact was that American enterprise in the [nineteen] twenties had opened its hospitable arms to an exceptional number of promoters, grafters, swindlers, impostors, and frauds. This, in the long history of such activities, was a kind of flood tide of corporate larceny."[25] In short, the SEC regulates disclosure in the sale of securities because actors in the securities market of the 1920s proved that they were incapable of self-regulation.

The Securities Act of 1933 (the "1933 Act") and Securities and Exchange Act of 1934 (the "1934 Act") were federal efforts built on the shoulders of state blue sky laws, which regulated the sales of securities within each state: "These statutes were popularly known as blue sky laws after the complaint of one state legislator that some securities swindlers were so barefaced that they 'would sell building lots in the blue sky.'"[26] The trouble with the blue sky laws is that they could not capture interstate fraudsters. All a grifter had to do to avoid legal consequences was sell worthless securities from a neighboring state.[27] Congress created the SEC to regulate interstate sales of securities so that fraudulent securities could not be peddled across state lines.

To support the need for transparency of political spending, campaign finance advocates have frequently relied on Justice Brandeis's quote, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants...." In fact, the quote appears in *Buckley v. Valeo* as a justification for campaign finance disclosure laws.[28] However, the original context for the quote was Mr. Brandeis's concern about the capital markets. As Professor Cynthia Williams reminds us:

> Brandeis proposed disclosure as a remedy for ... excessive

---

[24] Steve Thel, *The Original Conception of Section 10(b) of the Securities and Exchange Act*, 42 STAN. L. REV. 385, 407 (Jan. 1990) ("Securities legislation has historically been the product of calamity.").

[25] JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929, 178 (2009).

[26] Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 20 (Fall 1983).

[27] *Id.* at 54.

[28] Buckley v. Valeo, 424 U.S. 1, 67 n.80 (1976) (quoting L. Brandeis, OTHER PEOPLE'S MONEY 62) (Nat'l Home Library Found. ed. 1933).

> underwriter commissions, because he thought "if each investor knew the extent to which the security he buys from the banker is diluted by excessive underwritings, commissions and profits, there would be a strike of capital against these unjust exactions[.]"[29]

In his book, *Other People's Money and How the Bankers Use It*, Brandeis likened needed securities disclosures to nutritional labeling on food:

> But the disclosure must be real. And it must be a disclosure to the investor. It will not suffice to require merely the filing of a statement of facts with the Commissioner of Corporations or with a score of other officials, federal and state. That would be almost as ineffective as if the Pure Food Law required a manufacturer merely to deposit with the Department a statement of ingredients, instead of requiring the label to tell the story...[30]

Consequently, Brandeis suggested that disclosures appear in bold print on each offering so that the end user could see the warning: "[K]nowledge of the facts must be actually brought home to the investor, ... by requiring the facts to be stated in good, large type in every notice, circular, letter and advertisement inviting the investor to purchase."[31]

Following Brandeis's recommendations,[32] American securities laws nearly start and end with disclosure under the 1933 and 1934 Acts.[33] Congress has stepped in throughout the years to bolster the original 1933 and 1934 Acts with additional disclosure requirements.[34] Consequently, "[d]isclosure obligations also exist pursuant to various provisions of the

---

[29] Williams, *supra* note 21, *at* 1214-15 (quoting Louis Brandeis).

[30] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, 104 (2009). More recently, Professor Justin Levitt has suggested a "Democracy Facts" disclaimer on political ads that looks like the "Nutritional Facts" label on food. Justin Levitt, *Confronting the Impact of* Citizens United, 29 Yale L. & Pol'y Rev. 217, 227 (2010).

[31] BRANDEIS, *supra* note 30, at 104.

[32] Thel, *supra* note 24, at 405.

[33] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 727-28 (1975) ("During the early days of the New Deal, Congress enacted two landmark statutes regulating securities. The 1933 Act was described as an Act 'to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.' The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. s 78a et seq. (1934 Act), was described as an Act 'to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.'").

[34] Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 9 (1985) (the point of the Williams Act was to make "disclosure, rather than court imposed principles of 'fairness' or 'artificiality,'... the preferred method of market regulation."); Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir. 1980) (per curiam) (the "very purpose" of the Williams Act was "informed decision making by shareholders.").

federal securities laws governing particular transactions."[35]

Although the securities laws are eighty years old, they have remained remarkably stable over time.[36] Disclosure and antifraud provisions have always had an intertwined and complimentary co-existence in the securities laws.[37] In sum, the federal securities laws represent a stark break with the previous laissez faire approach to securities sales nationwide, which preceded the 1929 stock market crash.[38]

B. Defining Pay to Play

If sunlight is the best disinfectant, as Brandeis suggested, the need for public disclosure is particularly acute in the arena of political contributions and expenditures by government contractors to stave off "pay-to-play" schemes. While the nomenclature varies from federal agency to agency and from state to state, contribution restrictions that apply to lobbyists, government contractors, or highly regulated industries are often known as "pay-to-play" regulations. They are referred to as "'pay-to-play' regulations, because they seek to prevent corrupt deals whereby contributors 'pay' officials for the opportunity to 'play' with the government."[39]

While the federal government has regulated pay to play in various ways, including the Hatch Act,[40] there is no uniformity in pay-to-play regulations in the fifty states.[41] Some states have no pay-to-play regulations at all. Fourteen states regulate contributions by lobbyists to

---

[35] Dennis J. Block, Nancy E. Barton, & Alan E. Garfield, *Affirmative Duty to Disclose Material Information Concerning Issuer's Financial Condition and Business Plans*, 40 BUS. LAW. 1243, n.8 (Aug. 1985) ("Section 5, 7, and 10 of the Securities Act of 1933, 15 U.S.C. §§ 77e, 77g and 77j, require extensive disclosures in connection with a public offering of securities; § 14(c) of the 1934 Act, 15 U.S.C. §§ 78n(c), requires disclosure in connection with the solicitation of proxies; and §§ 13(d), 13(e), 14(d), 14(e) and 14(f) of the 1934 Act, 15 U.S.C. §§ 78m(d), 78m(e), 78n(d) 78n(e), and 78n(f), require disclosure in connection with stock accumulation programs and tender offers.").

[36] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669. 669 (May 1984) ("The securities laws, however, have retained not only their support but also their structure. They had and still have two basic components: a prohibition against fraud, and requirements of disclosure when securities are issued and periodically thereafter.").

[37] Milton H. Cohen, *"Truth in Securities" Revisted*, 79 HARV. L. REV 1340, 1352 (May 1966); *see also* Stroud v. Grace, 606 A.2d 75, 86-87 (Del. 1992) ("Delaware, like Congress, has recognized that proxy voters generally do not attend shareholder meetings. We require proxy voters to have all material information reasonably available before casting their votes. Thus, proxy materials insure that directors do not use their "special knowledge" to their own advantage "and to the detriment of the stockholders.") (internal citations omitted).

[38] *Id.* at 166.

[39] BRENNAN CENTER FOR JUSTICE, WRITING REFORM : A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS, at III-25 (Torres-Spelliscy Ed. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729827.

[40] The Hatch Act, 5 U.S.C. §§ 7321-7326.

[41] Mike Zolandz, John R. Feore, III & Meredith Irvin, *State Pay-to-Play Laws Analysis of State Pay-to-Play Restrictions on Contractors* (Dec. 1, 2011), http://www.snrdenton.com/pdf/State_Pay_to_Play_Laws.pdf.

legislators and/or executive offices during the legislative session to prevent corruption, while a few states ban contributions from lobbyists to certain officeholders or candidates year-round.[42] Furthermore, seventeen states regulate contributions from potential state contractors to political candidates.[43]

Since private parties are strictly forbidden under most bribery laws from actually giving anything of value to a member of the government in exchange for an official act,[44] the problem of pay to play has evolved into a system of winks and nods and campaign contributions.[45] A potential contractor, who wants to be considered for a future deal, donates campaign contributions to the key government official, who has either decision making power or influence over the contracting process. This is particularly pernicious in the no-bid contract context where government is allowed to simply grant a contract without competition. These questionable political contributions and expenditures are pose a risk of corruption when political decision makers control the allocation of significant amounts of public dollars, as they do in the municipal bond market. The SEC has stepped in to regulate this market to prevent pay to play.

B. The Municipal Bond Market

The burgeoning municipal bond market includes both state and locally issued bonds.[46] The size of the municipal bond market is vast. States and their political subdivisions raise money for public works by borrowing it on the national capital markets.[47] American cities and towns have used bonds to finance their capital improvements, such as public water systems and transportation projects as early as the 1800s.[48] As SEC economists

---

[42] National Council on State Legislatures, *Limits on Campaign Contributions During the Legislative Session* (Dec. 6, 2011), http://www.ncsl.org/legislatures-elections/elections/limits-on-contributions-during-session.aspx (an additional 15 states ban all contributions during the legislative session for all donors).

[43] Zolandz, Feore, & Irvin, *supra* note 41.

[44] 18 U.S.C. § 1346 (2012); 18 U.S.C. § 201(b)(1)(2012); 18 § U.S.C. 201(c)(1)(A) (2012).

[45] David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 435 (2010) ("The phrase 'pay-to-play' comes from the widespread practice in the 1980s of law firms and investment banks lavishly supporting politicians who were in a position to give these firms a piece of the lucrative municipal bond business.").

[46] Gajan Retnasaba, *Do Campaign Contributions and Lobbying Corrupt? Evidence from Public Finance*, 2 J. L. ECON. & POL'Y 145, 153 (2006).

[47] *Id.* ("municipal bonds are debt instruments whereby the issuer, a state or municipal entity, raises money by selling investors the right to receive some greater sum of money in the future.").

[48] David M. Cutler & Grant Miller, *Water, Water Everywhere: Municipal Finance and Water Supply in American Cities*, (NBER 19 WORKING PAPER NO. W11096, 2005), http://ssrn.com/abstract=657621 ("Although the precise date of the first municipal bond issuance in the United States is unknown, there were very few in the early nineteenth century. New York City issued its first securities around 1812, and bonds to support the construction of the Croton Aqueduct were

explained, "[m]unicipal securities are debt obligations issued by over 50,000 units of state and local governments such as cities, counties, and special authorities or districts. Well over one million different municipal securities are outstanding..."[49]

While the municipal bond market was comparatively small after World War II, comprising less than $20 billion of municipal debt in 1945, the market has continued to mushroom over the past sixty-eight years.[50] In 1995, there was $1.3 trillion in outstanding municipal debt.[51] Economists at the Federal Reserve estimated the municipal bond market at $1.9 trillion in 2005.[52] In 2012, the municipal bond market had an estimated value of $3.7 trillion.[53] Michael Lewis summed up the state of play for *Vanity Fair*, "[f]rom 2002 to 2008, the states had piled up debts right alongside their citizens': their level of indebtedness, as a group, had almost doubled, and state spending had grown by two-thirds."[54]

The market for underwriting municipal bonds is competitive with large commissions at stake for the investment bank that wins the contract. These large commissions, the highest of which are earned in negotiated deals, can create perverse incentives to engage in pay-to-play abuses.[55] As detailed in

---

issued in 1837 and 1838."). David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 523 (1999) (noting that "The railroad companies maneuvered themselves to lay claim to public funds by exerting political pressure to secure the bond issues and then seeking to immunize their ill-gotten gains from public correction by relying on the constitutional protection afforded private contracts").

[49] Lawrence E. Harris & Michael S. Piwowar, *Secondary Trading Costs in the Municipal Bond Market*, USC FBE FINANCE SEMINAR, at 3 (May 18, 2004), http://www.usc.edu/schools/business/FBE/seminars/papers/F_8-27-04_HARRISTradingCost.pdf.

[50] SECURITIES AND EXCHANGE COMMISSION, *The State of the Municipal Securities Market* (2012), http://www.sec.gov/spotlight/municipalsecurities.shtml.

[51] John Chalmers, *Default Risk Cannot Explain the Muni Puzzle: Evidence from Municipal Bonds That Are Secured by U.S. Treasury Obligations*, 11 THE REVIEW OF FINANCIAL STUDIES 281, 283 (1998), http://darkwing.uoregon.edu/~finance/MuniDefaultRisk.pdf.

[52] Junbo Wang, Chunchi Wu & Frank Zhang, *Liquidity, Default, Taxes and Yields on Municipal Bonds*, FEDERAL RESERVE BOARD FINANCE AND ECONOMICS DISCUSSION SERIES DIVISIONS OF RESEARCH & STATISTICS AND MONETARY AFFAIRS, 1 (July 8, 2005), http://www.federalreserve.gov/pubs/feds/2005/200535/200535pap.pdf; *see also* Harris & Piwowar, *supra* note 49 (estimating the municipal bond market in 2004 at $1.9 trillion).

[53] *US Municipal Securities Holder*, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, http://www.sifma.org/research/statistics.aspx (last visited Sept. 27, 2012); Michelle Kaske & William Selway, *Fed Agrees With Citi on $3.7 Trillion Estimate*, BLOOMBERG (Dec. 8, 2011, 3:44 PM), http://www.bloomberg.com/news/2011-12-08/u-s-municipal-bond-market-28-larger-than-estimated-federal-reserve-says.html; William Selway, *U.S. Municipal Bond Market Shrinks as States, Cities Cut Debt*, BLOOMBERG (June 7, 2012, 12:04 PM), http://www.bloomberg.com/news/2012-06-07/u-s-municipal-bond-market-shrinks-as-states-cities-cut-debt.html (reporting that the municipal bond market shrank to $3.73 trillion, down by $11.3 billion); *see also Flow of Funds Accounts of the U.S.*, FEDERAL RESERVE BOARD, Table L.211 (Third Quarter 2012), *available at* http://www.federalreserve.gov/releases/z1/Current/z1.pdf (finding $3.74 trillion of municipal securities outstanding at the end of the fourth quarter of 2011.).

[54] Michael Lewis, *California* and *Bust*, VANITY FAIR (Nov. 2011), http://www.vanityfair.com/business/features/2011/11/michael-lewis-201111.

[55] *Municipal Bonds*, KIPLINGER, http://www.kiplinger.com/basics/archives/2007/08/bonds8.html (last visited Sept. 27, 2012) (stating that the average sales commission for municipal bonds is 4.5

the chart below, most municipal bond deals are negotiated deals.

Municipal Bond Issuance By Sales Type (by volume, in percent)[56]

Year	Competitive	Negotiated	Private Placement	Total
1996	25.4	72.6	2.0	100.0
1997	21.7	75.4	3.0	100.0
1998	22.8	75.1	2.1	100.0
1999	23.2	73.2	3.6	100.0
2000	24.2	72.7	3.1	100.0
2001	21.9	77.0	1.1	100.0
2002	20.1	79.2	0.8	100.0
2003	19.8	79.2	1.0	100.0
2004	19.1	80.1	0.8	100.0
2005	18.6	80.9	0.4	100.0
2006	18.0	80.9	1.1	100.0
2007	17.0	81.9	1.1	100.0
2008	13.6	85.3	1.1	100.0
2009	14.2	85.2	0.7	100.0
2010	16.9	82.5	0.6	100.0
2011	20.2	76.6	3.2	100.0

The underwriting fees in the early 1990s were also particularly large since they were not negotiated as arms-length transactions because of pay to play.[57] As former Counsel to the SEC Jon B. Jordan explains:

> [I]n the municipal securities industry ... dealers and underwriters use political contributions to the campaigns of

percent); Alan Walter Steiss, *Local Government Finance: Capital Facilities Planning and Debt Administration*, http://www-personal.umich.edu/~steiss/page68.html (last visited Sept. 27, 2012) (stating that the average profit for underwriters of municipal bonds is between 0.25 and 2 percent); *What You Should Know: Bonds and Bond Funds*, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION http://www.investinginbonds.com/learnmore.asp?catid=3&id=43 (last visited Sept. 27, 2012) (stating that the average municipal-bond-sales commission is 1 to 5 percent).

[56] Lori Raineri, Mark Robbins, Bill Simonsen & Keith Weaver, *Underwriting, Brokerage, and Risk in Municipal Bond Sales*, (Working Paper) (Aug. 3, 2012), http://www.brandeis.edu/global/pdfs/centers/munifinance/12%20-%20raineri%20et%20al%20brokers%20and%20underwriters.pdf (original data from Securities Industry and Financial Markets Association (SIFMA), *US Municipal Issuance Bid*, http://www.sifma.org/research/statistics.aspx).

[57] Kevin Opp, Comment, *Ending Pay-To-Play in the Municipal Securities Business: MSRB Rule G-37 Ten Years Later*, 76 U. COLO. L. REV. 243, 244 (2005) ("Investment banks contract with state and local governments to sell the debt in the form of bonds. If investment banks collected even 0.75% of that in fees, investment banks received $3.39 billion in 2003.").

> elected officials in order to solicit municipal bond business for their firms. These contributions are specifically directed to the campaigns of elected officials who will in turn favor those firms that contributed to them when it is time to select dealers for municipal bond work.[58]

Similarly, Gajan Retnasaba frames the municipal bond pay-to-play problem this way: "[i]n the public finance industry, a temptation for corruption was created by having governmental officials make highly subjective decisions regarding lucrative contracts. This created incentives for competitors to attempt to influence these officials by offering them private benefits in the form of political contributions."[59]

Economists Alexander W. Butler, Larry Fauver, and Sandra Mortal found the problem of pay-to-play was particularly pronounced from 1990 to 1993 when "[underwriters'] campaign contributions could cause distortions in at least two different ways. First, they could change the allocation of contracts to underwriters with political connections. Second, and more directly, campaign contributions might generate a *quid pro quo* in the form of higher fees for underwriting services."[60] These economists found that underwriters were able to extract larger fees in negotiated deals, as opposed to competitive deals, with municipal bond issuers by donating political campaign contributions to politicians who control the issuance of bonds:

> [W]hen underwriting firms routinely made political campaign contributions to win underwriting business from the state, gross spreads were significantly higher, but only for negotiated bid deals, i.e., those deals that can be allocated on the basis of political favoritism. The effect is statistically significant and economically large—it ranges from 11.8 to 13.8 basis points, depending on the specification. ... In contrast, competitive deals, which offer no room for favoritism, have fees that are only negligibly higher (and generally not statistically significant). This result continues to hold when controlling for underwriter fixed effects. We interpret these higher fees as the quid pro quo for political campaign contributions.[61]

---

[58] Jon B. Jordan, *The Regulation of "Pay-To-Play" and the Influence of Political Contributions in the Municipal Securities Industry*, 1999 COLUM. BUS. L. REV. 489, 493 (1999).

[59] Retnasaba, *supra* note 46, at 181.

[60] Alexander W. Butler, Larry Fauver & Sandra Mortal, *Corruption, Political Connections, and Municipal Finance*, 22 THE REVIEW OF FINANCIAL STUDIES 2873, 2890 (2009) (citation omitted).

[61] *Id.* at 2876.

These results have been replicated in other economic studies.[62]

Charles Anderson, who retired as manager of tax-exempt bond field operations for the Internal Revenue Service, summed up the problem for the *New York Times*, "[i]t's rare to sell a Senate seat, but it's not rare to sell a bond deal... Pay-to-play in the municipal bond market is epidemic."[63]

II. The SEC's Regulation of Pay to Play for Municipal Bonds

A. Arthur Levitt's Call to Arms on Pay to Play

The SEC under President Clinton made addressing pay-to-play in the municipal bond market a top priority.[64] When the SEC turned its attention in 1993 to the municipal bond market, private investors held over $850 billion in municipal securities.[65]

What brought the SEC into this regulatory space was the foresight of then-SEC Chair Arthur Levitt Jr.[66] Mr. Levitt was troubled by the fact that the municipal bond market was not functioning as a normal market.[67] Rather, the award of lucrative underwriting contracts seemed to flow not necessarily to the best talent, but rather to the most politically connected.[68] In particular, municipal bond underwriting business seemed to go to those investment banks that had given generously to mayoral and gubernatorial election campaigns.[69]

Many of the underwriters are themselves publicly traded companies.[70]

---

[62] David Rakowski & Saiying Deng, *Geography and Local (Dis)Advantage: Evidence from Muni Bond Funds* 30 (November 16, 2010) (working paper), *available at* http://ssrn.com/abstract=1571380 ("In general, fund managers earn a premium on raw returns when investing in [municipal bonds in] states with more corruption"); *see also* Retnasaba, *supra* note 46.

[63] Mary Williams Walsh, *Nationwide Inquiry on Bids for Municipal Bonds*, N.Y. TIMES, Jan. 9, 2009, at A1, *available at* http://www.nytimes.com/2009/01/09/business/09insure.html?_r=pagewanted=print (quoting Charles Anderson).

[64] Leslie Wayne, *Cleaning Up Municipal Markets*, N.Y. TIMES, Jun. 3, 1998, http://www.nytimes.com/1998/06/03/business/clean-up-municipal-markets.html?pagewanted=print ("[T]he S.E.C.'s chairman, Arthur Levitt Jr., declared cleaning up the municipal markets his 'No. 1' priority....[in 1994]").

[65] Jordan, *supra* note 58, at 495.

[66] Ethan Yale & Brian Galle, *Muni Bonds and the Commerce Clause After* United Haulers, 115 TAX NOTES 1037 n.4 (2007) ("'municipal bond' ... denote[s] all bonds eligible for preferential treatment by federal or state tax laws, whether issued by states or their political subdivisions.").

[67] Of course no market works perfectly in the real world, as there are asymmetries of information and inherent problems of moral hazard or adverse selection. Here a "normal market" is meant to capture a market where goods and services compete on the basis of quality and price.

[68] Order Approving Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Political Contributions and Prohibitions on Municipal Securities Business, Securities Exchange Act Release No. 34-33868, 56 SEC Docket 1045 (Apr. 7, 1994) [hereinafter Order].

[69] Sharon Walsh, *SEC's Levitt is Called Biased in Bond Probes; Denver, Orange County Urge Recusal*, WASH. POST, Nov. 23, 1995, at B13 (quoting Levitt).

[70] Philip Mattera, *Overview of Major Players*, PUBLIC BONDS (June 2004), http://www.publicbonds.org/major_players/players_over.htm (listing the top ten municipal bond

The secretive use of corporate money to gain advantage through the government presents a potential fraud on the market problem where investors cannot judge the true value of an investment. Investors are frustrated because they cannot tell which companies are making profits from sustainable, arms-length transactions and which are profiting due to pay-to-play corruption, which could abruptly end if discovered by law enforcement or the press.

Cataloging the many harms of corruption is beyond the scope of this piece.[71] Corruption damages both the government and the private sector as resources are allocated, not for their most productive use, but rather for the benefit of the select few who can gain an advantage from corrupt deals. Pay to play in the municipal bond market is not a victimless practice because it can steer government contracts not to the most efficient business partner, but rather to the best connected.

This, in turn, can cost the government more than if a contract was awarded on a competitive and lowest cost basis.[72] As one author articulated: "pay to play harms the public. Taxpayers and investors are harmed ...[because it] cheats taxpayers out of the quality of services taxpayers would receive if pay to play conduct were not involved....[and costs are passed on to] federal, state or local government[s]."[73]

Instead of starting with a SEC regulation, Chair Levitt encouraged Wall Street firms to take themselves out of the pay-to-play game.[74] In October of 1993, at the encouragement of Frank G. Zarb, the Chair of the National Association of Securities Dealers (NASD),[75] seventeen firms agreed to stop giving campaign contributions.[76] By the end of 1993, over

---

underwriters in 2003 as Bank of America, Bear Stearns, Citigroup, Goldman Sachs, J. P. Morgan, Lehman Brothers, Merrill Lynch, Morgan Stanley, RBC Dain Rauscher, and UBS).

[71] Robert S. Mueller, III, Dir., FBI, Address at the City Club of San Diego, YOUTUBE (May 11, 2006), http://www.youtube.com/watch?v=D-Wnmy6DwIA ("Public corruption is a betrayal of the public's sacred trust. It erodes public confidence and undermines the strength of our democracy. Unchecked, it threatens our government and our way of life.").

[72] Thomas J. Gradel, Dick Simpson & Andris Zimelis, *The Depth of Corruption in Illinois: Anti-Corruption*, Report No. 2, at 2, May 13, 2009, http://www.uic.edu/depts/pols/ChicagoPolitics/Anti-corruptionReportNumber2.pdf ("we now believe that the cost of corruption, or "corruption tax," for the Chicago and Illinois taxpayer is at least $500 million a year.").

[73] Brian C. Buescher, *ABA Model Rule 7.6: the ABA Pleases the SEC, but Does Not Solve Pay to Play*, 14 GEO. J. LEGAL ETHICS 139, 142 (Fall 2000); Alan Vinegrad, *Government Corruption and Civil Rico: Providing Compensation for Intangible Losses*, 58 N.Y.U. L. REV. 1530, 1572 (Dec. 1983).

[74] *Fireside Chat on Pay to Play* (SEC Historical Society Webcast Apr. 28, 2011), http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/programs/sechistorical_042811_transcript.pdf (David Clapp stating "So then [Arthur Levitt] went in sort of a different way, instead of just getting behind the MSRB, what he wound up doing was putting together a group of major dealers, investment banking dealers who became known as the 'Group of 17...'").

[75] Jordan, *supra* note 58, at 496.

[76] Jonathan Fuerbringer, *17 Big Underwriters Bar Campaign Gifts Aimed at Bond Sales*, N.Y. TIMES (Oct. 19, 1993), http://www.nytimes.com/1993/10/19/business/17-big-underwriters-bar-campaign-gifts-aimed-at-bond-sales.html?ref=arthurjrlevitt ("The firms that endorsed the ban include Merrill Lynch & Company; Goldman, Sachs & Company; Lehman Brothers; CS First Boston; Smith

fifty firms had joined the voluntary ban.[77] Shortly thereafter, Levitt urged the MSRB, the self-regulating organization (SRO) that has been authorized by Congress to make rules for the municipal bond market,[78] to promulgate rules to make the ban mandatory.[79] The Board did just that with Rule G-37 (a.k.a. the Political Contributions and Prohibitions on Municipal Securities Business Rule). The SEC approved this rule[80] explaining that "[u]nlike general campaign financing restrictions, ... which...combat unspecified forms of undue influence and political corruption, [these] conflict of interest provisions, ...are tied to a contributor's business relationship with governmental entities and are intended to prevent fraud and manipulation."[81]

MSRB Rule G-37[82] (and its companion Rule G-38[83]) curtailed how much money could be given to a candidate for an office that controlled the sale of municipal bonds in an attempt to blunt the pay-to-play culture that had taken hold in this bond market.[84] Looking back on the sordid practices

---

Barney Shearson, and Bear, Stearns & Company. The firms had been expected to adopt this policy since the industry trade group, the Public Securities Association, called for a moratorium on Oct. 5. Most big firms had endorsed that moratorium.").

[77] Jordan, *supra* note 58, at 497-98.

[78] *See* 15 U.S.C. § 78o (2006). The MSRB was created in 1975 in response to the fraudulent sale of New York City municipal bonds and the near financial collapse of the city. Ann Judith Gellis, *Municipal Securities Market: Same Problems - No Solutions*, 21 DEL. J. CORP. L. 427, 430-35 (1996).

[79] Jordan, *supra* note 58, at 498. The MSRB has continued its leadership in battling pay to play practices. As this article is being written pursuant to the Dodd-Frank Act, the Board has a proposed rule which would expand the pay to play restrictions in the industry. Key aspects of the proposed rule G-42 include the following: "a municipal advisor from engaging in 'municipal advisory business' with a municipal entity for compensation for a period of time beginning on the date of a non-de minimis political contribution to an 'official of the municipal entity' and ending two years after all municipal advisory business with the municipal entity has been terminated... [and] would prohibit municipal advisors and municipal advisor professionals from soliciting contributions, or coordinating contributions, to officials of municipal entities with which the municipal advisor is engaging or seeking to engage in municipal advisory business or from which the municipal advisor is soliciting third-party business..." MUNICIPAL SECURITIES RULEMAKING BOARD, MSRB DRAFT MUNICIPAL ADVISOR PAY TO PLAY RULE 5-6 (2011), *available at* http://www.msrb.org/Home/News-and-Events/~/media/Files/Training-Events/Outreach/MSRB-Draft-Rule-G-42.ashx; Rules and Regulations, Investment Advisers Act of 1940, 17 C.F.R. § 275.206(4)-5 (2012); Political Contributions by Certain Investment Advisers: Ban on Third- Party Solicitation; Extension of Compliance Date, 77 Fed. Reg. 35,263 (June 8, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-06-13/pdf/2012-14440.pdf.

[80] Self-Regulatory Organization; Municipal Securities Rulemaking Board, 59 Fed. Reg. 17,621 (Apr. 7, 1994).

[81] *Id.* at 17,628.

[82] *Id.* at 17,621; *Id.* at 17,625.

[83] David Clapp explained the genesis of Rule G-38: "G-38 came about because by this time we found out that people were circumventing G-37 basically through the use of outside consultants, paid consultants. ... It basically was to prevent everybody from using these consultants, to deter that and to detect attempts by dealers to avoid restrictions placed on them by G-37..." *Fireside Chat on Pay to Play*, *supra* note 74 (quoting Mr. Clapp). This paper will not discuss Rule G-38 further.

[84] *See, e.g.*, Blount v. SEC, 61 F.3d 938, 944-48 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making certain campaign contributions to politicians who award government underwriting contracts).

that motivated Rule G-37, David Clapp, a retired partner with Goldman Sachs & Co. and the 1994 Chair of the MSRB, reminisced in 2011:

> [W]ining and dining and a few other requests for money here and there... grew into a very big deal with people asking for firms or individual municipal finance professionals or their bosses to buy tables at these events costing from $25 to $50,000 and on occasion more. I have myself experienced someone sitting across the table from me saying that she would need a [sic.] $50,000 from me for a candidate who was running for office and I said I wasn't able to do that and she said, "Well, then I have to be very frank with you. You are not going to do any business with this particular client."[85]

Mr. Clapp's experiences in the municipal bond market were more typical than atypical.[86]

Rule G-37 fits the SEC's Money in Politics Model for the following reasons: (1) there were market inefficiencies in the early 1990s of underwriting contracts being awarded to banks that had given campaign contributions to state and municipal officials; (2) the efficiencies were unlikely to self-correct as the participating elected politicians needed more campaign cash for each succeeding election, while bankers competing to be underwriters wanted increasingly lucrative municipal bond deals; (3) the reasons why any given underwriting contract was granted was not transparent for outsiders; (4) millions in underwriting fees were at stake in the municipal bond market; and (5) corruption of the municipal bond contracting process occurred as states paid premium fees for services that would have cost less if the contracts had been awarded in a competitive bidding, but for the pay to play in the selection process for underwriters.

B. How the Courts Judge Pay-to-Play Regulations

The fact that the SEC and the MSRB regulate various aspects of pay to play is not the end of the legal inquiry, but rather the beginning. Given that pay-to-play regulation implicates cherished rights such as freedom of speech and of association, the judiciary may stop such regulations if they go beyond constitutional limits. American courts usually allow reasonable limits on contributions to prevent corruption, or the appearance of corruption, including proportional pay-to-play regulations.

Pay-to-play restrictions are heavily litigated on constitutional grounds.

---

[85] *Fireside Chat on Pay to Play*, *supra* note 74 (quoting Mr. Clapp).

[86] Nicholas Reade Everett, Note, *Kicking Back Corruption in the Public Fund Advisory Selection Process: The SEC's Proposed Rule to Curtail Pay-to-Play Practices by Investment Advisers*, 29 REV. BANKING & FIN. L. 557, 560-65 (discussing the details of pay to play scandals).

Courts consider the scope of the pay-to-play restriction to ensure that the regulation is properly tailored to be neither overbroad nor under-inclusive. Courts have upheld many restrictions on contributions on lobbyists, state contractors, and regulated industries.[87] Courts have sustained pay-to-play restrictions after examining their factual basis and determining that they were carefully designed to further important government interests.[88]

C. The Blount *Decision*

The courts have been generally hospitable to reasonable pay-to-play regulations, including the SEC's regulation of pay to play. In *Blount v. SEC*, the D.C. Circuit upheld the SEC's anti-pay-to-play Rule G-37 that prevented brokers and dealers from soliciting or coordinating contributions to officials of any municipal issuer with whom the broker or dealer is engaging or seeking to engage in municipal securities business.[89] The Supreme Court did not grant certiorari, so the D.C. Circuit Court's ruling is the final word on the matter.

In upholding the constitutionality of Rule G-37, the D.C. Circuit Court explained political contributions have both positive and negative aspects—being one part free speech and one part bribery.

> Contributions . . . may communicate support for a candidate and his ideas, but they may also be used as the cover for what is much like a bribe: a payment that accrues to the private advantage of the official and is intended to induce him to exercise his discretion in the donor's favor, potentially at the

---

[87] *See, e.g.*, Casino Ass'n of La. v. State, 820 So. 2d 494, 509–10 (La. 2002) (upholding ban on contributions from riverboat and land-based casinos to all candidates and all PACs that support or oppose a candidate); State v. Alaska Civil Liberties Union, 978 P.2d 597, 619–20 (Alaska 1999) (upholding a restriction on lobbyists' giving contributions to candidates outside of their own district); Gwinn v. State Ethics Comm'n, 426 S.E.2d 890, 892–93 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); Soto v. State, 565 A.2d 1088, 1097–99 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees to any candidate or political committee); Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61, 66–69 (Ill. 1976) (upholding ban on contributions from members of liquor industry to any candidate or political party).

[88] *See, e.g.*, Inst. of Gov'tl. Advoc. v. Fair Polit. Prac. Comm'n, 164 F. Supp. 1183, 1189 (E.D.Cal. 2001). Courts considering pay-to-play bans have applied varying levels of constitutional scrutiny in analyzing the statutes. This is an issue we will need to address in our brief. Some have held that the government must show that the ban furthers a "compelling" interest, *see, e.g.*, *Gwinn*, 426 S.E.2d at 892, while others have held that it must show an "important" or "substantial" interest, *see, e.g.*, *Inst. of Gov'tl. Advoc.*, 164 F. Supp. at 1194; *Casino Ass'n of La.*, 820 So. 2d 504. Similarly, some have held that the statute must be "narrowly tailored" to further the government interest, *see, e.g. Inst. of Gov'tl. Advoc.*, 164 F. Supp. at 1194; *Gwinn*, 426 S.E.2d at 892, while others have held that the statute must be "closely drawn," or something similar, to further the interest, *see, e.g. Casino Ass'n of La.*, 820 So. 2d at 504.

[89] Blount v. SEC, 61 F.3d 938, 944-949 (D.C. Cir. 1995).

expense of the polity he serves.[90]

The Court went on to explain that the parallel between the government's interest in defending the integrity of the market and of the political system: "here the effort is to safeguard a commercial marketplace. ... In every case where a *quid* in the electoral process is being exchanged for a *quo* in a particular market where the government deals, the corruption in the market is simply the flipside of the electoral corruption."[91]

In *Blount*, the SEC claimed that Rule G-37 was justified by the need to "(1) protect[ ] investors in municipal bonds from fraud and (2) protect[ ] underwriters of municipal bonds from unfair, corrupt market practices."[92] The D.C. Circuit Court found these reasons to be both substantial and compelling.[93] Indeed the Court found the conflict of interest between underwriters who are political donors to local politicians with influence over hiring underwriters patently obvious.

> [U]nderwriters' campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity. Petitioner himself remarked on national radio that "most likely [state and local officials] are gonna call somebody who has been a political contributor" and, at least in close cases, award contracts to "friends" who have contributed.[94]

The Court also found the link between ending pay to play and promoting a free market to be manifest as well, noting "the link between eliminating pay-to-play practices and the Commission's goals of 'perfecting the mechanism of a free and open market' and promoting 'just and equitable principles of trade' is self-evident."[95]

The Court also explained why pay-to-play arrangements in the municipal bond market were unlikely to be self-correcting:

> Moreover, there appears to be a collective action problem tending to make the misallocation of resources persist. As beneficiaries of the practice, politicians vying for state or local office may be reluctant to stop it legislatively; some, of course, may seek to exploit their rivals' cozy relation with

---

[90] *Id.* at 942.
[91] *Id.* at 943.
[92] *Id.* at 944.
[93] *Id.* (thereby, sidestepping the thorny question of what level of scrutiny to apply).
[94] *Id.* at 944-45 (citing *Morning Edition* (National Public Radio, June 1, 1994), *available in* LEXIS, News Library, Transcript No. 1358-9).
[95] *Blount*, 61 F.3d at 945.

> bond dealers as a campaign issue, but if they refuse to enter into similar relations, their campaigns will be financially handicapped. Bond dealers are in a still worse position to initiate reform: individual firms that decline to pay will have less chance to play, and may even be the object of explicit boycott if they do.[96]

The Court concluded that the SEC/MSRB was not required to show actual corruption before promulgating a prophylactic rule. As the Court wrote: "no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic."[97] Thus, the D.C. Circuit Court considered many aspects of the Money in Politics Model in its constitutional analysis of Rule G-37.

Rule G-37 also contained a solicitation ban, which was upheld by the Court as well. The D.C. Circuit noted that while "[s]olicitation of campaign funds... is close to the core of protected speech, as it is 'characteristically intertwined' with both information and advocacy and essential to the continued flow of both[,]" nevertheless the Court upheld the solicitation restriction in part because "[the underwriter] is barred from soliciting contributions [from the issuer] only during the time that it is engaged in or seeking business with the issuer associated with the donee."[98]

Rule G-37 required not only a restriction on contributions and solicitations of contributions, but also basic disclosures.[99] Former SEC attorney Jordan reminds us, "[c]ertain disclosure and record-keeping requirements were enacted together with Rule G-37 to 'facilitate enforcement of Rule G-37's "pay-to-play" restrictions and, independently, to function as a public disclosure mechanism to enhance the integrity of, and public confidence in, municipal securities underwritings.'"[100]

Most of the *Blount* decision focused on whether Rule G-37 violated the First Amendment and found decisively that it did not, since it was narrowly tailored to promote a compelling state interest. In a coda to the

---

[96] *Id.* at 945-46.

[97] *Id.* at 945.

[98] *Id.* at 941, 947.

[99] Municipal Securities Rulemaking Board, Form G–37 (2010), *available at* http://www.msrb.org/Rules-and-Interpretations/~/media/Files/Forms/FormG-37.ashx; Exchange Act Release No. 34-33868, 56 SEC Docket 1006, 1045 (April 7, 1994) ("rule G–37 will require dealers to disclose to the MSRB on Form G–37 certain information about political contributions, as well as other summary information, to facilitate public scrutiny of political contributions in the context of the municipal securities business of a dealer. Contributions to be reported include those to officials of issuers and political parties of states and political subdivisions made by the dealer, any municipal finance professional, any executive officer, and any PAC controlled by the dealer or by any municipal finance professional. Only contributions over $250 by municipal finance professionals and executive officers are required to be disclosed.").

[100] Jordan, *supra* note 58, at 507.

decision, the Court briefly disposed of the claim that Rule G-37 violated the Tenth Amendment by intruding on the prerogative of the states to regulate state elections.

> [P]etitioner claims that Rule G-37 is an effort to regulate state election campaigns and, as such, usurps the states' power to control their own elections. This contention is meritless. Rule G-37 neither compels the states to regulate private parties, as the Tenth Amendment prohibits, nor regulates the states directly ... Blount points to no theory of the Tenth Amendment or the commerce clause under which Congress is disabled from regulating private persons in their conduct of interstate trade in municipal securities, so we need not proceed further...[101]

The *Blount* case indicates that the D.C. Circuit supports the SEC's ability to regulate in the anti-pay-to-play area.

Economic analysis by Mr. Retnasaba indicated that Rule G-37 was effective in limiting pay to play. He found that:

> As would be expected in the presence of corruption, the use of negotiated bonds dropped suddenly following the banning of campaign contributions. Results imply that about one-third of municipal bond issuers (measured by value) acted corruptly, willing to switch from their natural reference for a competitive issue to a negotiated issue in order to gain the opportunity to realize a private gain in the form of campaign contributions...[102]

He went on to estimate that the MSRB's pay-to-play rule had saved municipalities significant money that would have been overpaid to underwriters, concluding that:

> The results suggest that prohibition of campaign contributions was effective in reducing a large portion of the corruption in the industry. A rough estimate suggests that the enacting of Rule G-37 by reducing corruption, saved municipalities $500 million in real interest costs for bonds sold in the first year it was enacted alone.[103]

In the end, Rule G-37 was a constitutional and efficient way for the SEC to protect the municipal bond market from pernicious pay-to-play schemes.

---

[101] *Blount*, 61 F.3d at 949 (internal citations omitted).
[102] Retnasaba, *supra* note 46, at 159-60.
[103] *Id.*

III. SEC'S REGULATION OF PAY TO PLAY IN PUBLIC PENSIONS

By the time Arthur Levitt left the Commission in 2001,[104] he was equally concerned by the behavior he saw when investment advisers sought lucrative fees from investing money from public pension funds.[105] As Levitt explained in 1999, "[j]ust as the 'culture of pay-to-play' came to corrupt the municipal securities market, pay-to-play has tainted the management of public [pension] funds."[106] He started, but did not complete, an investment adviser rule for public pensions.[107] The Bush Administration failed to take up the rulemaking, but President Obama's SEC revived it.[108] After a raft of embarrassing public pension scandals left several elected officials in jail,[109] the SEC promulgated Rule 206(4)-5 in 2010 to keep investment advisers from being major campaign donors to those politicians who control public pension funds.[110]

Like the municipal bond market, public pension funds are also a huge revenue source.[111] In 2011, the estimated size of the public pension fund

---

[104] Reuters, *S.E.C. Is Set To Restrict Pension Firms*, N.Y. TIMES (Mar. 31, 1999) ("Arthur Levitt, chairman of the S.E.C., said that his staff had uncovered possible wrongdoing in at least 17 states that offer public pensions to tens of thousands of bus drivers, firefighters and other workers.").

[105] *Remarks by Arthur Levitt, Jr., New York Private Equity Conference; New York, NY*, at 5 ("With the escalating costs of political campaigns....the enormous sums of money to be invested...and the prospect of huge payoffs for private equity firms, hedge funds, and their agents if they are able to attract even a sliver of this capital...we have created a situation in which workers' retirement savings are being used for private gain.").

[106] Arthur Levitt, *In the Best Interests of Beneficiaries: Trust and Public Funds* (Mar. 30, 1999), http://www.sec.gov/news/speech/speecharchive/1999/spch263.htm.

[107] S.E.C., Release No. 1812, Release No. IA - 1812, 70 S.E.C. Docket 611, 1999 WL 566490, 17 CFR Part 275, *Political Contributions by Certain Investment Advisers*, Proposed Rule, File No. S7-19-99, Aug. 4, 1999.

[108] SEC, Political Contributions by Certain Investment Advisers; Proposed Rule, 17 CFR Part 275, 74(151) Federal Register 39840, 39841 (Aug. 7, 2009), http://www.sec.gov/rules/proposed/2009/ia-2910fr.pdf ("Pay to play practices undermine the fairness of the selection process when advisers seeking to do business with the governments of States and municipalities make political contributions to elected officials or candidates, hoping to influence the selection process. In other cases, political contributions may be solicited from advisers, or it is simply understood that only contributors will be considered for selection. Contributions, in this circumstance, may not always guarantee an award of business to the contributor, but the failure to contribute will guarantee that another is selected.").

[109] Jose Martinez & Kenneth Lovett, *Disgraced Former Controller Alan Hevesi Gets up to 4 Years in Jail for Pension Fund Scandal*, NEW YORK DAILY NEWS, Apr. 15, 2011, http://articles.nydailynews.com/2011-04-15/local/29452968_1_hank-morris-assemblyman-andrew-hevesi-pension-fund; Mike Allen, *Treasurer's Downfall in Kickback Scheme Shakes Connecticut Political Establishment*, N.Y. TIMES, Oct. 25, 1999, http://www.nytimes.com/1999/10/25/nyregion/treasurer-s-downfall-kickback-scheme-shakes-connecticut-political-establishment.html?pagewanted=all&src=pm ("Mr. Silvester ... now faces up to six years in prison.").

[110] *See* Political Contributions by Certain Investment Advisors, 17 Fed. Reg. 41,018 (July 14, 2010) (codified at 17 C.F.R. § 275.206(4)-5).

[111] Mary Williams Walsh, *Political Money Said to Sway Pension Investments*, N.Y. TIMES (Feb. 10, 2004) ("Nationwide, about 2,600 state and local pension plans hold some $2.1 trillion for more than 20 million teachers, firefighters, garbage collectors, judges and other public employees and retirees. (The figures do not include federal workers.").

market was $4.6 trillion.[112] According to the U.S. Census Bureau, "[i]n 2010, the largest share of all state government cash and security holdings was in public-employee retirement trust funds, [a.k.a. public pensions] which accounted for 64.3 percent of state government cash and investments at $2.1 trillion."[113] Given the size of the market, adviser fees paid by public pension funds generate lucrative business for investment banks.[114]

Explaining why this investment adviser rule was needed for public pensions, Andrew J. Donohue, then-Director of the SEC's Division of Investment Management, explained, "[p]ay-to-play serves the interests of advisers to public pension plans rather than the interests of the millions of pension plan beneficiaries who rely on their advice. The rule we are proposing today would help ensure that advisory contracts are awarded on professional competence, not political influence."[115]

SEC Rule 206(4)-5 prevents investment advisers from exchanging large contributions for the ability to manage a public pension fund's investments.[116] Professor Richard Hasen summarizes the rule thusly:

> Under the rule: (1) an investment adviser may not provide investment advisory services for compensation to a government entity within two years after making a contribution to an official of the government entity it seeks to advise; (2) investment advisers may not pay third parties, known as placement agents, to solicit government entities for business on the adviser's behalf unless the placement agent is also subject to these restrictions; (3) investment advisers may

---

[112] Towers Watson, *Global Pension Asset Study 2012*, http://www.towerswatson.com/assets/pdf/6267/Global-Pensions-Asset-Study-2012.pdf (January 2012) (total pensions in the U.S. have $16.1 trillion in assets and 29% of those U.S. pensions are public for a total of $4.6 trillion in U.S. public pensions).

[113] Jeffrey L. Barnett & Phillip M. Vidal, *State and Local Government Finances Summary: 2010*, at 4 (Sept. 2012), http://www2.census.gov/govs/estimate/summary_report.pdf.

[114] Jeff Hooke & Michael Tasselmyer, *Wall Street Fees and The Maryland Public Pension Fund*, Maryland Public Policy Institute & Maryland Tax Education Foundation, 2, July 25, 2012 ("The 50 systems had total assets of over $2 trillion. In 2011, they spent over $7.8 billion in Wall Street fees..."); *id.* at 1 (average fees were 0.409 nationwide); Robert Reed & Brett Chase, *Sticker Shock: Lofty Fees, Low Returns*, http://www.bettergov.org/sticker_shock_lofty_fees_low_returns/ (Apr. 18, 2012) (reporting that a $30 billion pension fund paid $1.3 billion in investment advisor fees); Mike Alberti, *Private Consultants Rake in Public Pension Fund Fees*, http://www.remappingdebate.org/map-data-tool/private-consultants-rake-public-pension-fund-fees (Apr. 4, 2012) (reporting that, in fiscal year 2011, California Public Employees' Retirement System paid financial advisers $48.7 million, 1/3 the amount it paid its own employees).

[115] Curtis C. Verschoor, *We Need to Stop Pay-to-Play Corruption*, STRATEGIC FIN. 14, 16, Sept. 2009, http://www.imanet.org/PDFs/Public/SF/2009_09/09_09_ethics.pdf.

[116] For a good summary of the details of the new Rule, *see* Covington & Burling LLP, *Summary of the SEC's Pay-To-Play Rule 206(4)-5* (2010), http://www.cov.com/files/Uploads/Documents/Summary%20of%20the%20SEC's%20Pay%20to%20Play%20Rule.pdf.

> not solicit or coordinate contributions to the government entity the adviser is seeking to provide services to, or payments to political parties of the state or locality in which the adviser seeks to or provides services; and (4) investment advisers may not circumvent the rule by doing anything indirectly which, if done directly, would result in a violation of the rule. Finally, probably in an effort to assuage First Amendment concerns, the rule allows covered investment advisers to contribute up to $350 per election to officials for whom the adviser is entitled to vote, or up to $150 to officials for whom the adviser is not entitled to vote.[117]

In other words, just like the municipal bond dealers regulated by Rule G-37, under Rule 206(4)-5, the "investment adviser rule," the investor advisers can choose to be big fundraisers for municipal and state candidates, or they can advise public pension funds, but they cannot do both simultaneously.[118]

One motivation for the SEC's investment adviser rule was the downfall of the Connecticut Treasurer Paul Silvester.[119] As Professor Hasen recounts, "[i]n 1999, Connecticut's state treasurer pled guilty to racketeering charges. He later admitted in court to collecting campaign contributions in exchange for 'placing $500 million in state pension investments with certain equity funds.'"[120] California has had similar scandals.[121]

Also prominent in the minds of regulators was the downfall of New York Comptroller Alan Hevesi.[122] Then-New York Attorney General Andrew

---

[117] Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 251-52 (2012) (internal citations omitted).

[118] Following the SEC's lead, the Commodity Futures Trading Commission (CFTC) issued its own pay-to-play rules in 2012 imposing business conduct standards (BCS) on swap dealers (SDs) and major swap participants (MSPs). *See* Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).

[119] Sec. Exch. Comm'n v. Paul J. Silvester et al., Litigation Release No. 16759, 73 SEC Docket 1255 (Oct. 10, 2000) (reporting a pay-to-play scheme involving Connecticut state pensions funds and alleging violations of Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act); *see also* SEC v. William A. DiBella et al., Litigation Release No. 20498 (Mar. 14, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20498.htm; 2007 U.S. Dist. LEXIS 73850 (D. Conn., May 8, 2007), *aff'd* 587 F.3d 553 (2d Cir. 2009) (DiBella was fined for his role in the Treasurer Silvester scandal).

[120] Richard L. Hasen, *Lobbying, Rent Seeking and the Constitution*, 64 STAN. L. REV. 191, 252 (Jan. 2012).

[121] Marc Lifsher & Stuart Pfeifer, *Report of the CalPERS Special Review*, republished in the L.A. TIMES, March 14, 2011, http://documents.latimes.com/calpers-special-review/ ("In a scathing report, a former chief executive of the California public employee pension fund was accused of pressuring subordinates to invest billions of dollars of pension money with politically connected firms.").

[122] Times Topic Profile: Alan G. Hevesi, http://topics.nytimes.com/top/reference/timestopics/people/h/alan_g_hevesi/index.html.

Cuomo's "investigation into pay-to-play allegations ... in the New York State Comptroller's office...was capped off when Hevesi pleaded guilty to accepting almost $1 million in kickbacks. In exchange for the kickbacks, Hevesi admitted, he approved $250 million in pension funds investments with a California private equity firm."[123] Hevesi's and his associates' kickback scheme involved hundreds of investment firms.[124]

In November 2012, Hevesi was paroled from jail after serving nineteen months of his four year sentence.[125] Hevesi's elaborate gambit was not just a fraud on the political system. It was also a fraud on the market – as investors could have been misled into presuming that investment advisers were being picked because of their acumen and skill instead of their political connections.[126]

Not surprisingly given the backdrop of the Hevesi scandal, Michael Bloomberg, the Mayor of New York City, was supportive of the new 2010 SEC investment adviser rule. As he explained in a letter to the Commission, pay to play in choosing investment advisers for the city's public pension system could cost every New York City tax payer:

> When lucrative investment contracts are awarded to those who pay to play, public pension funds may end up receiving substandard services and higher fees, resulting in lower earnings. Because the City is legally obligated to make up any short fall in the pension system assets to ensure full payment of pension benefits, pay to play practices can potentially harm all New Yorkers.[127]

Both New York City and New York State stand to gain from the protection of Rule 206(4)-5 as fees are more likely to be competitively priced and therefore likely lower for taxpayers footing the bill of public pensions.

---

[123] Bruce Carton, *The SEC's Newest Targets? Muni-Bonds and Pension Funds*, Securities Docket (Nov. 11, 2010, 4:47 pm), http://www.securitiesdocket.com/2010/11/11/the-sec%E2%80%99s-newest-targets-muni-bonds-and-pension-funds/.

[124] Danny Hakim & Mary Williams Walsh, *In State Pension Inquiry, a Scandal Snowballs*, N.Y. TIMES, Apr. 18, 2009, at A1; Sec. Exch. Comm'n v. Henry Morris, et al., Litigation Release No. 21036, 2009 WL 1309715 (May12, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21036.htm (reporting action brought for alleged fraudulent scheme involving New York State's largest pension fund, the Common Retirement Fund (the "CRF") in violation of Section 10(b) of the Securities Exchange Act, Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act).

[125] James King Thu, *Alan Hevesi Paroled; Told to Avoid Criminals. Return to New York Politics Officially Illegal*, VILLAGE VOICE (Nov. 15 2012 at 1:04 PM), http://blogs.villagevoice.com/runninscared/2012/11/alan_hevesi_par.php.

[126] *See also* Arthur Allen & Donna Dudney, *Does the Quality of Financial Advice Affect Prices?*, 45 THE FINANCIAL REVIEW 387, 412 (2010) ("It is also possible that cronyism or corruption results in the selection of lower-quality advisors.").

[127] Letter from Michael R. Bloomberg, Mayor of N.Y., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Sept. 9, 2009), *available at* http://www.sec.gov/comments/s7-18-09/s71809-87.pdf.

Of course, not everyone embraced the need for a new SEC rule. The Investment Counsel Association of America tried to stop the SEC from promulgating the investment adviser rule in 2000 by issuing a highly critical report.[128] In the end, the Commission brushed aside criticism and forged ahead to unanimously embrace the new rule.

At the time that the Commission's adopted Rule 206(4)-5 in 2010, Chair Mary Schapiro made the following statement articulating the justification for the rule:

> An unspoken, but entrenched and well-understood practice, pay to play can also favor large advisers over smaller competitors, reward political connections rather than management skill, and — as a number of recent enforcement cases have shown — pave the way to outright fraud and corruption.... Pay to play practices are corrupt and corrupting. They run counter to the fiduciary principles by which funds held in trust should be managed. They harm beneficiaries, municipalities and honest advisers. And they breed criminal behavior.[129]

The Commission recognized that campaign spending could have a distorting impact, and it rightly chose to act to safeguard the integrity of the market from this tempting conflict of interest.[130] Rule 206(4)-5 fits into the SEC's Money in Politics Model for intervention because: (1) the market inefficiency allocated investment adviser contracts to those who had participated in pay to play exchanges with state and municipal officials in charge of investing vast public pension trust funds; (2) the problem was unlikely to self-correct as state and municipal officials involved in the pay-to-play process would continue to rely on campaign contributions to win re-election and investments advisors would continue to covet contracts to manage public pension trust funds; (3) this market for investment advisers lacked transparency as investors could not tell which investment advisers were successful as a result of pay to play versus investment acumen; (4) millions of dollars in commissions were at stake for investing $4.6 trillion in public pensions nationwide; and (5) corruption of the government was evident by the jailing of at least two public officials in New York and Connecticut for participation in the pay to play schemes.

---

[128] Investment Counsel Association of America, *Pay-to-Play and the Investment Advisory Profession* (2000), http://www.sec.gov/rules/other/f4-433/tittswo2.htm.

[129] Mary L. Schapiro, *Speech by SEC Chairman: Opening Statement at the SEC Open Meeting* (June 30, 2010), http://www.sec.gov/news/speech/2010/spch063010mls.htm.

[130] Press Release, SEC, *SEC Adopts New Measures to Curtail Pay to Play Practices by Investment Advisers* (June 30, 2010), http://www.sec.gov/news/press/2010/2010-116.htm.

IV. LESSON FROM THE SEC'S POST-WATERGATE INVESTIGATION

Forty years ago, in the aftermath of Watergate, the SEC took a leadership role in investigating domestic and foreign political contributions.[131] Watergate investigations by the U.S. Senate and the Special Prosecutor revealed illegal contributions from public companies. One company that was a focus of the Watergate investigations was Gulf Oil.[132] Money that Gulf Oil gave to President Nixon's Committee to Reelect the President was part of a larger slush fund[133] to pay for political contributions around the world.[134] The SEC stepped in to investigate whether any securities laws had been broken, first by companies flagged in the Watergate investigation and then more broadly by listed companies.[135]

SEC Commissioner A.A. Sommer, Jr. painted a gruesome picture of the corporate political spending in the decades leading up to the 1970s revealed by the SEC's post-Watergate investigation. The quote below from Sommer illustrates the magnitude of the deception the SEC uncovered among hundreds of top American public companies at the time:

> [W]e have indeed lost our innocence; we have in a sense known sin and been repelled by its face.... Among the most distressing of disclosures has been the revelation that many large corporations have engaged in a variety of misdeeds ... to an extent never imagined.... [T]he pattern of illegal political contributions extended back many years.... [T]hese contributions were carefully planned, artfully concealed and

---

[131] JOHN T. NOONAN, JR., BRIBES 674 (1984) ("Approximately 500 corporations came forward to confess to the canonical offense of making unreported, questionable payments overseas.").

[132] *Id.* at 637 ("Because corrupt practices were a crime, because they had, therefore, to be hidden on a corporation's books, a corporation committing them had to engage in fictitious accounting and fraud under the securities laws. The interest of the SEC in accurate accounting created for it an interest in discouraging corruption and illegal political payments. It was the SEC's suit that had finally flushed out Gulf's system of illegal disbursements.")

[133] *Id.* at 641 ("Slush fund was term designating money to be dishonorably employed.").

[134] Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16(1) Chapman L. Rev. 71, 92 (Spring 2012) ("Mr. Wild gave a grand total of $100,000146 and pleaded guilty of violating the federal election laws for his donation of corporate funds to CREEP. Later investigations revealed that the $100,000 was only the tip of the iceberg, and that $5.4 million returned to Gulf Oil from foreign countries in off-book transactions. This money was used for political contributions, gifts, and related expenses.") (internal citations omitted).

[135] REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES SUBMITTED TO THE SENATE BANKING, HOUSING AND URBAN AFFAIRS COMMITTEE 36 (May 12, 1976), *available at* http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1976_0512_SECQuestionable.pdf; at nearly the same time that the SEC was looking into foreign payments because of Watergate, the Chair of United Brands Corporation, Eli Black committed suicide by jumping off the Pan Am building in New York City on Feb. 3, 1975 prompting the SEC to investigate his company. It found that $1,250,000 had been paid to Honduras to lessen a tax on bananas. *See* NOONAN, *supra* note 131, at 656.

> in no sense the fruit of illicit pressures. The means of tucking the money away for future distribution were often carefully developed, with clear assignments of responsibilities and well-developed techniques for the bestowal of the favors. The most distressing aspect of all this -- more distressing, if possible, than the realization that many corporations had deliberately, knowingly, wittingly, and as the result of command from the highest levels, flaunted the American election laws – was the discovery that frequently these payments were made out of substantial pools of money that had been sucked out of the corporate accountability process and squirreled away in the accounts of overseas agents, Swiss bank accounts, Bahamian subsidiaries, and in various other places where the use of the money would be free of the questions of nosey auditors, responsible directors, and scrupulous underlings. These systems were characterized by such interesting phenomena as the transportation in suitcases of vast sums of money in one hundred dollar bills by top executives. False or misleading entries were made in the books of corporations to conceal the true purposes for which the money was used.... [I]t was the executive suite itself which was engaged in deceit, cunning and deviousness worthy of the most fabled political boss or fixer.[136]

Commissioner Sommer's dismay is nearly palpable in this quote.

The SEC Commissioners put their revulsion to work in urging Congress to tighten the rules on internal accounting and the rules for the use of corporate funds for donations to foreign officials. The SEC reported to Congress on its findings from its post-Watergate investigation which concluded that:

Foreign political contributions were reported by 20 percent of new registrants, but many of these contributions were allegedly legal. In most instances, the payments had nonetheless been inaccurately reflected in company books and records....We have found millions of dollars of corporate funds placed in hidden accounts and expended entirely at the discretion of corporate executives who caused or permitted the payments to be inaccurately recorded on corporate books....What we do see in all of these cases, on the basis of our two-year effort, is the sobering fact that this Country's system of protection for investors, developed over the past 40

---

[136] A. A. Sommer, Jr., *Crisis and the Corporate Community*, Midwest Securities Commissioners Association Conference, Aspen, Colorado, July 21, 1975, http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1975_0721_Sommer_CrisisT.pdf.

years, and which includes corporate self-regulation with independent auditors, outside directors and counsel, and which is ultimately enforced by the Securities and Exchange Commission, has been seriously frustrated.[137]

In light of these post-Watergate revelations of gross corporate misconduct, with respect to political expenditures here and abroad, SEC Commissioners in the 1970s touted the need for better reporting from companies. For example, Commissioner Sommer addressing the American Institute of Certified Public Accountants in 1974 told the group:

> [I]nvestors are ...rational people who try to make rational choices about where to invest their money. To make a rational choice in any matter, information is essential – and the possibility of a rational choice is enhanced if that information has certain characteristics. Investors must have information that is sufficient, timely, reliable and fairly presented.[138]

Contemporaneously, SEC Chair Ray Garrett Jr. said: "[T]he aggregate capital resources of our economy will best be employed if the allocation is left to the ... investors. But this can only be true ... when these investors know what they are choosing and rejecting."[139] In other words, for market discipline to work, transparency in the market is essential.

President Ford announced a task force to look into the questionable foreign payments by U.S. corporations on June 14, 1976. In the announcement, President Ford expressed his support for legislation:

> [W]hich would require reporting and disclosure of payments by U.S.-controlled corporations made with the intent of influencing, directly or indirectly, the conduct of foreign government officials...[and] legislation proposed by the Securities and Exchange Commission to make it unlawful (a) for any person to falsify any book, record or account made, or required to be made, for any accounting purpose; and (b) for any person to make a materially false or misleading statement

---

[137] Roderick M. Hills, Statement, *Statement of the Honorable Roderick M. Hills Chairman, Security and Exchange Commission, before the Subcommittee on Consumer Protection and Finance of the House of Representatives Committee on Interstate and Foreign Commerce* (Washington D.C. Sep. 21, 1976), copy of transcript at www.sechistorical.org/collection/papers/1970/1976_0921_HillsStatementT.pdf.

[138] A.A. Sommer Jr., Address, *The Four Musts of Financial Reporting*, (Washington D.C. Jan. 8, 1974), *available at* www.sechistorical.org/collection/papers/1970/1974_0108_SommerAICPA.pdf.

[139] Ray Garrett Jr., Address, *Improving Disclosure for Investors*, at 2-4 (Denver, Colo. Dec. 12, 1974), *available at* www.sechistorical.org/collection/papers/1970/1974_1212_GarrettImprovingT.pdf.

to an accountant in connection with any examination or audit.[140]

As a result of the SEC's post-Watergate investigations, Congress enacted the Foreign Corrupt Practices Act (FCPA),[141] which has a books and records reporting requirement as one of its centerpieces to ensure that foreign bribes are not offered or concealed from investors.[142]

The SEC's post-Watergate intervention demonstrates the salience of the Money in Politics Model because: (1) market discipline was thwarted by hundreds of public companies concealing their off-the-books political funds for use domestically and abroad; (2) this problem was not self-correcting as it had existed for decades in many public companies, that apparently concluded that the only way to stay in business was to continue to make questionable payments and political contributions whether legal or not; (3) these corporate political slush funds were concealed from the investing public; (4) millions of corporate dollars flowed through these slush funds; and (5) corruption of the government was evidenced by the resignation of President Nixon and other heads of state abroad who abdicated after investigations showed that American companies had bribed them.[143]

V. THE PETITION FOR A POST-*CITIZENS UNITED* SEC RULE

Inspired by the Supreme Court's 2010 *Citizens United* decision, ten law professors in the fall of 2011 petitioned the SEC asking for a new rule on transparency of corporate political spending (Petition File No. 4-637). This Petition has brought an unprecedented level of public support.[144]

The idea behind the Petition was not original. A dozen years before, in 1999, Professor Cynthia Williams suggested that the SEC should expand social responsibility reporting for public companies. Among the categories

---

[140] Gerald Ford, *Statement Announcing New Initiatives for the Task Force on Questionable Corporate Payments Abroad*, 1976 Pub. Papers 593, www.sechistorical.org/collection/papers/1970/1976_0614_PresidentQuestionableT.pdf.

[141] NOONAN, *supra* note 131, at 680 ("One aspect of the FCPA was absolutely unique. Its prohibitions applied only to payments intended to influence a country other than the United States... For the first time, a country made it criminal to corrupt officials of another country.").

[142] 15 U.S.C. § 78m (2010).

[143] Laura E. Longobardi, *Reviewing the Situation: What is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 433 (1987) (The discovery of payments by Lockheed to the Prime Minister of Japan, for example, forced his resignation ... Reports that Lockheed had paid Prince Bernhardt of the Netherlands $1 million compelled him to relinquish his official functions. Finally, reputed payments by Lockheed, Exxon, Mobil, Gulf and other corporations to the Italian Government caused the Italian President to resign..."); NOONAN, *supra* note 131, at 663 ("governments around the world had been told by American senators in the most public of forums, a Senate hearing, that they had been bribed.").

[144] SEC, *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities* [File No. 4-637], http://www.sec.gov/comments/4-637/4-637.shtml (last visited Nov. 28, 2012).

of reporting Prof. Williams suggested were "information on domestic and international political contributions"[145] including "(i) Support of candidates ... (ii) Direct contributions to political parties ... (iii) Support for ballot initiatives ... [And] statewide or federal lobbying efforts [as well as] lobbying efforts of any trade associations to which the company belongs ...."[146] The inability of shareholders or the investing public to monitor this political behavior makes it difficult for them to hold managers accountable for this spending. University of Pennsylvania Professor Jill Fisch suggested seven years ago, that modification of securities' disclosure is in order:

> It may also be desirable to incorporate political activity into the disclosure requirements applicable to publicly-traded companies under the federal securities laws. In addition to enabling shareholders to monitor the activities of a corporation's officers and directors, and thereby to police against possible waste or self-dealing, such disclosure would integrate information on political activity with a firm's reporting on the business operations to which the firm's political participation relates.[147]

Just one day after *Citizens United* was decided in January of 2010, a lone shareholder of AT&T stock asked the SEC to promulgate a new transparency rule on corporate political spending.[148] Regardless of who thought of it first, the idea is a good one. Post-*Citizens United*, the SEC should adopt a rule for transparency of political spending by public corporations.[149]

*A. Post-*Citizens United *Political Spending Raises Corporate Governance Issues*

One of the reasons listed companies should disclose their political spending to investors is so that investors may judge the efficacy of this nonmarket strategy for themselves. There is cause for investors to be concerned in light of recent scholarship by economists showing a negative

---

[145] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1310-11 (April 1999).

[146] *Id.* at 1299.

[147] Jill Fisch, *How Do Corporations Play Politics? The Fedex Story*, 58 VANDERBILT L. REV. 1495, 1565 (2005).

[148] James Evan Dallas, *Sec. Exch. Comm'n Petition No. 4-593* (Jan. 22, 2010) (seeking a "Rulemaking in Reaction to *Citizens United*").

[149] A new SEC rule may be in the works. *See* Matea Gold, *Advocates Cheer SEC Consideration of Corporate Disclosure Rule*, L.A. TIMES, Jan. 8, 2013, http://www.latimes.com/news/politics/la-pn-sec-campaign-spending-disclosure-20130108,0,55217.story; Office of Information and Regulatory Affairs, *Office of Management and Budget Unified, Regulatory Agenda and Regulatory Plan*, Dec. 21, 2012, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=3235-AL36.

relation between corporate political activity and shareholder value. For example, economist Dr. Michael Hadani reported to the SEC, after analyzing an eleven year sample of 1,110 small-, mid-, and large-cap S&P firms, "the regression analysis reveals that PAC expenditures and cumulative PAC expenditures have a statistically significant negative affect on firms' market value, both when examining their year to year PAC expenditures and also when examining their cumulative, 11 years, PAC expenditures."[150] In a soon to be published piece, Professor Hadani with co-author Professor Douglas Schuler, found:

> Although many believe that companies' political activities improve their bottom line, empirical studies have not consistently borne this out. We investigate ... a set of 943 S&P 1500 firms between 1998 to 2008. We find that firms' political investments are negatively associated with market performance and cumulative political investments worsen both market and accounting performance.[151]

Professors Hadani's and Schuler's findings are consistent with Professor John Coates' recent studies.[152] In examining the S&P 500, Professor Coates found that:

- CPA [Corporate Political Activity] correlates negatively with two different measures of shareholder power, which are themselves uncorrelated—ownership concentration and greater shareholder rights—and CPA correlates positively with measures of managerial agency costs— greater use by CEOs of corporate jets.
- CPA correlates positively with the significant fraction (11 percent) of large firm CEOs who gain post-CEO political office. ...
- CPA correlates negatively with measures of corporate value—industry-adjusted Tobin's *Q*—and that relationship, too, is weakest (or even positive) in heavily regulated or government-dependent industries, and is stronger in other industries, even after controlling for other factors in various ways, including with firm fixed effects. ....
- Firms that were politically active in 2008 experienced an average 8 percent lower increase in their industry-relative shareholder value

---

[150] Comment of Dr. Michael Hadani, *supra* note 14.

[151] Hadani & Schuler, supra note 14.

[152] Hadani, *Institutional Ownership Monitoring, supra* note 14. ; Remarks of John Coates, *Can Shareholders Save Democracy, supra* note 14; John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will* Citizens United *Have on Shareholder Wealth?*, HARVARD'S JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS, Sept. 2010 ("together with the likelihood that unobservable political activity is even more harmful to shareholder interests imply that laws that replace the shareholder protections removed by citizens united would be valuable to shareholders."); Aggarwal, Mesehke & Wang, *supra* note 14.

> from their crisis-era lows when compared to firms that were politically inactive in 2008, consistent with *Citizens United* inducing an increase in unobservable political activity by previously politically active firms, with a significant attendant drag on shareholder value. [153]

Professors Aggarwal, Mischke and Wang correspondingly found, in an economic examination of 12,105 firms, that "[t]here are important differences between [politically active] donating and non-donating firms. The key difference for our purposes is that the mean excess future return for soft money and 527 Committee donating firms is 2.8% while for non-donating firms, it is 3.6%."[154] These economists concluded that corporate political spending was indicative of firms with agency problems between shareholders and managers. These empirical findings indicate that investors have more than a prurient interest in knowing the scope of corporate political spending: rather, they have a financial interest in accountability so that they can protect their investments.[155] Increased transparency of corporate political spending would reduce monitoring costs for shareholders while increasing market efficiency.[156]

B. Corporate Political Spending in the United States Lacks Transparency

The 2010 midterm federal election showed the scale of undisclosed political spending.[157] Studies have shown that between one third and one half of the independent spending in 2010 was from unnamed sources.[158]

---

[153] Coates, *Corporate Politics, Governance, and Value Before and After* Citizens United, *supra* note 14, at 688.

[154] Aggarwal, Meschke & Wang, *supra* note 14; *see also* Jeffrey M. Drope & Wendy L. Hansen, *Futility and Free Riding: Corporate Political Participation and Taxation Rates in the United States*, 10 Bus. & Pol., no. 3, art. 2, at 17 (2009) (finding "Contrary perhaps to popular belief, or at least anecdotal illustration, we find after controlling for firm size and industry-level tax rates, among other controls, that there is no discernible effect of political spending on firm-level taxation...").

[155] There are also contrary economic studies which find that corporate political activity profits certain firms. Brian Kelleher Richter, (working paper)*'Good' and 'Evil': The Relationship Between Corporate Social Responsibility and Corporate Political Activity*, University of Western Ontario, June 24, 2011; Michael J. Cooper, Huseyin Gulen, Alexei V. Ovtchinnikov, (working paper), *Corporate Contributions and Stock Returns*, Sept. 26, 2008.

[156] *See* Comment of Dr. Susan Holmberg on Sec. Exch. Comm'n Petition File No. 4-637 at 8 ("The expected benefits of mandatory disclosure of corporate political spending would be substantial. Disclosure would help to mitigate the moral hazard problems inherent in CPA [corporate political activity] by diminishing the monitoring costs for shareholders, allowing them to make more informed investment decisions.").

[157] Comm. for Econ. Dev., *Hidden Money: The Need for Transparency*, in POLITICAL FINANCE 1 (2011), http:// www.ced.org/images/content/events/moneyinpolitics/2011/hiddenmoney.pdf (reporting that the Campaign Finance Institute estimated that organized groups may have spent $564 million on federal elections in 2010 while only disclosing $300 million).

[158] Bill De Blasio, Citizens United *and the 2010 Midterm Elections*, 3 (Public Advocate for the City of New York Dec. 2010), http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf (finding

Initial data from the 2012 federal election cycle gathered by Demos and U.S. Public Interest Research Group shows there was over $300 million in dark money spent.[159]

Money can get from a publicly-traded corporation into the political system without detection in the following way:

- First, the SEC currently requires no reporting of political spending. This enables a publicly-traded company to give a donation to a politically active nonprofit (usually organized under the Internal Revenue Code §§ 501(c)(4) or 501(c)(6))[160] without reporting this donation to the Commission.[161]
- Second, the politically active nonprofit, such as a § 501(c)(6) trade association, purchases a political ad supporting a federal candidate. This nonprofit will report these corporate donations to the Internal Revenue Service ("IRS"), but not to the public.[162]
- Third, the nonprofit reports to the Federal Election Commission ("FEC") that it has purchased a political ad. The FEC only requires the nonprofit to report earmarked donations.[163] If the publicly-traded corporation did not

---

36% of outside spending in the 2010 federal election was funded by secret sources); Congress Watch, *12 Months After: The Effects of* Citizens United *on Elections and the Integrity of the Legislative Process*, 12 (Public Citizen Jan. 2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf (finding "[g]roups that did not provide any information about their sources of money collectively spent $135.6 million, 46.1 percent of the total spent by outside groups during the election cycle.").

[159] "Dark money" is money that cannot be traced to its original source because it has been spent through an intermediary. Bowie & Lioz, *supra* note 13, at 5..

[160] 26 U.S.C. § 501(c)(4); § 501(c)(6).

[161] The SEC requires no disclosure of corporate political spending. Bebchuk et al, Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf ("Because the Commission's current rules do not require public companies to give shareholders detailed information on corporate spending on politics, shareholders cannot play the role the Court described.").

[162] L. PAIGE WHITAKER, ERIKA K. LUNDER, KATE M. MANUEL, JACK MASKELL, & MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V.* FEC: CONSTITUTIONAL AND LEGAL ISSUES 6 n.41 (2010), http://www.fas.org/sgp/crs/misc/R41096.pdf ("Under the Internal Revenue Code, § 501(c) organizations that file an annual information return (Form 990) are generally required to disclose significant donors (typically those who give at least $5000 during the year) to the Internal Revenue Service (IRS). 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). No identifying information of donors to § 501(c) organizations is subject to public disclosure under the tax laws except in the case of private foundations (which are a type of § 501(c)(3) organization). IRC § 6104(b), (d).").

[163] According to the instructions for FEC Form 9, "[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)." Fed. Election Comm'n, Instructions for Preparing FEC Form 9 (24 Hour Notice of Disbursements for Electioneering Communications) 4 (undated), http://www.fec.gov/pdf/forms/fecfrm9i.pdf; *see also* Fed. Election Comm'n, FEC Form 5 Report of

> "earmark" the donation, which nearly no sophisticated donor would, then the role of the corporation will never be revealed to the public.

The investing public can see that the nonprofit bought a political ad, but they cannot discern the role of the publicly-traded company in underwriting the purchase. As Peter Stone at the Center for Public Integrity reported on the eve of the 2010 midterm election, "[m]any corporations seem inclined to give to groups that are allowed by tax laws to keep their donations anonymous."[164] This theme was repeated on a larger scale in the 2012 election as Eliza Newlin Carney reported for *Congressional Quarterly*, "[w]hatever the moniker, secret money is playing an ever-larger role in the 2012 election."[165] The amount of dark money in politics more than doubled between 2010 and 2012.[166]

C. The Need for Better Disclosure from the SEC

One reasons that the Commission needs to act is because its sister agencies have failed to provide transparency of corporate money in politics for investors. For example, the Federal Election Commission ("FEC") could take the lead on requiring corporate political disclosures, but it is not.[167] As Former Chair of the FEC Trevor Potter explained in the *Washington Post*'s editorial page: "Things are so bad at the FEC that the commissioners have deadlocked three times in the past year over whether to even accept public comments about changing the inadequate disclosure regulations."[168]

The FEC has failed to promulgate any post-*Citizens United* disclosure rules. In June 2011, FEC Commissioner Weintraub lamented:

> [H]ere we sit, almost eighteen months after *Citizens United* was announced, mired in gridlock over whether certain

---

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.

[164] Peter Stone, *Campaign Cash: The Independent Fundraising Gold Rush Since 'Citizens United' Ruling* (Ctr. for Public Integrity Oct. 4, 2010), http://www.publicintegrity.org/articles/entry/2462/.

[165] Eliza Newlin Carney, *Politicking Under Cover*, CQ WEEKLY (Sept. 15, 2012 – 1:12 p.m.), http://public.cq.com/docs/weeklyreport/weeklyreport-000004152999.html.

[166] Paul Blumenthal, *'Dark Money' In 2012 Election Tops $400 Million, 10 Candidates Outspent By Groups With Undisclosed Donors*, HUFFINGTON POST, Nov. 2, 2012, http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html ("The amount spent by 'dark money' groups and reported to the FEC is already more than twice as much as was spent in 2010.").

[167] Torres-Spelliscy, *Hiding Behind the Tax Code*, *supra* note 12.

[168] Trevor Potter, *How the FEC Can Stop the Tidal Wave of Secret Political Cash*, WASH. POST (Nov. 16, 2012), http://www.washingtonpost.com/opinions/how-the-fec-can-stop-the-tidal-wave-of-secret-political-cash/2012/11/16/966c48cc-2dae-11e2-89d4-040c9330702a_story_2.html.

> aspects of the case may be addressed in the rulemaking, over whether the Commission is willing to hear from the public on a part of the case that my colleagues would prefer to pretend is not there. Regrettably, we cannot even agree on whether certain questions may be posed, let alone reach the stage to consider the substance of any final rule. Disclosure, which I have always considered one of the core missions of the FEC, has become, like the villain in a children's novel, the topic that may not be named.[169]

The third anniversary of *Citizens United* came and went without clear disclosure rules from the FEC.

Meanwhile at the state level, there is not a single unified system for reporting money that is spent in state or local elections.[170] States have their own disclosure laws which are regulated by each state's election officials.[171] A few states like Minnesota have strong laws capturing the wide range of disclosures.[172] Many states, including large states like New York, have gaping disclosure loopholes which allow corporations to spend in their elections without disclosure.[173] States also differ in their zest for enforcing the disclosure laws already on the books.[174] If corporations are spending in states with lackluster or unenforced disclosure laws, then investors have no way of discovering this spending, no matter how much

---

[169] Fed. Election Comm'n, *Statement of Commissioner Ellen L. Weintraub on the Draft Notices of Proposed Rulemakings on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, June 17, 2011, http://fec.gov/members/weintraub/nprm/statement20110617.pdf.

[170] For a 50 state overview *see* Robert Stern, *Sunlight State by State After* Citizens United, CORPORATE REFORM COALITION (June 2012), http://www.citizen.org/documents/sunlight-state-by-state-report.pdf.

[171] Kristen De Pena, *Ignoring State Disclosure Laws: Campaign Finance Trends* (Sept. 28, 2011), http://sunshinestandard.org/ignoring-state-%E2%80%9Cdisclosure%E2%80%9D-laws-campaign-finance-trends.

[172] This Minnesota law is likely to be revised in light of a ruling by the Eighth Circuit Court of Appeals. *See* Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 877 (8th Cir. 2012) ("Because Minnesota has not advanced any relevant correlation between its identified interests and ongoing reporting requirements, we conclude Minnesota's requirement that all associations make independent expenditures through an independent expenditure political fund, *see* Minn. Stat. § 10A.12, subdiv. 1a, is most likely unconstitutional.").

[173] Ciara Torres-Spelliscy, *Transparent Elections After* Citizens United (Brennan Center 2011), http://ssrn.com/abstract=1776482.

[174] Matea Gold & Chris Megerian, *States Crack Down on Campaigning Nonprofits, State Regulators Increase Pressure on Advocacy Groups Active in the Election to Disclose Their Donors. There Is No Such Effort on the Federal Level*, L.A. TIMES, Nov. 26, 2012, http://articles.latimes.com/2012/nov/26/nation/la-na-state-disclosure-20121126 ("California's Fair Political Practices Commission forced an Arizona-based group to reveal the source of $11 million it gave for two ballot initiative campaigns." Also "The legal wrangling between [Montana] state officials and ATP [American Tradition Partnership] is ongoing, but has already pulled back the curtain on the group's contributors.").

they may try.[175] Furthermore, the duty to disclose to the state under election laws often falls on candidates, political parties, and PACs, not donor corporations.

Another potential source of transparency is the IRS which requires public disclosures from certain political organizations.[176] IRS disclosure is strong as far as it goes; the IRS requires transparency for 527s, but the IRS is statutorily barred from revealing money flowing through other nonprofits into the political sphere such as 501(c)(4)s and 501(c)(6)s.[177]

The Federal Communications Commission ("FCC") is one more potential source of disclosure.[178] In March of 2011, the Media Access Project petitioned the FCC, asking for on-ad disclaimers of the sources of broadcast political ads and online access to the political file.[179] On April 27, the Federal Communications Commission (FCC) voted to place certain broadcasters' political files online.[180] The new FCC rule applies to the top four TV networks and in the top fifty media markets and it phases in over time.[181] Its biggest limitation is that the new rule only covers broadcast ads, leaving other media, like corporate sponsored campaign mailers, without the same transparency.[182]

The SEC is the best positioned of any federal agency to attain full disclosure of political spending from publicly traded companies.[183] First,

---

[175] Linda King, *Indecent Disclosure Public Access to Independent Expenditure Information at the State Level* 4 (National Institute on Money in State Politics Aug. 1, 2007), https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1.

[176] IRS, *Filing Requirements* (Jan. 7, 2011), http://www.irs.gov/charities/political/article/0,,id=96355,00.html.

[177] 26 U.S.C.A. § 501.

[178] Electioneering communications are reported to the FCC. *See* FCC, *Electioneering Communications Database* (ECD) (2009), http://gullfoss2.fcc.gov/ecd/; *see generally* Lili Levi, *Plan B For Campaign-Finance Reform: Can The FCC Help Save American Politics After* Citizens United*?*, 61 CATH. U. L. REV. 97 (Winter 2011).

[179] Press Release, Media Access Project, *Media Access Project to FCC: Mandate Disclosure of Political Broadcast Sponsors* (Mar. 22, 2011), http://www.mediaaccess.org/2011/03/media-access-project-to-fcc-mandate-disclosure-of-political-broadcast-sponsors/; Press Release, Media Access Project, *Media Access Project Says that FCC Media Report Lacks Meaningful Recommendations* (Jun. 9, 2011), http://www.mediaaccess.org/2011/06/media-access-project-says-that-fcc-media-report-lacks-meaningful-recommendations/.

[180] FEC, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations Final Rule*, 47 CFR Part 73, MM Docket No. 00-168; MM Docket No. 00-44 (2012).

[181] Martha T. Moore, *FCC Political Ad Database Reveals Little*, USA TODAY (Aug. 3, 2012), http://content.usatoday.com/communities/onpolitics/post/2012/08/fcc-political-ad-database-reveals-little/1.

[182] Ciara Torres-Spelliscy, *FCC Brings Sunlight to Elections, But the SEC Needs to Help, Too*, HUFFINGTON POST, Apr. 27, 2012, http://www.huffingtonpost.com/ciara-torresspelliscy/fcc-brings-sunlight-to-el_b_1459319.html.

[183] The SEC should act in part because the average publicly-traded corporation has not agreed to voluntarily disclose. *See* PAUL DENICOLA, BRUCE F. FREED, STEPHAN C. PASSANTINO, & KARL J. SANDSTROM, HANDBOOK ON CORPORATE POLITICAL ACTIVITY, EMERGING CORPORATE GOVERNANCE ISSUES 6 (Conference Board 2010) (noting that disclosure by for-profit corporations is still not the norm finding "as of October 2010, seventy-six major American corporations, including half

the Commission has clear regulatory authority to require disclosure from reporting companies.[184] Furthermore, it would be more efficacious to capture this spending at the source, instead of vainly attempting to catch it after it has gone out of the corporation and passed through intermediaries, such as opaque trade associations or other nonprofits.[185] Transparency of corporate political spending will empower the investing public to navigate the new post-*Citizens United* terrain with facts instead of speculation.[186]

C. The United States Is 46 Years Behind the United Kingdom on Disclosure

The United States is forty-six years behind the United Kingdom, which has required disclosure of corporate political spending since the 1960s.[187] Investors in U.S.-listed companies need a one stop shop to see all corporate political spending in an easy to search place on the SEC's webpage.

The U.K.'s experience can serve as an example when designing a new system for the United States. The U.K.'s Companies Act of 1967 imposed a duty on companies to declare political donations in the company's annual report over £50, which was subsequently increased to £200 in 1980.[188] However, this information was not systematically reported or aggregated in a single location.[189] In the 1990s, the lack of readily accessible data led the U.K. press to complain about the lack of transparency around party financing, including reports of millions of pounds of contributions from unnamed sources.[190]

---

of the S&P 100, had adopted codes of political disclosure. However, a similar shift toward political disclosure has not yet taken place outside of the S&P 100."); Heidi Welsh & Robin Young, *How Companies Influence Elections - Political Campaign Spending Patterns and Oversight at America's Largest Companies* 18 (Oct. 14, 2010), http://ssm.com/abstract=1692739. ("Fully 83 percent of the [S&P 500] index does not report on its political spending.").

[184] Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (prohibiting the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors"); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988) ("This Court 'repeatedly has described the "fundamental purpose" of the [Exchange] Act [of 1934] as implementing a "philosophy of full disclosure."'" (quoting Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477-78 (1977) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)))).

[185] BRUCE F. FREED & JAMIE CARROLL, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING 1-2 (2006), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932.

[186] *See* Comment of Dr. Michael Hadani on SEC petition File No. 4-637.

[187] Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U. OF SAN FRANCISCO L. REV. 479 (Spring 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1853706.

[188] Committee on Standards in Public Life, Fifth Report § 6.24 (vol. 1 1998), http://www.public-standards.org.uk/Library/OurWork/5thInquiry_FullReport.pdf.

[189] *Id.* at § 6.25 ("there is no central record of the companies that give political donations. That information is held in the reports of over one million registered UK companies.").

[190] Rosie Waterhouse, *Source of Pounds 15m in Donations to Tory Party Not Disclosed*, THE INDEPENDENT, (June 16, 1993) (reporting "The source of more than [ ] 15 [million pounds] in

In 2000, under the Political Parties, Elections and Referendums Act, the United Kingdom adopted amendments to its Companies Act, which improved reporting requirements for corporate political contributions.[191] The Act covers political advertisements in addition to direct donations to candidates or parties.[192] Under the Companies Act, if a publicly-traded company made a political donation of over £2,000, then the directors' annual report to the shareholders must include the donation's recipient and amount.[193] The Companies Act covers political spending by a U.K. company in elections for public office in the United Kingdom and in any European Union (EU) member state.[194] After the 2000 amendments, companies have given detailed accounts of how they spent political money in their annual reports to investors down to the pound.[195] In the United Kingdom, the directors' report is equivalent to a company's annual report on Form 10-K to the SEC in the United States, and £2,000 is roughly equal to $3,000 at current exchange rates.[196] The U.K.'s disclosure threshold of a few thousand dollars is a good example for future U.S. action to follow.[197]

---

donations to the Conservative Party made before the 1992 general election remains a mystery despite an exhaustive search of the accounts of 5,000 companies to see if they declared political donations last year.").

[191] Political Parties, Elections and Referendums Act at §§ 139–140, & sched. 19, http://www.legislation.gov.uk/ukpga/2000/41/pdfs/ukpga_20000041_en.pdf; *see also* Explanatory Notes to Political Parties, Elections and Referendums Act (2000), c. 41, http://www.opsi.gov.uk/ACTS/acts2000/en/ukpgaen_20000041_en_1. The Companies Act was amended again in 2006. Companies Act at c. 46, *see also* Companies Act 2006 Regulatory Assessment (2007), http://www.berr.gov.uk/files/file29937.pdf. In addition, directors are jointly and severally liable for any unauthorized political expenditures plus interest. *Id.* at § 369.

[192] Companies House, *Companies Act* (Oct. 1 2008), http://www.companieshouse.gov.uk/companiesAct/implementations/oct2008.shtml ("A company must also be authorised by its members before it incurs expenditure in respect of political activities such as advertising, promotion or otherwise supporting a political party, political organisation [o]r an independent candidate in an election.").

[193] Political Parties, Elections and Referendums Act, at § 140; *see also* ELECTORAL COMMISSION, GUIDANCE TO COMPANIES: POLITICAL DONATIONS AND LENDING (2007), http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0014/13703/Companies-Guidance-Final1_27776-20443__E__N__S__W__.pdf.

[194] Freshfields Bruckhaus Deringer LLP, *The 2011 AGM Hot Topics*, 21 (Dec. 2010), http://www.freshfields.com/publications/pdfs/2010/dec10/29290.pdf (British law firm Freshfields reports, "From 1 October 2008, the scope of statutory control was extended to donations to, and expenditure on, independent candidates at any election to public office in the UK or any EU member state—previous rules applied only to support for political parties and organizations.").

[195] *See* for example, British American Tobacco, *Annual Report*, 64 (2010).

[196] The original reporting threshold in the 2000 law was £200. Political Parties, Elections and Referendums Act 2000, at § 140. The amount was later raised to £2,000 in 2007 under secondary legislation, the British equivalent of American implementing regulations. *See* DEPARTMENT FOR BUSINESS ENTERPRISE & REGULATORY REFORM, GOVERNMENT RESPONSE TO CONSULTATION ON THE COMPANIES ACT 2006 – ACCOUNTING AND REPORTING REGULATIONS (2007), http://www.berr.gov.uk/files/file40480.doc.

[197] I caution the SEC against adopting disclosure thresholds that are too low. Courts across the country have routinely invalidated disclosure laws that capture tiny expenditures. *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 29 (1st Cir. 1993) (striking down a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as $1, a practice

D. Shareholders Need a New Rule is Because of Flaws in Current Disclosure

As explained above, while the idea for a political transparency rule is not a new one, the urgency for the rule has increased with the advent of post-*Citizens United* corporate political spending in federal elections and in an additional twenty-three states.[198] The need for the SEC to act on Petition No. 4-637 now is clear. Present campaign finance disclosure rules often hide the original source of funds from both investors and voters. In 2010, Nell Minow, an expert in corporate governance gave the Diane Sanger Memorial Lecture, addressing the impact of *Citizens United*. Ms. Minow urged:

> If investors are going to be able to send some kind of a market reaction to this political speech by corporations, we have to have better disclosure. We are currently facing a situation where some companies are taking public positions in favor of one thing and then finally money to intermediary groups to oppose it. We can't have that any more. So, we need better disclosure about the contributions and other kinds of political speech pay, that is paid out.[199]

Shareholders are already clamoring for more disclosure of political expenditures.[200] Fortune 500 companies don't have to read the writing on the wall; they can read the shareholder proposals in their proxies demanding more transparency.[201] In its 2012 Guidance, the Institutional

---

known as "first dollar disclosure"); *see also* Canyon Ferry Rd. Baptist Church v. Unsworth, 556 F.3d 1021, 1033 (9th Cir. 2009) (holding disclosure statute unconstitutional as applied to a one-time in-kind *de minimis* expenditure in a ballot measure context and stating "the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level").

[198] National Conference of State Legislatures, *Life After* Citizens United (Jan. 4, 2011) http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx (listing 23 states impacted by Citizens United).

[199] Nell Minow, *Diane Sanger Memorial Lecture*, Mar. 17, 2010, http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/programs/sechistorical-podcast-031710-transcript.pdf.

[200] SEC, *Bank of America No Action Letter*, Feb. 29, 2012, http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/trilliumassetstephen022912-14a8.pdf (allowing shareholders at Bank of American to file a shareholder proposal regarding the company's political spending); SEC, *Home Depot No Action Letter*, Mar. 25, 2011, http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf (allowing shareholders at Home Depot to file a shareholder proposal regarding the company's political spending).

[201] Sustainable Investments Institute (Si2), *FACT SHEET: Corporate Political Spending Shareholder Resolutions, 2010-2012, available at* http://www.sec.gov/comments/4-637/4637-1149.pdf ("Investors filed 282 shareholder resolutions about corporate political spending from 2010 to 2012. These proposals accounted for 41 percent of all votes on social and environmental issues in 2012. ... The vast majority (79 percent) asked companies to disclose more about spending before and after elections.").

Shareholder Services (ISS) suggested institutional investors vote in favor of resolutions requesting political spending disclosure.[202] In 2013, proxy adviser Lewis Glass & Co issued a report, which urged better disclosure of corporate political activity.[203] Many public companies are already voluntarily disclosing.[204] Comparing these voluntary disclosure "apples to apples" is nearly impossible since each company is disclosing a different set of data.

Because of the lack of transparency explained herein, determining the exact amount of money from public companies in American elections is currently impossible. Most corporate political spending is likely being hidden in plain sight in politically active trade associations. Nonetheless, some publicly-traded corporations spent money in the 2012 federal election through various Super PACs under their Doing Business As ("DBA") names. According to the Center for Responsive Politics, Chevron (ticker CVX) gave $2.5 million to the Congressional Leadership Fund Super PAC. Clayton Williams Energy (ticker CWEI) gave $1 million to American Crossroads Super PAC. Chesapeake Energy (ticker CHK) gave $250,000 to the Make Us Great Again Super PAC. Scotts Miracle Gro (ticker SMG) gave $200,000 to Restore our Future Super PAC. CONSOL Energy (ticker CNX) and Hallador Energy (ticker HNRG) each gave $150,000 to Restore our Future Super PAC. Pilot Corp (Ticker 7846 on the Tokyo Nikkei) gave $100,000 to the American Crossroads Super PAC.[205] Public companies have also made additional contributions to state elections through 527s like the Republican Governors Association and the Democratic Governors Association.[206] This peek into

---

[202] ISS, 2012 U.S. Proxy Voting Summary Guidelines, at 64 (Jan. 31, 2012), http://www.issgovernance.com/files/2012USSummaryGuidelines1312012.pdf.

[203] Courteney Keatinge & David Eaton, *Political Contributions: A Glass Lewis Issue Report 2012*, GLASS LEWIS & CO (2013), http://www.glasslewis.com/blog/glass-lewis-publishes-political-contributions-a-glass-lewis-issue-report/.

[204] Press Release, Center for Political Accountability, *Corporate Disclosure Expands as Political Spending Surges, New CPA-Zicklin Index Reveals* (Sept. 25, 2012), http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6906 ("almost 60 percent of companies in the top echelons of the S&P 500 are now disclosing some political spending information..."); Robert Ludke, *Is It Worth It? Political Spending and Corporate Governance*, BUSINESS ETHICS MAGAZINE (Nov. 17, 2012), http://business-ethics.com/2012/11/17/10419-is-it-worth-it-political-spending-and-corporate-governance/ ("it is imperative that companies take a much more proactive and transparent approach to the governance of their political giving.").

[205] Center for Responsive Politics, *2012 Top Donors to Outside Spending Groups*, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=O&superonly=S.

[206] Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under* Buckley's *Major Purpose Test?*, 15 NYU J. of Legislation & Public Policy 485, 489-90 (Spring 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988603 (finding "IRS reporting reveals that much of the money filling the coffers of the Governors Associations is actually corporate in origin. A majority of the corporate contributions (over 65%) comes from publicly traded corporations..."); *see also* Paul Abowd, *Million-Dollar Donation in Indiana Race May Skirt Limits on Corporate Giving*, CENTER FOR PUBLIC INTEGRITY CONSIDER THE SOURCE (July 26, 20126:00 am),

the spending of public companies shows that millions of dollars have been spent on elections in this past cycle.

F. Without Disclosure, There is a Catch-22 for Investors Trying to Evaluate the Utility of Corporate Political Activity

Even those academics who have been critical about the role of the SEC in requiring mandatory disclosures admit that some disclosures are needed to create an efficient market for securities. Frank Easterbrook and Daniel Fischel once wrote:

> [F]raud reduces allocative efficiency. So too does any deficiency of information. Accurate information is necessary to ensure that money moves to those who can use it most effectively and that investors make optimal choices about the contents of their portfolios. A world with fraud, or without adequate truthful information, is a world with too little investment, and in the wrong things to boot.[207]

Not unlike the obfuscation revealed post-Watergate by the SEC's investigations within Fortune 500 companies, at present, there is an agency problem within corporations because shareholders cannot monitor how corporate managers are spending corporate assets on political causes.[208] This is troubling because there is not a perfect symmetry between the interests of shareholders and managers vis à vis political spending. As Columbia Professor John Coffee Jr. put it, when it comes to corporate political spending, "managerial and shareholder interests are not well aligned."[209]

Ultimately, the opaque environment of corporate political spending is

---

http://www.publicintegrity.org/2012/07/26/10229/million-dollar-donation-indiana-race-may-skirt-limits-corporate-giving ("The RGA's 527 raised $16.7 million since April, nearly twice as much as its Democratic counterpart. Fifty-seven percent of that money came from corporate treasuries and corporate PACs, according to a Center for Public Integrity analysis of IRS records."); John Dunbarel & Alexandra Duszake, *D.C.-Based Governors' Associations Provide Back Door for Corporate Donors Organization Raises Millions from Energy Interests*, CENTER FOR PUBLIC INTEGRITY (Oct. 18, 2012 6:00 am) ("Companies with an interest in the development of the natural gas industry in the state, including Chesapeake, gave at least $4 million in corporate treasury funds to the RGA in the 2009-2010 election, according to a Center for Public Integrity analysis of CRP data. Among them were Exxon Mobil ($704,900), CONSOL Energy ($338,200), Encana ([$]151,400), the American Natural Gas Alliance ($101,000) and two natural gas-consuming electrical utilities.").

[207] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669. 673 (May 1984).

[208] Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 at 4 (2011) ("In the CPA [corporate political activity] context, there is considerable potential for personal advantages to corporate executives, particularly prestige, a future political career, and star power (Hart 2004) or to help political allies (Aggarwal et al. 2011).").

[209] John C. Coffee, Jr., *Testimony Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services, United States House of Representatives* (Mar. 11, 2010).

an open invitation for incumbent politicians to try to extract spending from unwilling corporations. While it is true that *Citizens United* only empowered independent spending at the federal level, the temptation by incumbents to coordinate surreptitiously with large spenders may be powerful. This risk was realized during the Watergate scandal.[210]

Corporate political spending could be a wasteful brand of rent-seeking. As Professor Richard Hasen suggests:

> [M]inimizing rent-seeking therefore may be a necessary component of an effort to improve U.S. economic productivity and decrease the deficit. Unchecked rent-seeking may retard long-term economic growth. In their look back at the Gilded Age in the United States, Glasser et al. suggest that an earlier round of regulation to curb rent-seeking was necessary to sustain U.S. economic growth.[211]

Getting to the truth of the matter of whether this is a waste of money or a sound investment is nearly impossible when such a significant chunk of money in election is untraceable. According to Demos and U.S. PIRG's study, 31% of the money spent independently in the 2012 election was untraceable, totaling nearly $315 million.[212]

Fitting Petition File No. 4-637 *a priori* into the Money in Politics Model is more difficult because the public is in the dark about the true scope of post-*Citizens United* corporate political spending. The new rule contemplated by Petition No. 4-637 arguably would fit the SEC's Money in Politics Model for the following reasons: (1) the potential for market inefficiencies as government policy at the state and federal level could be skewed to the benefit of those public companies that spend in elections. The winners in this system could be the generous political spenders, instead of the most efficient market participants; (2) the problem of the lack of transparency is not going to self-correct. If truthful disclosure of

---

[210] *Trevor Potter's Keynote Address at Conference Board's Symposium on Corporate Political Spending*, CLC Blog, Oct. 21, 2011, http://www.clcblog.org/index.php?option=com_content&view=article&id=437%3Atrevor-potters-keynote-address-at-conference-boards-symposium-on-corporate-political-spending-10-21-11 ("It is usually forgotten now how many major corporations were found to have violated the law: ITT, American Airlines, Braniff, Ashland Oil, Goodyear Tire & Rubber, Gulf, Philips, Greyhound – those were just a few of the well-known corporations caught up in the Watergate campaign financing scandal: 31 executives ended up being charged with criminal campaign violations, and many plead guilty."); STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 435 (1990) (listing corporations as breaking the campaign finance laws during Nixon's administration including, among others, 3M, Carnation Company and the American Ship Building Company).

[211] Richard L. Hasen, *Lobbying, Rent Seeking and the Constitution*, 64 STAN. L. REV. 191, 232 (Jan. 2012)

[212] Bowie & Lioz, *supra* note 13, at 5.; *see also* Paul Blumenthal, *'Dark Money' In 2012 Election Tops $400 Million, 10 Candidates Outspent By Groups With Undisclosed Donors*, HUFFINGTON POST (Nov. 2, 2012 1:36 pm) (finding $412 million was dark money in the 2012 federal election).

political spending were the norm, the use of disclosure loopholes would be the exception instead of the rule; (3) there is an utter lack of transparency about which companies are spending what on which political campaign because of the many loopholes in the regulations at the FEC, FCC, IRS and SEC; (4) Super PAC disclosures and certain 527 disclosures demonstrate that millions of dollars from corporate treasuries are being spent on politics already. Less clear is what exactly the size of the upside (if there is any upside) is for public corporations; and (5) the corruption of the government is not manifest yet. Clearly, the risk of governmental corruption is real. Historically, weak-willed politicians have been influenced by money.[213] Post-*Citizens United*, companies are spending hundreds of thousands of dollars at a time.[214] This seems like a recipe for governmental officials to favor their benefactors with governmental rewards.

H. Scope of a New Rule

The new SEC rule should be expansive in its definition of political spending. The federal and state governments have long been able to require disclosures, not only of contributions to candidates, political parties, and PACs, but also of money purchasing political ads that expressly advocate the election or defeat of a candidate.[215] In 2003, the Supreme Court expanded the government's disclosure power to cover electioneering communications—broadcast ads which mention a candidate

---

[213] *Ex-Congressman Begins Prison Sentence Cunningham Sentenced to 8 Years, 4 Months in Prison in Corruption Case*, ASSOCIATED PRESS (Mar. 4, 2006 5:07:14 PM ET), http://www.msnbc.msn.com/id/11655893/ns/us_news-crime_and_courts/t/ex-congressman-begins-prison-sentence/ ("Former Rep. Randy 'Duke' Cunningham began his first day in prison after being sentenced to eight years and four months for taking $2.4 million in homes, yachts and other bribes in a corruption scheme unmatched in the annals of Congress.); Bruce Alpert, *William Jefferson Reports to Texas Prison to Begin 13-year Sentence*, TIMES-PICAYUNE (May 4, 2012 at 12:40 PM), http://www.nola.com/politics/index.ssf/2012/05/william_jefferson_reports_to.html ("Federal prosecutors said [ex-Congressman] Jefferson collected $470,000 in funds sent to businesses controlled by his family, with the potential to make millions if the business deals he championed succeeded. The case is most infamous for the $90,000 FBI agents found in the freezer of his Washington D.C. home by FBI agents during a search conducted in August, 2005.... The money was most of the $100,000 in cash that a government informant had handed him ..."); Susan Schmidt & James V. Grimaldi, *Ney Sentenced to 30 Months in Prison for Abramoff Deals*, WASH. POST (Jan. 20, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/19/AR2007011900162.html ("The gifts [Congressman] Ney accepted from [corrupt lobbyist] Abramoff included a golfing trip to Scotland and other travel that prosecutors valued at more than $170,000. In return, Ney sought to insert four amendments to benefit Abramoff's clients into a 2002 election reform bill. Ney also admitted helping another Abramoff client win a multimillion-dollar contract to provide wireless communication services to the U.S. Capitol.").

[214] Charles Riley, *Oops! Aetna Discloses Political Donations*, CNN MONEY (June 15, 2012: 6:37 PM ET), http://money.cnn.com/2012/06/14/news/economy/aetna-political-contributions/index.htm ("Documents obtained and distributed by Citizens for Responsibility and Ethics in Washington show that Aetna made a $3 million donation to the American Action Network and a $4.05 million donation to the U.S. Chamber of Commerce in 2011.").

[215] Torres-Spelliscy, *Transparent Elections After* Citizens United, *supra* note 173.

directly before an election and are targeted to that candidate's electorate.[216] The new rule should cover political contributions, independent expenditures, and electioneering communications.

The new SEC rule should cover corporate spending in local, state, and federal campaigns so that investors get a complete picture of where the company is spending money. While federal races garner the most attention from the press and hold the potential for the most expensive media buys, many companies are focused on narrow regional or even local political fights.[217] A rule that only covered federal spending would miss the corporate money flowing into state races, including increasingly costly state judicial races.[218]

The new Commission disclosure rules should cover not just corporate money for candidate elections, but rather, any item that appears before an American voter on a ballot including ballot initiatives. Ever since the Supreme Court's *Bellotti* case in 1978, corporations have had the right to spend on ballot measures. In a recent Colorado ballot measure election, a group called 'Littleton Neighbors Voting No' spent $170,000 to defeat a zoning restriction that would have prevented a new Wal-Mart. As it turned out, Wal-Mart, and not a grassroots groups, exclusively funded 'Littleton Neighbors.'[219] In addition, the nonprofit pharmaceutical trade association known as PhRMA has funded 311 ballot measures in the past eleven years in California.[220]

The new rule would have a significant loophole in it if it left out contributions from companies to 527s, 501(c)(4)s and 501(c)(6)s.[221] Corporate contributions to trade associations and other nonprofit organizations are one way that companies hide their role in politics. The use of opaque nonprofits thwarts transparency of money from for-profit

---

[216] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

[217] LIAM ARBETMAN ET AL., THE LIFE OF THE PARTY: HARD FACTS ON SOFT MONEY IN NEW YORK STATE 1 (Common Cause/New York 2006), *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/SOFT_MONEY_REPORT.PDF (finding between 1999 and 2006, corporations and other business entities gave over thirty-two million dollars to New York State political parties' Housekeeping Accounts).

[218] Committee for Economic Development, *Partial Justice: The Peril of Judicial Elections*, (2011), http://www.ced.org/images/content/events/moneyinpolitics/2011/38751_partialjustice.pdf; Adam Skaggs, *Buying Justice: The Impact of* Citizens United *on Judicial Elections* 2 (Brennan Center 2010).

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

[220] Coulter Jones & Elizabeth Titus, State's Top 100 Political Donors Contribute $1.25 Billion, CALIFORNIA WATCH, June 4, 2012.

[221] Nonprofits do not enjoy a blanket privilege of anonymity. *See* Nat'l Ass'n of Mfrs v. Taylor, 582 F.3d 1, 22 (D.C. Cir. 2009) (upholding disclosure as applied to a trade association and holding that the fear of association with controversial speech is insufficient and does not rise to levels of harm in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (finding association led to economic reprisal, physical coercion, and other hostility toward members)).

corporations.[222]

There should be specificity about which candidate or ballot initiative is being supported by the corporation and in what amount. Disclosures should list the candidate supported and the amount spent in favor of that candidate, both directly and indirectly, through nonprofit intermediaries.[223] Only a rule that covers all political spending will end the asymmetry of information among managers and investors.

Periodic updating is also in order as political spending ebbs and flows along with the election cycle. As Professor Milton Cohen explained about securities disclosure more generally, "for the purposes of the continuing trading markets, the value of the original disclosures under the 1934 Act will gradually diminish to the vanishing point unless stale information is constantly replaced by fresh."[224]

The information reportable under the rule should be aggregated on the SEC's webpage in a sortable and downloadable format for easy public access.[225] It is not enough to have companies merely report to their particular shareholders, as in the United Kingdom;[226] for true clarity, the data across companies needs to be accessible in a single public repository.

Finally, the SEC needs to include an enforcement mechanism to make the new transparency rule meaningful. Clearly one of the reasons the Rules G-37 and 206(4)-5 have a high compliance rate is that the SEC enforces these rules.

Compliance with a new political transparency rule would likely have a low cost. Companies are already required to keep track of lobbying and political expenses in order to file accurate tax returns since these expenses are not tax deductible.[227] As Dr. Susan Holmberg explained in her public comment on Petition File No. 4-637: "So long as the reporting categories chosen by the SEC ... mirror the categories that the IRS [uses in] ... § 162(e), the cost of compliance may be as little as the hours it would require an employee to copy and paste data from an internal file into a public

---

[222] Torres-Spelliscy, *Hiding Behind the Tax Code*, *supra* note 12; *see also* Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sept. 19, 2011, http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html?_r=1&hp.

[223] FREED & CARROLL, *supra* note 185 at 1-2.

[224] Milton H. Cohen, *"Truth in Securities" Revisted*, 79 HARV. L. REV 1340, 1356 (May 1966).

[225] Sunlight Foundation Blog, *Bringing Sunlight to Campaign Contributions*, Feb. 2, 2010, ("All information should be online, searchable, sortable, downloadable and machine-readable.").

[226] Aileen Walker, Parliament and Constitution Centre, House of Commons Library, *The Political Parties, Elections and Referendums Bill –Donations*, 30 (Jan. 7, 2000), http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf ("The Companies Act 1967 imposed a duty on companies to declare in the directors' report any political donations above a certain limit. ... There is no central record of such donations...").

[227] Richard L. Hasen, *Lobbying, Rent Seeking and the Constitution*, 64 STAN. L. REV. 191, 203 (Jan. 2012) ("in 1993, Congress repealed the deduction as to certain lobbying expenses, including for 'influencing legislation.'"); 26 I.R.C. § 6113.

one."[228]

VI. THE SUPREME COURT SUPPORTS TRANSPARENCY

A. Disclosure under the Securities Laws

Once the SEC promulgates a new disclosure rule, precedent should be in the Commission's favor since the judiciary can uphold such a rule drawing on two separate lines of cases: (1) those upholding transparency under the securities laws and (2) those upholding it under the campaign finance laws. The Supreme Court supports disclosure in both securities law, to inform investors, and in campaign finance law, to inform voters. The Supreme Court has focused on disclosure as the *telos* of the Securities Exchange Act of 1934.[229] In *Santa Fe Industries*, the Supreme Court held:

> Section 10(b)'s general prohibition of practices deemed by the SEC to be "manipulative" in this technical sense of artificially affecting market activity or in order to mislead investors is fully consistent with the fundamental purpose of the 1934 Act "to substitute a philosophy of full disclosure for the philosophy of caveat emptor." Indeed, nondisclosure is usually essential to the success of a manipulative scheme.[230]

The *Santa Fe* Court went on to state: "the Court repeatedly has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute."[231]

Section 14(a) of the Securities Exchange Act of 1934 empowers the SEC to require proxy disclosure[232] "as necessary or appropriate in the public interest or for the protection of investors."[233] As the Supreme Court

---

[228] Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 at 7 (2011), http://www.sec.gov/comments/4-637/4637-12.pdf.

[229] Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 6-7 (1985) (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 476-77 (1977), quoting Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972), quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)) ("fundamental purpose of the . . . Act 'to substitute a philosophy of full disclosure for the philosophy of caveat emptor.").

[230] Santa Fe Indust. v. Green, 430 U.S. 462, 476-77 (1977) (internal citations omitted).

[231] Id. at 477-78 (internal citations omitted); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 528 n.6 (1974) (Douglas, J., Brennan, J., White, J. & Marshall, J., dissenting) ("Requirements promulgated under the 1934 Act require disclosure to security holders of corporate action which may affect them. Extensive annual reports must be filed with the SEC including, inter alia, financial figures, changes in the conduct of business, the acquisition or disposition of assets, increases or decreases in outstanding securities, and even the importance to the business of trademarks held. *See* 17 CFR ss 240.13a-1, 249.310; 3 CCH Fed.Sec.L.Rep. 31,101 et seq. (Form 10-K).").

[232] A "proxy" is a mailing sent to shareholder prior to the annual meeting that contains required disclosures as well as ballots for voting on key matters of corporate governance.

[233] Exchange Act § 14(a), 15 U.S.C. § 78n.

explained in *Capital Gains Research Bureau:*

> [A] fundamental purpose, common to these [securities] statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. As we recently said in a related context, 'It requires but little appreciation...of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry.[234]

As the Supreme Court stated in the *Zandford* case, "[a]mong Congress' objectives in passing the [1934] Act was 'to insure honest securities markets and thereby promote investor confidence' after the market crash of 1929."[235]

In 1995, the Court repeated this stance with respect to the pro-disclosure purpose of the 1933 Act:

> The primary innovation of the 1933 Act was the creation of federal duties-for the most part, registration and disclosure obligations-in connection with public offerings. [T]he 1933 Act "was designed to provide investors with full disclosure of material information concerning public offerings..." [And] "[t]he 1933 Act is a far narrower statute [than the Securities Exchange Act of 1934 (1934 Act) chiefly concerned with disclosure and fraud in connection with offerings of securities-primarily, as here, initial distributions of newly issued stock from corporate issuers"[236]

B. Disclosure under the Campaign Finance Laws

Previous Supreme Court Justices recognized the risk of corruption presented by corporate and union spending. For example, Justice

---

[234] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

[235] SEC v. Zandford, 535 U.S. 813, 819 (2002); The Supreme Court referred to the 1933 Act: "The primary innovation of the 1933 Act was the creation of federal duties--for the most part, registration and disclosure obligations—in connection with public offerings." Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 571 (1995).

[236] Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 571-72 (1995) (internal citations omitted); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 760 n.4 (Powell, J., Stewart, J., & Marshall, J. concurring) (1975) ("The stated purpose of the 1933 Act was '(t)o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce . . ..' *See* preamble to Act, 48 Stat. 74. The evil addressed was the tendency of the seller to exaggerate, to 'puff,' and sometimes fraudulently to overstate the prospects and earning capabilities of the issuing corporation. The decade of the 1920's was marked by financings in which the buying public was oversold, and often misled, by the buoyant optimism of issuers and underwriters.").

Frankfurter wrote for the majority in *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers:*

> One of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.[237]

This clarity of thought has been abandoned in more recent cases like *Citizens United* which evidences no fear for the use of concentrated economic power in political campaigns. Nonetheless, even in *Citizens United,* the Supreme Court has remained steadfast in its belief that transparency is needed in campaign finance.[238]

In the United States, campaign finance reforms typically come on the heels of political scandals, and many of the biggest U.S. political scandals have at their heart a corporate controversy.[239] The Supreme Court and many lower courts have repeatedly upheld the constitutionality of disclosure of money in politics, recognizing the state's interest in preventing corruption and fraud.

Starting with *Burroughs v. United States* in 1934, the Supreme Court upheld the reporting requirements imposed by the Federal Corrupt Practices Act of 1925—a response to the Teapot Dome scandal.[240] In

---

[237] United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers, 352 U.S. 567, 576 (1957) (Frankfurter, J. (quoting 65 Cong. Rec. 9507–08 (1924)).

[238] Justice Clarence Thomas is the lone Justice who does not share this belief.

[239] The 1907 Tillman Act, which bans contributions from corporations to federal candidates, followed after the public discovered in 1905 that insurance companies had given vast sums of money to the Republican Party using policy holder money, including for the 1904 re-election of Theodore Roosevelt. *See* 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 New York courts threw out the criminal charges). 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 Corrupt Practices Act of 1925 expanded the federal disclosure requirements. 43 Stat. 1070. The Watergate investigations revealed that oil companies among others were giving large, illegal and secretive contributions to Nixon's Committee to Re-Elect the President (CREEP). 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); MICHAEL A. GENOVESE, THE WATERGATE CRISIS 23 (1999) (listing illegal corporate campaign donors); George Lardner Jr., *Watergate Tapes Online: A Listener's Guide* (2010) (dairy industry as illegal donors).

[240] 3 Stat. 1070.

upholding this law, the Court emphasized that disclosure of campaign spending serves crucial anti-corruption interests: the U.S. government "undoubtedly ...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."[241]

Over the past four decades, the Supreme Court has recognized a number of state interests in disclosure of money in politics including *Buckley v. Valeo*'s voter information interest, anti-corruption interest, and anti-circumvention interest, *Caperton v. Massey*'s due process interest in judicial elections, and *Doe v. Reed*'s interest in ballot measure integrity.[242]

There is language in the *Citizens United* opinion which gives the government the ability to protect shareholders. As Justice Kennedy wrote for the *Citizens United* eight-person majority:[243]

> Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative...[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[244]

The language of the *Citizens United* opinion makes clear that shareholders have the right to hold corporations accountable for their political spending. Such accountability is impossible unless shareholders know in the first place which companies are involved in political spending and which are not.

Post-*Citizens United*, lower courts have also embraced the constitutionality of disclosure of money in politics. For example, one federal district court noted that after *Citizens United*, "[i]n essence, corporations are free to speak, but should do so openly."[245] The First Circuit upheld disclosure laws in both Maine and Rhode Island.[246]

---

[241] Burroughs v. United States, 290 U.S. 534, 545 (1934).

[242] Buckley v. Valeo, 424 U.S. 1 (1976); Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252 (2009); Doe v. Reed, 130 S. Ct. 2811 (2010). On remand, the district court in *Doe* reaffirmed the state's interest in disclosure in an as-applied challenge based on alleged risk of harassment. *See* Doe v. Reed, 823 F.Supp.2d 1195, 1212 (D. W. Washington 2011), http://electionlawblog.org/wp-content/uploads/doevreed-summary-judgment.pdf ("The facts before the Court in this case, however, do not rise to the level of demonstrating that a reasonable probability of threats, harassment, or reprisals exists...").

[243] Eight Justices voted in favor of campaign finance disclosure and disclaimers in both 2010's *Citizens United* and in 2003's *McConnell*. The *Citizens United* decision had a five to four majority on the question of overturning the federal ban on corporate political expenditures.

[244] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[245] Yamada v. Kuramoto, 2010 WL 4603936, at *1 (D. Haw. Oct. 29, 2010) (not reported).

[246] National Organization for Marriage v. Daluz, 654 F. 3d 115 (1st Cir. 2011) ("As with Maine's law, the disclosures required by the [Rhode Island] provision here impose no great burden on the exercise of election-related speech. All that is required is the completion of a one-page form, which can be filled out and submitted to the Board online. This relatively small imposition serves [a] recognizedly important government interest...").

Meanwhile, in *SpeechNow*, the D.C. Circuit held there were strong governmental interests in requiring disclosure of who had made contributions to independent expenditure political committees, including corporate donors. As the D.C. Circuit wrote:

> [T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures. Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.[247]

The Supreme Court denied SpeechNow's petition for certiorari, thereby leaving the D.C. Circuit's endorsement of disclosure intact.[248] The American judiciary has embraced disclosure across the board in securities and campaign finance laws. This allows legislatures and executive agencies breathing room to craft reasonable disclosure requirements.

CONCLUSION

The attention generated by *Citizens United* has sparked calls for the SEC to take a new step in regulating campaign finance by requiring across the board disclosure of political spending by registered issuers.[249] In one aspect, this new rule would be far broader in scope than previous Rule G-37 and Rule 206(4)-5 because it would go outside of the four corners of either the municipal bond market or public pension funds, and rather would apply to the entire universe of publicly-traded stocks. On the other hand, the new rule as contemplated by Petition File No. 4-637 would be more modest than the two previous rules which impose either adherence to a low contribution limit or secession of trading for a two year cooling off period after large contributions. The new rule would be more modest because it would only require disclosure, but would lack any monetary limits on corporate political spending. A transparency-only rule, like the previous anti-pay to play rules, shares the similar goal of ensuring the integrity of the market. The closest analog to Petition File No. 4-637 is the SEC's post-Watergate intervention when hidden and questionable political

---

[247] SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 698 (D.C. Cir. 2010).

[248] Keating v. Fed. Election Comm'n, 131 S. Ct. 553 (2010).

[249] Bebchuk et al, Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf ("Because the Commission's current rules do not require public companies to give shareholders detailed information on corporate spending on politics, shareholders cannot play the role the Court described.").

spending practices were revealed in hundreds of America's largest publicly traded companies.

Perched high in Dante's Paradise were just leaders and truth seekers.[250] Centuries later and an ocean away, we still strive for justice and truth in our politics and in our markets, yet self-interest frequently pulls both spheres into the dark where mischief and illegality thrives. Once again, self-regulation is unlikely to produce ideal results. Some sensible regulations are necessary. The SEC is uniquely positioned to act as the guardian of the integrity of America's capital markets and to protect current shareholders and potential investors.[251] The Commission should require that publicly-traded corporations disclose all political expenditures so that shareholders have a full and complete picture of how much corporate money is being placed into the political sphere.

---

[250] DANTE ALIGHIERI, THE DIVINE COMEDY PARADISE, Canto XVII & XVIII (written between 1308 and 1321) (published in 1555).

[251] SEC, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation* (Oct. 24, 2011) ("The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.").

1818 N Street N.W. · Suite 300 · Washington, D.C. 20036 · 202.742.1520 F: 202.742.1524 · http://SunlightFoundation.com

Statement for the Record
Lisa Rosenberg, Government Affairs Consultant
The Sunlight Foundation

Senate Committee on Rules and Administration
Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond

April 30, 2014

Mr. Chairman, Senator Schumer, Senator Roberts, members of the Committee, thank you for the opportunity to submit a statement for the record on behalf of the Sunlight Foundation. The Sunlight Foundation is a nonpartisan nonprofit that advocates for open government globally and uses technology to make government more accountable to all. We do so by creating tools, open data, policy recommendations, journalism and grant opportunities to dramatically expand access to vital government information to create accountability of our public officials. Our vision is to use technology to enable more complete, equitable and effective democratic participation. Our overarching goal is to achieve changes in the law to require real-time, online transparency for all government information, with a special focus on the political money flow, those who are trying to influence government and how government responds.

Given that mission, we have a strong interest in ensuring that the Supreme Court's call for robust disclosure of money in politics is satisfied, despite the many ways the Court has undone other pillars of our campaign finance laws. Unfortunately, despite the Court's reliance on transparency to cleanse massive political contributions from their corruption influence, today's laws are a far cry from the robust disclosure regime the Court seems to believe is in place. Congress must act to, at a minimum, uphold transparency—the last remaining pillar of our campaign finance system.

The Sunlight Foundation endorses three proposals that would increase transparency: the Real Time Transparency Act, S. 2207 and H.R. 4442, would create a robust, real-time disclosure regime for large hard money contributions; the DISCLOSE Act would provide for disclosure of dark money contributions that are laundered through fraudulent social welfare organizations; and lobbying reform would ensure that the lobbying activities of the wealthiest interests making large hard money or dark money contributions are disclosed. While none of these legislative initiatives would undo the damage wrought by the Court, all are important to deter corruption and inform voters.

1818 N Street N.W. · Suite 300 · Washington, D.C. 20036 · 202.742.1520 · F: 202.742.1524 · sunlightfoundation.com

Large "Hard Money" Contributions Must be Disclosed within 48 Hours

The Supreme Court's most recent assault to our campaign finance system came earlier this year, when the Court's decision in *McCutcheon v. Federal Election Commission (FEC)* opened the door for a handful of wealthy individuals to give millions of dollars directly to the candidates and parties. The Court overturned years of jurisprudence deciding that the only type of corruption that exists is *quid pro quo* corruption, nothing short of buying votes for bags of cash. This Court naively believes that there is no corruption or appearance of corruption when candidates solicit five- and six-figure contributions and donors receive—at a minimum—the ear of elected officials in exchange for their generosity. With that narrow framework as its starting point, the Court lifted the overall limit (currently $123,200) on the amount individuals may gave to all candidates, PACs and parties. Thanks to the activist Roberts Court, a single individual can now contribute more than $3.5 million to a single party's candidates and committees in a two-year period. A donor more interested in buying access and influence than partisanship could give $7.25 million to the candidates and committees of both major parties.

By lifting the overall limits, the Court hands wealthy donors with a megaphone, simultaneously silencing everyone who doesn't have the means to buy access and influence with a large check. In other words, this Court disregards the First Amendment rights of every US citizen except the tiniest handful of the super-rich—the 1% of the 1%. There is one way, however, to return a degree of power back to the citizens of the United States: Inform citizens of large contributions to candidates, parties and committees in real time. Knowledge is power, and disclosure is the last remaining constitutional tool that can be employed to empower citizens.

The Real Time Transparency Act would mandate disclosure of all contributions of $1,000 or more to parties, candidates and political committees within 48 hours. It merely extends the current 48-hour notice rule in the Federal Election Campaign Act that applies to $1,000 contributions in the last 20 days prior to an election to provide for year-round disclosures. It would also mandate that Senate candidates electronically file their disclosure reports. The importance of immediate disclosure is not limited to the weeks before an election. It is necessary year-round to inform voters and let them determine whether and how they will react to large contributions.

As the McCutcheon Court noted, "disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. They may also deter actual corruption and avoid

1014 N Street NW · Suite 300 · Washington, D.C. 20005 · 202.742.1520 · F 202.742.1524 · http://SunlightFoundation.com

the appearance of corruption by exposing large contributions and expenditures to the light of publicity." (Emphasis added. Internal citations and quotations omitted.)

The Roberts' Court is mistaken—or disingenuous—if it believes that today's campaign finance disclosure system is up to the task of exposing large contributions to the public in a timely manner. While the Court justifies lifting the caps on contributions in part because "reports and databases are available on the FEC's Web site almost immediately after they are filed" it conveniently ignores the fact that current reporting schedules delay disclosure by as much as three months—even more for Senate candidates who do not have to file their campaign finance reports electronically with the FEC.

The Real Time Transparency Act would be an important step towards providing citizens with information in a timely manner, so that they can decide whether and how to respond to a huge contribution given to their elected representative or candidate for federal office.

Dark Money Contributions Must be Disclosed

Four years ago, the Supreme Court first showed its willingness to undo laws designed to prevent corruption or the appearance of corruption in our political process, shattering a 100-year old precedent and dismissing the lessons of Watergate. In *Citizens United v. FEC*, the Court decided that unlimited contributions from corporations and wealthy individuals would not have a corrupting influence on our political system as long as they were independent from the candidates' campaigns.

We now know the results of that disastrous decision: the influx of over a billion dollars of unlimited, often dark money into the 2012 elections; the creation of a cottage industry of money launderers disguised as nonprofits in order to hide the contributions of wealthy individuals; an easy route for foreign money to slip into the U.S. political process; messages shaped by donors instead of candidates; and a disclosure system wholly incapable of making any of the secret money transparent.

To inform the public and deter corruption in a manner consistent with the Court's own findings, Congress must enact the DISCLOSE Act to create a disclosure regime that reflects the new reality of expanded independent spending. Specifically, the bill's robust reporting requirements for super PACs, corporations, unions and nonprofit organizations that make independent expenditures and electioneering communications will begin to address many of the problems wrought by Citizens United: It will shine a light on dark money; it will provide an enforcement mechanism to ensure that no foreign money is influencing our political process; it will allow citizens to determine the

1818 N Street N.W. Suite 300 · Washington, D.C. 20036 · 202.742.1520 · F: 202.742.1524 · http://SunlightFoundation.com

credibility of campaign ads based on the messenger as well as the message; and it will arm citizens with information about campaign funding before they go to the polls, in real time and online.

Lobbying Activities Must be Disclosed

Perhaps the most damaging result of both Citizens United and McCutcheon is that the decision will provide a powerful tool—unlimited sums of money—that increase the ability of stealth lobbyists to purchase access and influence without any disclosure. Under current law, no disclosure is required of influencers if they spend less than 20% of their time lobbying on behalf of any one client. Under the Court's new campaign finance regime, an elected official may solicit $500,000 or $1,000,000 from a single individual, giving that individual the opportunity to ask for help on his or her pet issue. Or, a stealth lobbyist can hint that a large, negative dark money ad buy may be in a politician's future if the politician does not do the lobbyists' bidding. If the individual doing the asking falls under the 20% loophole, there will be no disclosure, and no way for the public to determine whether access and influence is being purchased. Institutionalizing a class of secret wealthy power brokers will never create vigorous debate that is required of a well-functioning democracy. The Lobbying Disclosure Enhancement Act (H.R. 2339, 112th Congress) would enhance lobbying disclosure, but Congress has so far opposed efforts to close the 20% loophole. However, because of the dramatically and lasting influence wealthy donors have on public policy, the public is entitled to have stealth lobbying activities brought to light.

Conclusion

Because of the Roberts' Court, average citizens have literally lost their voice in our political system to a handful of super wealthy special interests and individuals. While the Court may not be concerned about silencing the majority of citizens of this country, it has at least upheld citizens' right to be informed, stating, "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." Real-time disclosure of hard money, disclosure of dark money and disclosure of lobbying are important and minimally intrusive ways to inform the public ensure accountability where free speech and the functioning of our democracy intersect.

CO-DIRECTORS
ERIKA FRANKLIN FOWLER
WESLEYAN UNIVERSITY
MICHAEL M. FRANZ
BOWDOIN COLLEGE
TRAVIS N. RIDOUT
WASHINGTON STATE UNIVERSITY

CONTACT
LAURA BAUM
PROJECT MANAGER
WESLEYAN UNIVERSITY
238 CHURCH STREET
MIDDLETOWN, CT 06459-0019
(860) 685-3259
LBAUM@WESLEYAN.EDU

April 29, 2014

To the Distinguished Members of the Senate Rules Committee,

On behalf of the Wesleyan Media Project, please include this letter and attached testimony in the hearing record for the Senate Rules Committee Hearing entitled "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond" (Apr 30 2014 10:00 AM, Senate Hart Office Building - Room SH-216).

Sincerely,

Erika Franklin Fowler
Assistant Professor
Department of Government
Wesleyan University

Co-Director
Wesleyan Media Project
http://mediaproject.wesleyan.edu

Written Testimony on Interest Group Advertising

Submitted to the Senate Rules Committee Hearing
April 30, 2014

Erika Franklin Fowler, Ph.D.
Assistant Professor
Department of Government
Wesleyan University
Wesleyan Media Project Co-Director

Michael M. Franz, Ph.D.
Associate Professor
Department of Government and Legal Studies
Bowdoin College
Wesleyan Media Project Co-Director

Travis N. Ridout, Ph.D.
Thomas S. Foley Distinguished Professor of Government and Public Policy
Associate Professor
School of Politics, Philosophy and Public Affairs
Washington State University
Wesleyan Media Project Co-Director

To the Distinguished Members of the Senate Rules Committee:

As the directors of the Wesleyan Media Project and academics, we have 40 years of collective experience examining trends in and influence of political advertising. As such, we are pleased to provide this written testimony to the Senate Committee on Rules and Administration on behalf of ourselves and the broader scholarly community to attest to what is known about the scope and influence of interest group activity and how disclosure matters.

The Wesleyan Media Project is a nonpartisan research unit, not an advocacy organization. However, we believe that accountability and governmental responsiveness are fundamental to democracy. We also believe that current regulations provide insufficient transparency to the public in real-time and that our data allow a better understanding of the impacts of ad sponsor disclosure.

Therefore, we are committed to providing and promoting greater transparency[1] in U.S. elections, which we typically do through real-time press releases on the sponsors, content and tone of political advertising throughout election season. Beyond our real-time press work, we conduct and contribute to scholarly research on the scope and influence of interest group activity in elections, and it is in that dual capacity that we would like to provide further information on what is known about the volume and scope of interest group activity and how disclosure in particular affects interest group influence.

As will come as no surprise, interest group involvement in U.S. elections has grown over the last few years. Table 1 displays the interest group totals for federal election advertising in 2011 and 2012. Groups overall accounted for nearly 30 percent of all airings in federal elections, with dark money advertising comprising nearly half (47 percent) of that total. Dark money constituted the majority of the interest groups ads in both U.S. House (52 percent) and U.S. Senate races (62 percent).

Table 1: Interest Groups Ads in Federal Elections from 2011-2012

Race	Sponsor	Disclosure	Total Ads	Percent of All Ads	Percent of Group Ads
President	Candidate/party		926,707	64.92%	
	Group	None	189,830	13.30%	37.91%
		Some	159,139	11.15%	31.78%
		Full	151,726	10.63%	30.30%
	Total		1,427,402		
Senate	Candidate/party		677,985	71.42%	
	Group	None	168,250	17.72%	62.01%
		Some	39,587	4.17%	14.59%
		Full	63,495	6.69%	23.40%
	Total		949,317		
House	Candidate/party		586,573	81.23%	
	Group	None	70,261	9.73%	51.84%
		Some	42,971	5.95%	31.71%
		Full	22,290	3.09%	16.45%
	Total		722,095		
Overall	Group	None	428,341	13.82%	47.20%
		Some	241,697	7.80%	26.63%
		Full	237,511	7.66%	26.17%

Table from Ridout, Franz and Fowler 2013; WMP analysis of Kantar Media/CMAG data. Note: "Full" disclosure indicates that the group is either a PAC or a 527. No disclosure means the group is either a non-profit 501c4 or a business or trade group. "Some" disclosure means the group has multiple organizational forms, some full and some non-disclosure. In this latter case it is unclear in the data which organizational form funded the ad. Source on degree of disclosure is the Center for Responsive Politics.

[1] Because we believe donor disclosure is important, we are pleased to provide a complete list of the foundations and institutions which have made the Wesleyan Media Project's work possible since 2010. We are especially grateful to the John S. and James L. Knight Foundation and Wesleyan University for ongoing support, and we thank Rockefeller Brothers Fund, Sunlight Foundation, Bowdoin College and Washington State University for their past support. Our ad tracking data come from Kantar Media/CMAG, and we are partnering with the Center for Responsive Politics to provide greater information on interest groups. The views expressed in this written testimony are ours, not necessarily those of our funders or partner organizations.

Table 2 shows interest group involvement in post-Labor Day advertising in both House and Senate races over the last twelve years. In U.S. House races, interest group involvement grew to nearly 18 percent of all airings in 2012 from a low of 1.5 percent in 2004, higher than even the pre-McCain-Feingold levels of 16 percent in 2000. The pattern in U.S. Senate races has been a relatively steady growth to nearly 23 percent of all airings in 2012.

Table 2: Group and Party Ads in Congressional Elections, 2000-2012

	Percent sponsored by...			
	Groups		**Parties***	
	House	*Senate*	*House*	*Senate*
2000	16.12%	5.74%	24.92%	25.35%
2002	6.46%	4.83%	31.03%	31.78%
2004	1.49%	4.55%	29.17%	23.50%
2006	3.73%	4.24%	33.92%	23.33%
2008	5.73%	13.35%	23.85%	30.50%
2010	13.45%	14.50%	24.10%	17.75%
2012	17.78%	22.55%	27.66%	19.48%

*Party ads combine independent and coordinated airings.
Table from Fowler, Franz and Ridout 2014. Source: Wisconsin Advertising Project and Wesleyan Media Project analyses of Kantar Media/CMAG data. All ads aired post 8/31 in each year. Before 2008, only top 75 or 100 markets are included.

In addition, evidence suggests that the types of groups involved in elections is shifting in response to the more relaxed campaign finance atmosphere. Figure 1 displays a typology of interest groups on two dimensions – whether a group concentrates primarily on a single issue and whether it purports to have a membership base. As shown in the figure, over the last three election cycles, we have seen a growth in multi-issue, non-membership groups (e.g., groups like Crossroads GPS and Majority PAC) at the expense of multi-issue membership groups like the Chamber of Commerce. What is especially important about this shift is how it connects to voter knowledge about the types of groups in question (e.g., voters typically know much more about the latter compared to the former, which we'll provide evidence to substantiate below).

Figure 1. Involvement of Interest Groups in U.S. Senate Races by Type, 2008-2012

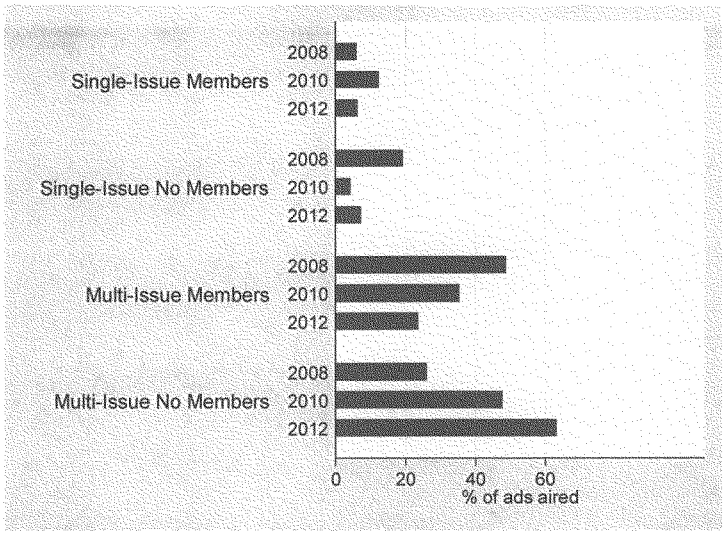


Figure from Franz, Fowler and Ridout 2013. Source: Wisconsin Advertising Project and Wesleyan Media Project analyses of Kantar Media/CMAG data.

In spite of *McCutcheon*'s removal of the aggregate caps on direct contributions, it is unclear whether the growth in interest group advertising will be curbed. While interest group advertising is more expensive than candidate ads that qualify for lowest unit rate cost,[2] there are several incentives for funds to continue to be funneled through interest groups. First, a growing literature has shown interest group advertising to be more effective than ads sponsored by candidates. This is in part because groups are seen as less self-interested than candidates and therefore are rated as more credible,[3] but also because the interest group shields the attacking candidate from the backlash that often occurs from criticizing their opponent.[4] While most of this evidence comes from experiments where respondents are randomly assigned to be shown identical ads where the only difference is the attributed sponsor, survey evidence from 2012 also indicates that interest group airings were rated by viewers as more effective.[5]

An even smaller (but growing) literature has investigated how interest group effectiveness is conditioned by disclosure and voter knowledge of the group itself. Evidence suggests that advertising by "unknown" groups – those with generic names who typically do not disclose their donors – tends to work better than ads from "known" groups (e.g., Planned Parenthood or the NRA)

[2] Fowler and Ridout. 2012.
[3] Garramone and Smith 1984; Garramone 1985; Groenendyk and Valentino 2002; Johnson, Dunaway and Weber 2011; Weber, Dunaway and Johnson 2012; Ridout, Franz and Fowler 2013.
[4] Garramone and Smith 1984; Garramone 1985; Shen and Wu 2002; Brooks and Murov 2012; Dowling and Wichowsky 2014.
[5] Fowler, Franz and Ridout. 2013.

for whom voters can use known cues about a group's motives to discount their message.[6] Perhaps even more disturbing than the notion that "unknown" groups would be most effective is the fact that the vast majority of American citizens had not heard of some of the largest interest group advertisers active in the 2012 elections. Table 3 displays the proportion of Americans who claim to have heard "a lot," "some" or "not to have heard" of some of the largest interest group advertisers. (The data are from a survey fielded in the immediate aftermath of the 2012 election.) As shown in the table, an overwhelming majority (62 percent) of Americans had not heard of Crossroads GPS despite the fact that the group had aired over 180,000 ads in federal races.

Table 3: Voter Knowledge of Interest Groups

Group	Heard "A Lot" About	Heard "Some" About	Haven't Heard of...	Ads Aired	Disclosure
Crossroads GPS	12.64%	25.78%	61.58%	181,185	None
Restore Our Future, Inc.	12.75%	26.14%	61.11%	117,707	Full
American Crossroads	17.81%	27.77%	54.42%	96,868	Some
Priorities USA Action	7.82%	16.27%	75.91%	65,823	Full
Americans for Prosperity	17.29%	35.21%	47.49%	60,930	None
U.S. Chamber of Commerce	33.50%	44.17%	22.33%	52,560	None
American Future Fund	3.40%	16.60%	80.00%	16,773	None
League of Conservation Voters	11.03%	33.46%	55.51%	9,212	None
Service Employees Int'l Union	20.38%	22.01%	57.61%	8,673	Full
Concerned Women for Amer.	10.74%	30.21%	59.05%	5,355	None
Planned Parenthood	55.01%	34.71%	10.28%	3,159	None
Sierra Club	25.81%	37.84%	36.34%	892	Some
MoveOn.org	34.13%	25.44%	40.43%	328	Some
National Rifle Association	51.88%	34.50%	13.63%	0	Full
Total				619,465	
% of all group ads in 2012				68.26%	

Table from Ridout, Franz and Fowler 2013.
Source: Wesleyan Media Project commissioned survey of 799 nationally representative respondents fielded 11/1-11/14/12 by YouGov; Ads aired come from Wesleyan Media Project analysis of Kantar Media/CMAG data; disclosure information from the Center for Responsive Politics.

Perhaps the silver lining in the literature on disclosure is that although interest group advertising has largely been shown to work better than candidate advertising, disclosure of donors (either through advertising or increased media attention) appears to curb – at least somewhat – the influence of unknown groups.[7] More research is needed given the very limited number of studies that examine the influence of disclosure, but on the whole, evidence suggests that shedding light on the donors to interest groups can limit – at least somewhat – the effectiveness of group attacks. In short, donor transparency and disclosure helps to ensure that candidates are on a more equal playing field with interest groups when it comes to advertising.

[6] Weber, Dunaway and Johnson 2012; Brooks and Murov 2012; Ridout, Franz and Fowler 2013.
[7] Dowling and Wichowsky 2013; Ridout, Franz and Fowler 2013.

REFERENCES

Brooks, Deborah Jordan and Michael Murov. 2012. "Assessing Accountability in a Post-Citizens United Era: The Effects of Attack Ad Sponsorship by Unknown Independent Groups." *American Politics Research* 40(3): 383–418.

Dowling, Conor M., and Amber Wichowsky. 2014. "Attacks without Consequences? Candidates, Parties, Groups, and the Changing Face of Negative Advertising." *American Journal of Political Science*. Published online before print. DOI: 10.1111/ajps.12094.

Dowling, Conor M., and Amber Wichowsky. 2013. "Does It Matter Who's Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure." *American Politics Research* 41(6): 965–96.

Fowler, Erika Franklin, Michael Franz, and Travis N. Ridout. 2013. "Which Ads Persuade? Identifying Persuasive Characteristics in Political Advertising," Paper presented at the 11th Annual American Political Science Association Preconference on Political Communication, August 2013, at the University of Illinois at Chicago.

Fowler, Erika Franklin, Michael Franz, and Travis N. Ridout. 2014. "Interest Group Advertising and Perceptions of Campaign Negativity." Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL, April 3-6, 2014.

Fowler, Erika Franklin, and Travis N. Ridout. 2012. "Negative, Angry, and Ubiquitous: Political Advertising in 2012." *The Forum* 10(4): 51–61.

Franz, Michael M., Erika Franklin Fowler and Travis N. Ridout. 2013. "Explaining Interest Group Advertising Strategies: Loose Cannons or Loyal Foot Soldiers?" Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL, April 2013.

Garramone, Gina M. 1985. "Effects of Negative Political Advertising: The Roles of Sponsor and Rebuttal." *Journal of Broadcasting & Electronic Media* 29(2): 147–59.

Garramone, Gina M. and Sandra J. Smith. 1984. "Reactions to Political Advertising: Clarifying Sponsor Effects." *Journalism Quarterly* 61(4): 771–75.

Groenendyk, Eric W. and Nicholas A. Valentino. 2002. "Of Dark Clouds and Silver Linings: Effects of Exposure to Issue versus Candidate Advertising on Persuasion, Information Retention, and Issue Salience." *Communication Research* 29(3): 295–319.

Johnson, Tyler, Johanna Dunaway, and Christopher R. Weber. 2011. "Consider the Source: Variations in the Effects of Negative Campaign Messages." *Journal of Integrated Social Sciences* 2(1): 98–127.

Ridout, Travis, Michael Franz, and Erika Franklin Fowler. 2013. "Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads." Working Paper.

Shen, Fuyuan and H. Denis Wu. 2002. "Effects of Soft-Money Issue Advertisements on Candidate Evaluation and Voting Preference: An Exploration." *Mass Communication & Society* 5(4): 395–410.

Weber, Christopher, Johanna Dunaway, and Tyler Johnson. 2012. "It's All in the Name: Source Cue Ambiguity and the Persuasive Appeal of Campaign Ads." *Political Behavior* 34(3): 561–84.

Questions for the Record
Ann M. Ravel
Former Chair, California Fair Political Practices Commission

Committee on Rules and Administration
United States Senate

"Dollars and Sense: How Undisclosed Money and Post-*McCutcheon* Campaign Finance Will Affect the 2014 Election and Beyond"

April 30, 2014

Questions Posed by Senator Angus S. King, Jr.

1. **Why are disclosure laws so important for our political system and to voters?**

Response:

Disclosure of the sources of political spending helps voters make informed decisions consistent with their own views and interests. Voters benefit from cues to help them decide how to vote, such as a candidate's political party, or whether there is a particular cause, industry, or other interest supporting her. As Chair of the California Fair Political Practices Commission (FPPC), I saw that people across the political spectrum believed strongly in the importance of getting information about the political process. In response to the FPPC's investigation of dark money in the 2012 election, people wanted to know who was behind the large contributions intended to influence the election so that they could make informed voting decisions.

Not only does disclosure provide vital information to voters, it also promotes accountability among political actors. As the Supreme Court has recognized, requiring disclosure deters those who would use money for improper purposes either before or after the election. Disclosure is also an essential means of gathering the data necessary to ensure compliance with other campaign finance rules, including those prohibiting foreign contributions.

Finally, transparency leads to enhanced public confidence and participation in the political and electoral process. Studies have shown that if people understand politics, there is increased trust and confidence in political institutions. By contrast, the lack of information leads to apathy and alienation. Thus, providing people with information not only assists them in voting, it tends to increase their interest in issues, which is likely to lead to greater civic engagement.

2. **How does the lack of disclosure affect the trust people have for their government?**

Response:

Undisclosed "dark" money in the political system not only increases the risk of corruption and undermines the ability to ferret out corruption, it also contributes to public

distrust and disassociation from government. The most recent Pew Research Center study shows that only 19% of Americans trust the federal government. For perspective, that's much worse than the 36% who trusted the federal government following President Richard Nixon's resignation after Watergate.

Dark money often is injected into the political process through networks of nonprofits using a variety of tactics to avoid disclosure laws and allow donors to cloak their identities from public view. Entities frequently operate across state lines and easily transfer or swap funds to sidestep disclosure. They emerge, spend money, and then disappear or change names, making it difficult to ensure compliance with disclosure rules.

These tactics can make it difficult to determine if contributions are legal, including whether or not they are from foreign sources. They also leave voters in the dark about which interests may be attempting to influence their votes, leading to distrust and a decline in confidence in the political process.

3. What initiatives do you see at the state level that can improve transparency and increase disclosure?

Response:

Recognizing the impact dark money networks with national reach are able to have on state and local elections, state and local election oversight officials are beginning to share information to improve disclosure. For example, as Chair of the FPPC, I worked with a non-partisan group of state and municipal elections oversight officials from across the country to promote transparency in campaign finance. Together, we founded the States' Unified Network (SUN) Center, which works to make state and local campaign finance disclosure information available nationally, and to share proposed legislation and regulations on campaign finance disclosure.

The SUN Center also serves as a forum for state and local officials to informally discuss matters relating to disclosure. This initiative and others like it seek to increase public confidence in the political process by increasing transparency.

* * *

HEARING—COLLECTION, ANALYSIS AND USE OF ELECTIONS DATA: A MEASURED APPROACH TO IMPROVING ELECTION ADMINISTRATION

WEDNESDAY, MAY 14, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 9:36 a.m., in Room SR–301, Russell Senate Office Building, Hon. Amy Klobuchar, presiding.

Present: Senators Klobuchar and Schumer.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Julia Richardson, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Correspondent; Jeffrey Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; and Rachel Creviston, Republican Senior Professional Staff.

OPENING STATEMENT OF SENATOR KLOBUCHAR

Senator KLOBUCHAR. Welcome to today's hearing of the Rules Committee. Good morning, everyone.

We are going to be focusing today on the use of data to improve the administration of elections. I want to thank Chairman Schumer for calling attention to this very important issue and for inviting me to chair this hearing.

I also want to acknowledge Staff Director, Jean Bordewich. Congratulations on your incredible service to this committee, and we wish you well in your new position, and I know that Chairman Schumer wanted to say a few words about Jean.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Well, thank you, and first, let me thank Senator Klobuchar, not only for chairing this hearing, but being a great member of the Rules Committee and a great member of the Senate.

And, I want to also welcome Heather Gerken, who was my daughter's teacher at Yale Law School, and I got to know her there, so thank you for coming, and all the other witnesses, of course, too——

[Laughter.]

Chairman SCHUMER [continuing]. Who did not have the opportunity to teach my daughter.

[Laughter.]

Chairman SCHUMER. But, today, I want to take a moment to recognize and thank one of the Senate's great public servants, the

Staff Director of the Rules Committee, my dear friend, Jean Parvin Bordewich. Today is Jean's final hearing with the Rules Committee. She is retiring from the Senate after 20.5 years of service to the House and to the Senate, but our time goes back much longer than that.

Jeanie and I met in 1969, when we were both young and impressionable interns on the Hill. I was interning for a Republican, New York Senator Charles Goodell, whose son is now the head of the NFL, but he represented Western New York, Jamestown. Jeanie was on the House side. She was interning for Representative Richardson Preyer of North Carolina. We met each other and almost instantaneously became friends as we learned our way around Capitol Hill and met people from all over the country.

Many years later, our paths crossed again. I was running for the Senate. Jeanie was running for Congress in New York's Hudson Valley. We saw each other out on the campaign trail and our friendship picked up right where it left off. While Jeanie did not win that race, the 22nd District's loss was the Senate's and my gain.

Shortly into my first term, Jean joined my staff and opened up the first office in the Hudson Valley that I think a Senator ever had. It was located in her basement in Red Hook in the Hudson Valley. Eventually, we let her have her house back.

After seven terrific years, Jean left my staff to become Chief of Staff to newly elected Congressman John Hall. She led him to a tough reelection victory, and as soon as she did that—that was her duty, and Jean is a person of duty—I was able to convince her to return to the Senate and help me as Staff Director when I became Chairman of this committee.

Over the past few years, Jeanie has helped guide the Senate community, assisting countless offices, staffs, and Senators, Republican and Democrat, in keeping with the grand tradition of this committee. Probably a week does not go by where a Senator does not come up to me and say thank you for just arranging this administrative thing which seemed impossible, and that has been done by the capable, non-political Rules staff under the guidance of Jean Bordewich.

Among her most noteworthy achievements was her organization of the 57th Presidential Inauguration Ceremony. It is a huge task, but Jean was up to the challenge and everyone said that the inauguration was one of the best. One of my fondest memories of Jean is from that inauguration. The sight of my old friend Jeanie leading President Obama onto the podium as a billion people watched throughout the world was a sight I will never forget. She had sure come a long way from our days as young, impressionable interns.

And now, all good things come to an end, so Jeanie is—you know, she is always an adventurer. She is always interested in new things and new ideas. Well, it is time to start another chapter in her life, and she and her husband, Fergus, who everyone knows is a very well known, insightful author and a delightful person, are ready to start a new adventure. She is retiring from the Senate to go to San Francisco, and I hope everyone—Jean is just public servant par excellence. When they used to talk about the British civil service and dedicated people who would just do the job through

thick and thin and made the British Empire what it was, well, if you had to think of an American version of that reputed, admired British civil servant, it would be Jean Bordewich.

She is a dear friend. She is part of our family, and we will stay friends for life, no matter where she and I end up on this globe. But, I want to thank her for her service to me, to this committee, to the Senate, to New York, to our country and our world. Jeanie, we will miss you.

[Applause.]

Senator KLOBUCHAR. Well, we feel like we should just end the hearing now.

[Laughter.]

Senator KLOBUCHAR. That was just beautiful. We do not usually have so much emotion at the Rules Committee. But, I was thinking as I sat here how I make the segue to the great stories about Jean's service and her steady hand, and I think a lot of the work of the Rules Committee is not just making sure the Senate works and that the inaugurations work, but it is also making sure our democracy works and that our election works, and Senator Schumer has taken a particular lead in looking at these issues.

We had a tremendous hearing last week on campaign finance and what that means to our democracy and this is really a part of that work, because, as you all know, earlier this year, the Bipartisan Presidential Commission on Election Administration came out with a very important report about how we can do things like reduce lines at polling places and improve the experience of people that can vote. When you have 100-year-old women who have to wait in line for hours, as the President pointed out at one of his State of the Unions, then we have a problem.

And, we appreciated the work of both the Bipartisan Commission put together from the counsel of the Romney campaign and counsel of the Obama campaign and coming up with some ideas. And one of the key conclusions of that report was that, quote, "despite the fact that elections drown in data, election administration has largely escaped this data revolution." The private sector has already figured out that using data to improve performance is the wave of the future. People going to the polls to exercise their right to vote deserves no less.

As our witnesses will discuss, collecting and analyzing data about how we run our elections can help us figure out what is going wrong and point us toward some cost effective solutions. Data can help us answer questions about these nuts and bolts things like, why are the lines so long? Did the Ward 2 polling place have enough workers at 8:00 a.m.? We have over 171,000 precincts across America. How do they do things differently and how does this affect someone trying to squeeze in picking the kids up from a soccer practice and getting that moment in to cast their vote, as is their right?

I have introduced a bill with Senator Tester, the Same Day Registration Act, which would try to make the voting process easier by allowing people to register on the same day as they cast their ballot. And we actually looked at the data when we introduced this bill and found that in the States that have some of the highest voter turnout, the vast majority of them, if you look at the top ten,

have the same day registration. And when you look at the ones at the bottom, none of them have same day registration.

And, I would point that these are blue States and red States and purple States and it does not necessarily have to do with their political bent as much as it has to do with the States' interest in having election participation and not limiting people's right to go to the polls.

What have we found from the data? Well, it turns out that something around 70 percent of people needed to update their address because they had moved since the last election. They were already registered, but this change needed to happen before they could vote. That is something that our State discovered from the data.

Because we had this information, our State looked at how we could fix the underlying issue. Just last week, our State legislature passed a bill that lets the Secretary of State automatically update voter registration rolls when people move within our State. We have consistently had one of the highest turnout rates in the country, and that is why Senator Tester and I and Congressman Ellison in the House are so devoted to this idea of same day registration.

With that, we are going to move to our panel of witnesses. We have, as Senator Schumer noted, Ms. Heather Gerken, the J. Skelly Wright Professor of Law at Yale Law School and the author of the book, The Democracy Index.

We also have with us Mr. Charles Stewart, who is a Distinguished Professor of Political Science at the Massachusetts Institute of Technology and Co-Director of the CalTech-MIT Voting Technology Project.

We have Mr. Kevin Kennedy, the Director and General Counsel at the Wisconsin—that is our neighbor, we do not always like the Packers—Government Accountability Board—but we will still have you as a witness.

We have Mr. David Becker, the Director of Election Initiatives at the Pew Charitable Trusts.

And, my personal favorite, because I was not wearing my glasses when I came in and saw the name "Justin Riemer" and thought we had Justin Bieber as a witness.

[Laughter.]

Senator KLOBUCHAR. I was wondering why, perhaps, we did not have more press here——

[Laughter.]

Chairman SCHUMER. With you, Madam Chair, have a long history——

Senator KLOBUCHAR [continuing]. Yes, I have a long history which we do not want to get into right now. If someone is out there watching this hearing on C–SPAN, he and I had a dispute about a bill I had.

[Laughter.]

Senator KLOBUCHAR. But, in any case, we have Justin Riemer, who serves as the Deputy Secretary and the Governor's Confidential Policy Advisory at the Virginia State Board of Elections.

I thank you all for joining us today and I would like to ask each of you to limit your statements to five minutes. If you have provided the committee with a longer written statement, without objection, the entire statement will be entered into the record.

Ms. Gerken, please proceed.

STATEMENT OF HEATHER K. GERKEN, J. SKELLY WRIGHT PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Ms. GERKEN. Senator Schumer, Senator Klobuchar, and members of the committee, I am a professor of election law and constitutional law at Yale Law School and I have written extensively on data-driven management and election administration. It is an honor to be here to discuss this important topic, although I will say, two Senators are a hard act to follow.

We measure what matters. The public and private sectors routinely collect and analyze data on virtually every aspect of our lives. As you just pointed out, Senator, data-driven management is not the ideal anymore, it is the norm, for corporations and the public sector alike. Good data help us spot, surface, and solve existing problems. They do not just allow us to identify policy making priorities, but they help move the policy making process forward. If you want a democracy worthy of our storied history, you must have 21st century management practices, and 21st century management practices require 21st century data collection.

This hearing could not be more timely, because data collection is at an inflection point in election administration. Things have improved in recent years, with a number of dynamic election administrators and State policy makers deploying data to identify problems and find solutions. Thanks to the effort by the public and private sector, most notably the Election Assistance Commission and the Pew Trusts, we now have the nation's first Election Performance Index, an idea I proposed several years ago but believed would take at least a decade to bring about.

For the first time, we have a baseline to compare State performance and evaluate the effects of reform over time. Thanks to the Pew Trusts and the efforts of, actually, many of the people sitting beside me, that index will provide a crucial policy making tool going forward.

Nonetheless, election administration still lags behind many public and private institutions on the data collection front. We still lack sufficient data on a wide variety of important issues, including the cost of elections, local performance, and voter experience. In some instances, the data are being collected, but they are not collected in a form that is accessible, let alone one that enables comparisons across jurisdictions.

The absence of good data handicaps our efforts to fix the problems we see in the elections process, to anticipate the problems we do not yet see, and to manage the reform process going forward. Unless we capitalize on the data collection efforts of recent years, we will never have an election system that meets the expectations of the American people.

The Federal Government is uniquely well suited to assist the States in nascent data collection efforts. The market variation in State and local election schemes lives up to Justice Brandeis' aphorism about the laboratories of democracy. But the laboratories of democracy can only work if someone is recording the results of the experiments. The Federal Government can provide what the States

cannot supply on their own, a cost effective, easy to use strategy for collecting, aggregating, and comparing State and local data.

As a scholar not just of elections but of Federalism, I know many worry about Federal interference with State policy making. But here, Congressional action will vindicate rather than undermine Federalism by making it easier for States to do their jobs.

All of the States—all of us—benefit from more and better data on election policy. Without more and better data, we risk turning the great promise of decentralization, that it can help us identify and implement better policy, into an empty promise. Data helps States identify the drivers of performance, pinpoint the cost effective strategies for solving shared problems, and decide when the reform gain is not worth the candle.

It would be a terrible waste of time and resources to ask the already cash-strapped States to move toward 21st century data collection practices on their own. Local election administrators are already asked to do too much with too little. The Federal Government must play its proper role. It should fund standardized data collection systems to record the results of the States' non-standardized practices. It should maintain a clearinghouse for policy makers so that States learn from one another's best practices and fix their own worst ones. It should make it easier for States to collect the data that we need with the limited resources that they have. The Federal Government can foster the competition and innovation that Federalism is supposed to produce without intruding on State policy making.

Thank you for your time, and I look forward to your questions.

[The prepared statement of Ms. Gerken was submitted for the record:]

Senator KLOBUCHAR. Thank you very much, Ms. Gerken.

Mr. Stewart.

STATEMENT OF CHARLES STEWART III, KENAN SAHIN DISTINGUISHED PROFESSOR OF POLITICAL SCIENCE, THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY, CAMBRIDGE, MASSACHUSETTS

Mr. STEWART. Thank you, Senator Klobuchar. It is an honor today to be before the committee and to speak about the collection, analysis, and use of data to improve elections for all Americans.

I have three points I would like to make today. The first is, there is a need for a more data-centered approach to making election policy in the United States. Imagine if we had a national debate about the state of our educational system without any reference to measures like graduation rates, enrollment statistics, student-teacher ratios, or school budgets. Yet, this is exactly how we often talk about elections policy in the United States. We struggle to improve access and security in voting without much, if any, attention to metrics in many places in this country. Instead, policy gets made based on anecdote, beliefs that are grounded in sparse facts and wishful thinking.

Now, the good news is that elections are awash in data, as you mentioned previously, Senator Klobuchar. There is a growing network of election officials, academics, and other experts who are developing a fact-based science of election administration to parallel

similar networks in areas like education, health care, and law enforcement. A major barrier to approaching elections policy more scientifically is the continued uncertainty about the future of the EAC, which alone among Federal agencies is charged with promoting research and disseminating best practices in election administration through its research and clearinghouse mandates.

The second point I would like to make is that the two Federal data collection efforts related to election administration in the United States need to be supported and strengthened. The granddaddy of all Federal election data efforts is the Voting and Registration Supplement of the Current Population Survey, which is conducted after each Federal election by the Census Bureau. It is the indispensable source of data that tracks the improvement of elections due to Federal laws, like the Voting Rights Act and the National Voter Registration Act.

The second of these Federal election data efforts is the Election Administration and Voting Survey, or the EAVS, which is administered by the EAC. The EAVS, which was begun in 2004, is the only national census of basic information about local election administration. Because of the EAVS, election officials, legislators, and the general public are now privy to statistics about a wide range of facts on topics ranging from voter registration to the staffing of polling places.

The future of the EAVS remains cloudy, due, again, to the uncertainty about the EAC's continued existence. Thankfully, the Commission staff continues to administer the EAVS in the absence of Commissioners. Still, no important Federal data gathering program can evolve under these conditions. Whatever the future of the EAC, the EAVS needs to be protected.

The third and final point is that local governments need help in converting the mountain of data that is generated in the conduct of elections into information they can use to better manage these elections. Addressing problems at the polling place, such as long lines at the polls, requires that local election officials have very precise information at their fingertips. They need to know basic facts, such as the arrival times of voters at the polls and the amount of time it takes them to cast ballots. Retailers know that service data like this is critical for effective management. Why do not all election officials have access to similar data? A major reason is that election equipment is rarely set up to produce the types of reports that would be useful to election officials as they make their plans to conduct elections.

Two focused Federal actions could help local officials manage their polling places more precisely. First, the EAC could fund a small grant program to spur the development of computer tools to take existing service data and turn it into information that local officials could use to manage elections more effectively.

Second, the Federal Government could continue to encourage the efforts that are underway to develop common data standards that would allow the seamless sharing of data across different types of computerized election equipment. One such effort is being undertaken by a working group under the Voting System Standards Committee of the IEEE computer society. The work of groups like this ultimately depends on forward progress in the EAC's Vol-

untary Voting System Standards. Without a functioning EAC, it is impossible to approve new Voluntary Voting System Standards, and without these standards, the work of creating a common data format for elections-related data will be slowed significantly.

So, to conclude, I thank the committee for their time and for holding hearings on these important topics and I look forward to your questions.

[The prepared statement of Mr. Stewart was submitted for the record:]

Senator KLOBUCHAR. Thank you very, very much for your work.

Next, we have Mr. Kennedy.

STATEMENT OF KEVIN J. KENNEDY, DIRECTOR AND GENERAL COUNSEL, WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, MADISON, WISCONSIN

Mr. KENNEDY. Thank you, Senator Klobuchar. I very much appreciate the opportunity to provide information to this committee on the collection, analysis, and use of election data. It is an honor to be here. This is a subject that State and local election officials in Wisconsin recognize as an essential element in conducting elections.

Numbers are what elections are all about. The basic concept of elections is the person with the most votes wins. There are some exceptions, as we know, in Presidential elections and the Electoral College. Rank choice voting also adds some more complicated math to the process. And, we also know that the prayer of all election officials involves numbers: "May your margins be wide."

As Wisconsin's chief election officer, I have developed a mantra when I talk to our local election officials. That is, "know your numbers." Let me give you some numbers related to Wisconsin.

Wisconsin is, arguably, the most decentralized election system in the nation. The State administers elections with the support of 72 counties, and our 1,852 municipalities conduct each election. About 62 percent of those municipal clerks are part-time. We have over 6,700 wards, often referred to as precincts in other States, organized into more than 3,500 reporting units. Those 3,500 reporting units are the data points that we use in elections.

We do not give county-level results or municipal results. We give those reporting unit results when we are collecting data. It helps us identify problems within particular polling places. For example, working with Charles Stewart in our recent reporting, we found that our municipal data was accurate, but within that, we found errors in the polling places where they were misallocating numbers.

Other numbers in Wisconsin, we have 4.3 million voters. We have had Election Day registration since 1976. Like Minnesota, we have learned from those numbers that 80 percent of all of our voters entered the voter registration system through Election Day registration. That is an important fact for us to know. Our numbers are very similar to Minnesota's when it comes to what happens on Election Day. We know what those numbers are, and Wisconsin has had a long history of tracking voter turnout and voter registration numbers.

We also have been, as a result of those numbers, competing with Minnesota, we are usually first or second in Presidential voter turnout in every election. A little ahead in Super Bowls.

Senator KLOBUCHAR. Oh, so unnecessary.

[Laughter.]

Senator KLOBUCHAR. You know, my dad wrote a book called, Will the Vikings Ever Win the Super Bowl, in the, I think, early 1980s, and sadly, it is still relevant today, but——

[Laughter.]

Mr. KENNEDY. Well, my son-in-law will let me know when they do, I am sure.

[Laughter.]

Mr. KENNEDY. Also, with these numbers, we have learned that Wisconsin, along with Minnesota, routinely performs in the top five in the Pew Charitable Trusts Performance Index of Elections.

Wisconsin's long history of data collection has been amplified by the fact that in 2008, we took our paper-driven system, where we had our 1,850-plus municipalities giving us paper data, using a grant from the U.S. Election Assistance Commission, we took that data and made that electronic. We now get that data more cost effectively. We no longer have boxes of paper sitting in our office. Instead, we get that data and this is something that can easily be replicated across the States.

We use this data for a number of things. In the last legislative session that just ended, 18 separate pieces of legislation were introduced. We were able, as a result of that legislation, to provide clear data analyzing the impact of, say, reducing the hours of in-person early voting, when those occurred, so that people could actually measure that. We could also measure what would be the cost if we eliminated Election Day registration.

From our experiences collecting and analyzing data, we can identify several valuable lessons learned. Data collection should be purpose-driven. With data, more is not necessarily better. Data collection, audit and analysis requires extensive resources and time and effort should be spent wisely. It is a commitment.

Data should be "smart" data. It should be simple, measurable, actionable, relevant and timely. It is also important that those reporting data clearly understand what you are asking of them and what they are reporting. This requires providing training for our local election officials that is clear, detailed, and easily understood. I cannot emphasize that enough, given the number of election officials we have.

With that, I will end my testimony. I look forward to answering questions from the committee.

[The prepared statement of Mr. Kennedy was submitted for the record:]

Senator KLOBUCHAR. Well, thank you very much.

Next, we have Mr. Becker.

STATEMENT OF DAVID J. BECKER, DIRECTOR, ELECTION INITIATIVES, THE PEW CHARITABLE TRUSTS, WASHINGTON, D.C.

Mr. BECKER. Senator, thank you for the opportunity to be here today to discuss this important topic.

We at the Pew Charitable Trusts began to look at the issue of using data to measure performance in the field of election administration several years ago, partially in response to what we heard from election officials who felt bombarded by news stories driven by anecdotes, not data. These stories about long waiting times to vote, or polling places opening late, or registration problems are important, but it is never clear whether they truly represent systemic problems or if they are simply one-time challenges. We knew that in other policy areas, such as health and education, there must be a way to use data and empirical evidence to get a clearer picture of what is happening across the States.

Following important research by Professor Gerken and many others in the elections field, Pew partnered with Professor Stewart and MIT in 2010 to pull together an advisory group of State and local election officials from around the country, as well as leading academics in the field of elections and public administration, to determine what data was available to accurately and objectively measure the performance in this field.

In 2013, Pew unveiled the results of this research, the Elections Performance Index, or EPI, the first comprehensive assessment of election administration in all 50 States and D.C. The release introduced the Index's 17 indicators of performance, including such data relating to wait times at polling locations, voter registration rates and problems, military and overseas voting, and mail ballots. This data, collected from five different data sources, including the Census and the EAC, provided a baseline of performance using 2008 and 2010 data, giving users a way to evaluate States' elections side by side.

Pew's latest edition of the Index, released just over a month ago, adds analysis using data from the 2012 election. This provides the first opportunity to compare a State's performance across similar elections, the 2008 and 2012 Presidential contests, and presents a rich picture of the U.S. democratic process that will be enhanced as new data are added each election cycle.

The results from the 2012 EPI were generally good news for the States and for voters, as elections performance improved overall. Nationally, the overall average improved 4.4 percentage points in 2012 compared with 2008, and the scores of 21 States and the District improved at a rate greater than the national average.

In addition, we had several findings. First, high performing States tended to remain high performing, and vice versa. Most of the highest performing States in 2012, those in the top 25 percent, including States such as Wisconsin and Minnesota, were also among the highest performers in 2008 and 2010. The same was true for the lowest performing States in all three years.

Second, gains were seen in most indicators. Of the 17 indicators, overall national performance improved on 12 of them, including a decrease in the average wait times to vote and an increase in the number of States allowing online voter registration.

Third, wait times decreased, on average, about three minutes since 2008.

Fourth, although voters turned out at a lower rate in 2012 generally, fewer of those who did not vote said they were deterred from

the polls by illness, disability, or problems with registration or absentee ballots.

Fifth, 13 States offered convenient and cost effective online registration in 2012, compared with just two in 2008, which may have contributed to the reduction in voter registration problems.

Sixth, more States offered online voter information look-up tools in 2012.

And, seventh, States are reporting more complete and accurate data. Eighteen States and the District reported 100 percent complete data in 2012, compared with only seven in 2008.

We present all these data in an interactive report, which can be found at pewstates.org/EPI, that allows policy makers, election officials, and citizens to dig through each piece of information.

We make a series of recommendations in this report, but two are particularly relevant to this hearing. First, States should work to upgrade their voter registration systems. By adopting innovative reforms, such as online voter registration, better sharing data within a State between motor vehicles agencies, et cetera, and using a tool like the Electronic Registration Information Center, or ERIC, to better share voter registration between States—voter registration data between States, all recommendations of the Bipartisan Presidential Commission on Election Administration, States can see a marked improvement in their performance. For instance, of the bipartisan group of seven States who founded ERIC in 2012, including Virginia, five of those States were among the highest performers in that year.

Second, we encourage that States report and collect even more elections data. Several States, such as Wisconsin, have pioneered efforts to better collect source data from local election jurisdictions, but many do not. As the Presidential Commission notes, if the experience of individual voters is to improve, the availability and use of data by local jurisdictions must increase substantially.

And, we continue our work toward this end. Just last week, we released a report entitled, "Measuring Motor Voter," where we attempted to rate how well States were providing voters with the opportunity to register or update their registrations at motor vehicles offices. What we found was that States' performance in this area could not be fully measured because States were not collecting or reporting adequate data to document the provision of these important services. We, therefore, made several recommendations, including that States prioritize, automate, and centralize motor voter data collection. We went on to highlight several States, such as Delaware, Michigan, and North Carolina, that have already made great strides in this area.

Pew continues to see this data-driven approach lead to higher performance in the States. The EPI is being cited by policy makers and others in official testimony and is being used in a geographically and politically diverse group of States to help reform policy and technology in election administration. We will continue this work as we look forward to publishing the 2014 edition of the Index and ensuring the data-driven performance measurement is enshrined in this field for years to come.

Thank you.

[The prepared statement of Mr. Becker was submitted for the record:]

Senator KLOBUCHAR. Thank you very much.

Mr. Riemer.

STATEMENT OF JUSTIN RIEMER, FORMER DEPUTY SECRETARY, VIRGINIA STATE BOARD OF ELECTIONS, RICHMOND, VIRGINIA

Mr. RIEMER. Senator, thank you for the opportunity to address you today regarding data in elections. I am a former Virginia election official and co-author and editor of a recent report from the Republican National Lawyers Association reviewing the Presidential Commission on Election Administration's report and providing additional suggestions to improve election administration.

I would first like to discuss issues pertaining to ranking State election performance, then to offer a few reasons why we have such challenges in obtaining good data, and, finally, to express concerns regarding how ever-increasing election data and records requests have become an administrative burden on local election officials.

Using data to rank States' performance has value to identify both deficiencies and best practices, but there are also concerns. First is a worry that graders will penalize States for not adopting policies, such as expanded early voting, vote by mail, and election day registration. The RNLA, many nonpartisan election officials, and other stakeholders, have significant policy reservations regarding these issues and they should not be included as indicators of performance.

Similarly, graders should reward, not penalize, States for implementing voter integrity measures, such as reasonable voter ID requirements and enhanced voter registration list maintenance activities. Election officials and organizations with particular concern for the integrity of our elections will be more likely to embrace these performance indexing efforts if they recognize State efforts to prevent fraud.

Second, I would like to discuss a few of the many challenges election officials have when gathering and reporting election data. The first lies in limitations with State voter registration databases, and second is a difficulty in collecting accurate data from the polling place.

Statewide election databases, created as a result of requirements in the Help America Vote Act, suffered from many problems commonly associated with large government IT projects. In the scramble to meet implementation deadlines, building in adequate data reporting and analytics capabilities became a secondary concern to complying with the specific database requirements outlined in HAVA.

In Virginia's case, it was impossible to reverse-engineer the system after it was launched to add better data collecting and reporting capabilities. While HAVA's database requirements mostly address voter registration functions, many States design these systems to be much more comprehensive. For example, Virginia's database administers most of the electoral functions at the State and local levels, including absentee voting, voter registration, and data collected at the polling place on election day, and part of the

system's job is to gather data related to those processes. Consequently, these database limitations impact a broad array of a State's electoral functions and make it difficult for officials to provide the data sought by the EAC and other interested parties.

A second challenge is that much of the data used to analyze elections is collected on election day by poll workers who receive minimal training, work only a few days out of the year, and are paid very little. Poll workers must complete a significant amount of complex paperwork after a long day and frequently make mistakes or omit important information on forms. This information is often impossible to correct or collect later if not captured properly on election night. Poll workers also, understandably, treat supplemental data reporting as a secondary priority to reporting precinct vote totals and ensuring the security of ballots, voting equipment, and other important election materials.

Fortunately, State and local officials are gradually overcoming some of these hurdles. First, States have improved their databases and analytics capabilities. In addition, the adoption of electronic poll books at the polling place will result in better data collection on election day. The nationwide trend towards online voter registration and electronically sending registration applications completed at DMVs to registration officials will also help improve the quality of voter registration records. Multi-State data sharing programs, like the Interstate Voter Registration Cross Check and ERIC, are also further helping improve the quality of States' voter registration data.

The PCEA and RNLA endorse these reforms, and RNLA also recommends that States pair electronic poll books with ID card bar code scanners to improve the reliability of voter history data.

A final issue for policy makers to consider is how increasing demands for data and records impose significant administrative burdens on election officials. Survey obligations from the EAC, Federal Voting Assistance Program, and other stakeholders are tedious, but manageable. However, adding an increased request from FOIAs, State and local governments, litigation, and a public records disclosure provision in the National Voter Registration Act have turned basic data and records reporting obligations into a significant administrative burden. Combined with an increasingly shorter election off-season, because of 45-day absentee ballot mailing deadlines and expanded early voting, these obligations make it more difficult for election officials to perform their core job functions and make improvements to their election processes.

Thank you for the opportunity to appear before this committee.

[The prepared statement of Mr. Riemer was submitted for the record:]

Senator KLOBUCHAR. Thank you very much to all of you.

I will start with you, Ms. Gerken. I know you have made the point that it is hard for us to really take advantage of the States as the laboratories of democracy, as you noted, if we cannot figure out the way to compare what they are doing. And, States and localities have a big role to play in actually carrying out our elections, but that makes it harder to have uniform data. So, I figure we need to make sure we are not comparing apples and oranges and that we are actually trying to compare things in the right way to figure

out how we make the voting experience better and how we get more people to vote. What do you think the Federal Government's role is in improving election administration, and what should Congress be doing to increase the supply of quality data while respecting our State and local partners who carry out the election?

Ms. GERKEN. There are many things that the Federal Government should do, in my view, and I will just begin by agreeing with Professor Stewart that one of the most important things is to support current ongoing efforts to provide data from the States, which is done through the Elections Assistance Commission. The Elections Assistance Commission has a somewhat inconsistent reputation among election administrators. However, I think there is little question that——

Senator KLOBUCHAR. Why is that?

Ms. GERKEN [continuing]. Because I think that there has been some frustration with the way that it is administered, both its grants and its surveys. While those criticisms are well taken, the importance of the EAC survey cannot be underestimated. It is the best set of data we have on a variety of practices. The EAC has also done something very useful, which is to help us standardize what kinds of terminology are used, so we are comparing apples and apples rather than apples and oranges.

As Professor Stewart has mentioned, I think there are many other ways that the Federal Government can be supportive here. Some of them are as simple as assisting the States through modest funding to figure out how to get the data that they do have and put it in an accessible form that everyone can share.

I would also love to see more work on the costs of administering elections. One of the things one begins to believe in working in these areas is that there will be no reform unless Almighty God comes down to dictate it. But sometimes the almighty dollar does the trick. One of the real reasons why we have seen such a push for online registration has been the immense cost savings that come from it. Having data on those kinds of questions is extremely important to the States in helping do their job——

Senator KLOBUCHAR. You mean how much money it saves to do the online?

Ms. GERKEN [continuing]. Exactly. It is not only more accurate, but it turns out to be much more efficient in terms of cost. So, having just that kind of information in no way intrudes on State policy making, but enables them to make better decisions going forward.

Senator KLOBUCHAR. Okay. Why do we not move on to the online, since you brought that up, and whether a State allows online registration is one of the 17 factors included in the Index. Why do you think—I will start with you, Mr. Stewart, and maybe Mr. Becker—why do you think this is a good thing to do online registration, and how do you think we get the other States to adopt it?

Mr. STEWART. Well, maybe I can say why this is a good thing and Mr. Becker probably has some well thought out ideas about getting States to adopt it.

I think there are two good things about online registration. One, picking up from what Professor Gerken said, is the cost. The second, as well, is accuracy. I think we all wish to see more accurate

voter rolls. It is easier for voters. More accurate rolls dispel many concerns about fraud and can help us to hone in on where there are, in fact, problems with people coming and trying to vote who should not.

So there is the accuracy side and the cost side, and I know Mr. Becker has thought a lot about getting States to say yes.

Senator KLOBUCHAR. Mr. Becker.

Mr. BECKER. Yes, that is right. We just put out a brief on this in January called "Understanding Online Voter Registration," which can be found at pewstates.org/OVR. And, what we found in our research in this field over many years is that online voter registration is one of those rare win-wins in government. It saves money and it produces a better product by making voter registration more complete, more accurate, and more convenient.

So, for instance, with regard to costs, every State that has kept data on this has found tremendous cost savings, ranging——

Senator KLOBUCHAR. Now, maybe you told me this in your testimony, Mr. Becker——

Mr. BECKER. Yes——

Senator KLOBUCHAR [continuing]. But do we know how many States are doing it?

Mr. BECKER [continuing]. So, by our count, we show 19 States that are currently offering their citizens an opportunity to register to vote online without ever having to print, mail, or——

Senator KLOBUCHAR. And, how long has it been going on?

Mr. BECKER [continuing]. Since 2002. Arizona was the first State, but it took six years until the second State offered online voter registration, Washington in 2008. They were the only two States that offered it in 2008. That number went up to 13 in 2012, and now it is up to——

Senator KLOBUCHAR. Okay. You really know these numbers, so——

[Laughter.]

Senator KLOBUCHAR [continuing]. Let us continue on. It went up to 13 when?

Mr. BECKER. It went to 13 in 2008, and now there are 19 States, almost 100 million Americans who currently can complete a voter registration application entirely online, without ever having to handle a piece of paper in any way or mail anything in. And, this is leading to huge cost savings. States are seeing cost savings ranging from about 70 to 80 cents in States like Colorado, Arizona, to over $2 per registration transaction in a State like California. California——

Senator KLOBUCHAR. And they still make the mail available for people that do not have——

Mr. BECKER [continuing]. Absolutely.

Senator KLOBUCHAR [continuing]. And, what is the resistance in some of the States?

Mr. BECKER. I do not think we are really seeing much real resistance.

Senator KLOBUCHAR. It is just——

Mr. BECKER. I think it is just a matter of time. There is a capital expenditure that is needed to put it in place. Our research indicates that, on average, it costs about $240,000, which is not very

much, to install an online voter registration system. But, still, some States are working towards that end. But, we are going to see many more States. I think, easily, half the States will be offering it, if not many more, by the 2016——

Senator KLOBUCHAR [continuing]. And, have you been able to show direct correlation with increasing voting?

Mr. BECKER [continuing]. I do not think we have been able to see that online voter registration directly leads to turnout. We have not had a controlled experiment in that regard. What we do know about online voter registration is it transfers a lot of the not cost effective and not convenient paper activity that would ordinarily occur that can lead to duplicates and errors to electronic activity, which is much more convenient and cost effective. So, at a minimum, it is saving election offices a lot of money and leading to a lot more convenience for the voters.

Senator KLOBUCHAR. Very good. Anyone else want to comment on that? Do you have that in Wisconsin yet?

Mr. KENNEDY. We do not have that in Wisconsin.

Senator KLOBUCHAR. Ah, that is why I asked that question.

[Laughter.]

Mr. KENNEDY. I know that Minnesota just did. I will tell you that Wisconsin has done a cost-benefit analysis on this. We partnered with our University of Wisconsin La Follette School of Public Policy and have determined that, if properly implemented, we will save over a million dollars, most of that at the local level, where it is really effective. It is the cost of that. So, Wisconsin has been using our data for things like that.

Senator KLOBUCHAR. Mm-hmm.

Mr. KENNEDY. We had a hearing on that two weeks ago and that data was prominent.

Senator KLOBUCHAR. And, you have same day?

Mr. KENNEDY. We have Election Day registration.

Senator KLOBUCHAR. Yes. I think that is probably why—probably, in States like ours that—while I think it is a good thing, it maybe matters a little less when we already have the higher—you will not see quite the dramatic increase because of the fact that people can always register.

Mr. KENNEDY. No, and it is not really a question—turnout is driven by so many other things, but one of the things I always emphasize is that we talk about numbers. We talk about election administration. Ultimately, it is all about the voter, and certainly, online registration, which is one thing that was not mentioned, provides a service to the voter. It makes it convenient.

This is why Election Day registration has worked very well in Minnesota and Wisconsin, because we find it serves the voter. It provides them convenience. They are not thinking about elections every day. They are thinking about it when the elections come around. That means being prepared. So, online registration fits in very well with that. It is a nice pairing with Election Day registration.

Senator KLOBUCHAR. Mr. Riemer, what do you think about the electronic registration?

Mr. RIEMER. Well, Senator, Virginia implemented online voter registration approximately a year ago. It was passed with broad bi-

partisan support and it is very popular. The voters love it. The local election officials love it and the State Board of Elections, the State election officials love it, as well. It works well, and for all the reasons described.

Senator KLOBUCHAR. Okay. Good. A different topic, now. Ms. Gerken, I was interested in your testimony about using the Census as a model for comprehensive gathering of information on election administration. You advocated for some basic information to be gathered nationwide, but with a deeper dive into some randomly selected polling places. Can you elaborate on how this system would work and the challenges it would face. Having been at hearings, I think it was with the Joint Economic Committee, about the Census and some of the political things that surround it—whether true or not—we all know it is very important and many of us are always working to protect the Census and making sure it continues. Let me hear what you think we could do to make it even better, and then try to put on my political hat and figure out if we could get it done.

Ms. GERKEN. Sure. The analogy to the Census was simply that the Census has a very widely known strategy for getting information. It asks for a little bit of information from everyone, and then a lot of information from a few people, and in doing so is able to get at the kinds of things we need to know.

This strikes me as a particularly good model for local elections. One of the things that you learn very quickly whenever you talk to Secretaries of State is that they all know of one or two localities that really are outliers within the State. They all are nervous that those outliers are going to make the State the next Florida 2000, or the next Ohio in 2004, but they have very little ability to influence what is going on there because, one, they do not have data, and two, they do not actually have much by way of regulatory authority over localities. In many places, localities are very powerful.

Having more and better information on the variation within localities is just as important as it is to have information about variation among the States for the same kinds of reasons. The trouble is, and here, I agree entirely with Mr. Riemer, localities are strapped and they are often staffed by people who work part-time, or who run the elections and run many other things in their towns, so you cannot ask them to do the kind of sophisticated data drops that you can ask from State officials.

That is why the Census is a nice model, to get a little information from all of them and then have more and better in-depth information from a number so we can learn how things are going.

And, the last thing I will say on this——

Senator KLOBUCHAR. I am not an expert on the Census, so, this would be, like, additional questions you would add on, or——

Ms. GERKEN. It would be like a short form and a long form. I do not know if you have ever gotten the long form. It takes a while to fill out.

Senator KLOBUCHAR. Oh, yes.

Ms. GERKEN. But, the other thing I actually just added, and again, I will agree——

Senator KLOBUCHAR. And so in the long form, they sometimes add different questions.

Ms. GERKEN. Yes, a lot of different questions. Exactly.

Senator KLOBUCHAR. So, this would be something, and this would be to supplement what we are getting from the Election Administration and Voting Survey?

Ms. GERKEN. Exactly. If you randomly selected localities, it would help us glean information about the variation among them.

And, the last thing I will just say is I agree with Mr. Riemer that one of the great dilemmas of election administration is that a lot of the data comes from poll workers who are part-time and not always well trained. Here, I think the way to think about that problem is to think about it in exactly the way that Burger King and McDonald's think about that problem. If I remember from high school, the pimply faced 16-year-olds that used to work behind the counter there were not sophisticated data collectors, and yet they were part of a sophisticated data collection system that was adapted to their abilities. And so anything that the Federal Government can do to help us think about how to get information from poll workers without having to train them or to expect more than we can expect from them would be very useful.

Senator KLOBUCHAR. Very good.

Mr. Stewart, do you think this Census idea is a good one, or do you think there is more we should be doing with the Election Administration and Voting Survey?

Mr. STEWART. As you can tell from my testimony, I am a big EAVS fan. I would emphasize assisting the States that are currently not reporting and complying with the EAVS data requests to actually report the data that they need to report. So, that is one thought.

The other thing, I think that you hear a lot of agreement on this panel—is that diving deeply into precincts and localities requires the creation of a technology that allows relatively untrained and unsophisticated poll workers to gather the data that is needed. That is why things like electronic poll books are very promising, because you can automate a lot of this data gathering. If you could automate a lot of data gathering in electronic poll books, in the voting equipment that is used, then county officials or State officials who have the capability to aggregate data could become more involved.

So, I would push a bit more on the technology side and on encouraging States to report the EAVS data. It seems to me if Wisconsin can do it, and Mr. Kennedy and his folks are my data heroes in this regard, I think any State can do it.

Senator KLOBUCHAR. Very good. And, so, this is an example where you got some funding, Mr. Kennedy, from the Election Assistance Commission, a $2 million grant. So, how did you use that money?

Mr. KENNEDY. Basically, because Wisconsin already was committed to collecting certain data, we wanted to get it as granular as possible, and we recognized when we applied for the grant we could go from municipality-based reporting right down to the reporting unit. You know, Milwaukee has 202 polling places, but there are 324 separate reporting units, and knowing how each of those wards collects that data.

So, what we did is provide a portal where that data can be easily entered. We are using the polling place data. And what we learned is it is training. Now, we did start out with a bribe. The first time around, we paid every municipal clerk $100——

Senator KLOBUCHAR. Now, not everyone in elections wants to use the word "bribe."

[Laughter.]

Mr. KENNEDY. I understand. I understand.

Senator KLOBUCHAR. We are in a small room.

Mr. KENNEDY. It was an incentive.

Senator KLOBUCHAR. There is not a lot of media here, but I——

[Laughter.]

Mr. KENNEDY. It was an inducement or incentive——

Senator KLOBUCHAR. An inducement. An incentive.

Mr. KENNEDY [continuing]. To get them to do this.

Senator KLOBUCHAR. Uh-huh.

Mr. KENNEDY. And I think it is important to find some way to convince election officials why this is important. In 2011 and 2012, Wisconsin got a lot of attention because we had a number of recall elections. We had 16 separate recalls.

Senator KLOBUCHAR. I remember hearing about those.

Mr. KENNEDY. Yes. And one of the big policy debates was, if we are going to have a Statewide recall, what is that going to cost? And it landed in 2012. We did some surveying to estimate that, and then, based on that surveying, we built a data collection cost tool with a lot of give and take with the municipalities. We were able to demonstrate that the $37 million that we spent on administering elections at the county and municipal level in 2012, 14 million of that was directly related to the 2012 recall elections, money that was not budgeted for. That provided good information for the governing bodies that had to support this, you know, why did the costs go up? Where did they come from?

Senator KLOBUCHAR. Another issue that we talked about or touched on with the long line issue—and who was giving me the numbers, was it you, Mr. Becker, on the decreasing—that there was some decrease in three minutes per voter, was that what it is, from the last Presidential—was it from 2008 to 2012?

Mr. BECKER. That is right, from 2008 to 2012, three minutes——

Senator KLOBUCHAR. So, then, how is the—what is the total wait? What is the——

Mr. BECKER [continuing]. Right now, it is at 11 minutes, on average, nationally.

Senator KLOBUCHAR [continuing]. So, what we are dealing here with—because I think most people think they can wait ten minutes—so, what we are dealing with here is the fact that there are some—would it be, in Ms. Gerken's words, outliers of some areas that have really bad problems that we have to try to get at?

Mr. BECKER. Well, of course, that is one of the reasons that the work of people like Professor Stewart is so important and why we hope the Index can be helpful, is that it is important to assess this not based on just the anecdotes of all the cable news stations outside that one polling place in Miami at 2:00 a.m. on election night, but to really see what is going on all across the country, because

the cable news stations are not camped out at polling places in other States looking at what is happening.

So, what we found was, in fact, yes, Florida was the worst reported wait times, of around 45 minutes in 2012. Many States saw wait times of below ten minutes. The Presidential Commission, I believe, came to the——

Senator KLOBUCHAR. The average in Florida was not 45, was it?

Mr. BECKER [continuing]. I am sorry?

Senator KLOBUCHAR. Was the average in Florida 45——

Mr. BECKER. That was the average reported wait time of those that were surveyed on this issue.

Senator KLOBUCHAR [continuing]. So, would that mean across polling places in Florida?

Mr. BECKER. Yes, across the State, across polling places——

Senator KLOBUCHAR. That seems like a real problem——

Mr. BECKER [continuing]. In a survey conducted by Professor Stewart.

Senator KLOBUCHAR [continuing]. And that would seem like a deterrent to getting people to vote.

Mr. BECKER. It is probably not a good thing. I think election officials in Florida would be the first to say that. They did see an increase in their reported wait times. The Presidential Commission came to the conclusion in their research that about—that under 30 minutes was the target. I think that was a reasonable conclusion. And, I think States getting that data is very important to them, because once they can assess the depth of the problem, they can start looking at ways to try to correct that problem.

Senator KLOBUCHAR. Yes.

Mr. BECKER. One of the conclusions we consistently reach is that having inaccurate voter rolls is one of the key things that can drive lines, that can lead to delays at the polling place and cause a logjam when people are trying to get their ballot and cast their ballot. So, States that are seeing improvements in that area are seeing lower lines—smaller lines.

Senator KLOBUCHAR. And this would be because of technology, they are seeing improvements? This is the voting roll issue? What do you think, Mr. Stewart?

Mr. STEWART. Well, part of it is technology, in terms of shorter lines. Part of it is technology. Part of it is also that some States and localities are becoming more sophisticated in using data to move resources around. I mentioned in my testimony the field of industrial engineering, which does these things. Some of the larger jurisdictions are able to put some brainpower behind optimizing where their resources go.

It is also the case, that States are beginning to experiment with moving some voters off of election day into the early voting period. One of the things that does is take some of the pressure off of election day voting. Little bits and pieces here and there can take pressure off and can reduce lines.

Senator KLOBUCHAR. So, you know, I used to administer—prosecute the cases for eight years of any voting issues that came out of our county in Minnesota. We had the biggest county. It was over a million people and was an urban county, but also had 45 suburbs. And we had a Secretary of State who was pretty aggressive

at the time, and so I was very careful that we would look at every case that came our way. And so I have actually had this on-the-ground experience with this.

We would have, at first, hundreds of cases that looked like they were a problem, and I had a full-time investigator—I do not know why we—but this was my job—that would look at these cases, and 80 percent of them were father and sons that had the same name and so they were not voting fraud. Then we would have a number of ones where felons would still be on probation and they would actually, I think, be either gotten some wrong information or just not understood that they were still on probation, and those were sort of sad cases, because then we would prosecute these felons on probation for voting. They would attempt to, then not be allowed to vote the next time, and then would be restored or something like that.

But, there were not that many of those cases, and so that is going to be one of my questions, because I am wondering if with this online—and, I know States have different rules—if we could do a better job of taking care of that, because a lot of times, they just did not quite understand. They were still on probation. Minnesota puts tons of people on probation. We use less prison time.

And then the second one, which I will just tell you for your own amusement, my investigator called a guy and said, "Sir, it looked like you voted twice," and the guy goes, "Yeah, I did." And the investigator goes, "Well, sir, do you mind if I turn on my tape recorder here so I can get your story," because we had to legally do that, and the guy goes, "No, no, I will just write you a letter, because I live in Minneapolis and it is so hard for a Republican to get elected, I just decided to vote twice."

[Laughter.]

Senator KLOBUCHAR. So, the guy wrote him a letter and went on and on about how he had voted twice, and then we had to issue some kind of a complaint, and then he was much more sheepish when he came in, and I think he was banned from voting one more time.

But, we had a few of those type of cases, but they were very, very rare. And what bothers me, having looked at this, like, around the five years, having been in a State that had this dramatic recount in the Franken-Coleman race, that we did have some issues with felons voting, there is no doubt, but a lot of it, from my view, was mistakes. It was not some intentional thing, both on the election administrator side and on the felon side.

And then the ones that actually deliberately voted twice, like the person who—this was another one I had—the school board line goes through their house, and the husband and wife decided that they are going to vote in both elections because they wanted to vote in both school board races, but then did not really realize that they were then actually also voting double, and they would each vote on each race for President. And then when we told them we had to do research for them, because they wanted to know where they should vote when the line goes through your house, we said, well, you vote where you sleep, and then they called back and said, well, what if we say we sleep in separate rooms?

[Laughter.]

Senator KLOBUCHAR. That was the level of detail we got to with them.

[Laughter.]

Senator KLOBUCHAR. Those cases, where someone actually votes twice, either for some crazy reason, because a line is going through their house and they do not understand it, or because their mom fills out the form and then they then vote—they voted by mail, and then they vote again—were very rare. And what bothers me is that a lot of our election laws and these reasons that we are not talking about today, about some of the things that ban people from voting or do not allow them to register to vote, we have so used one or two examples of these when the vast majority of them, to me, could most likely be solved by data, especially some of the felon information, so we get that straight.

And I just wondered if you think that this technology could help us to ferret through what is clearly mistakes in most of the cases, as opposed to this guy who was intentionally voting twice, which is such a rarity. So, a lot of times, it might involve mental illness when people do it. But, the point is, it is a rarity, and so, yes, it is used as the defining reason why we have to have all these strict registration laws and why it makes it so hard so people cannot same day register like they do in Minnesota and Wisconsin, which, by the way, produces very different results, as you know, Mr. Kennedy, in our Governors' political parties, in our legislators' political parties, and yet we make it easy for people to vote.

So, if you could just address this, if there is some way we could get at this online with some of this technology to make it not even—not just the voting experience better, but also to make it so that we have a defense, almost, against some of these claims so that we do not keep limiting people's ability to register and make it easier for them to sign up. Does anyone want to go for that one?

Mr. KENNEDY. I could mention that in Wisconsin, we have similar rules in terms of felon voting, and there has always been an issue about what is the extent of voter fraud, and most of the cases that we have identified, I mean, the technology that has been put in place since 2006 with our Statewide voter registration system, we have identified those rare cases of double voting. Usually, it is because they own property in two places and want to vote because they pay taxes and it is a conscious decision, or they have just moved, and again, very rare. But, mostly, it is the felons, and so we have—we do——

Senator KLOBUCHAR. And you understand what I mean about that they are on probation, but it is not clear. Like, they really do not want to commit another felony by voting, most likely.

Mr. KENNEDY [continuing]. Well, using those numbers, we have built in a couple of checks. We have Election Day registration, at the polling place we have access to a list of all the felons in that municipality or county, depending on the size, so it can be double-checked so that people can be advised.

I mean, the best anecdote was someone who came in to vote who was on the felon list, was not eligible. The person said, "Oh, one more thing I cannot do," once the poll worker said, "I am sorry, we cannot let you vote because of this." But, the technology was there. It was available. I think that is very helpful.

But, it also allowed us to build some checks into the process so that when the person is sentenced, part of the instructions the judge gives is, you will not be allowed to vote until you complete the terms of your sentence. When they are released from incarceration, they get the same information, and they also sign paperwork. So, we use that——

Senator KLOBUCHAR. Now, some States, when they get released from incarceration, then they just get to vote, I think, right? Or, can they vote while they are on probation? I mean, that is the other way to think about it.

Mr. KENNEDY [continuing]. A few States can do that, but the general norm is you have to complete the terms and get off paper, as they say.

Senator KLOBUCHAR. Right. Exactly. And, I think that is what creates that confusion. If someone has been in prison, they get out and they think they can vote then, like everyone else, even though they may have been—so, I am just trying to find a way to double-check this so they do not get in trouble and so it does not create this aura about our elections.

Mr. KENNEDY. And it is something that, by matching the data with the Corrections Department, you can have that so that they are flagged in the voter registration list. As I said, Wisconsin produces lists that we make available for the clerks to download that give that information.

Senator KLOBUCHAR. Does anyone want to add to that?

Mr. BECKER. I would just add that I think you are absolutely right. Technology is important in two very key areas. First, it can help ensure that all eligible voters, but only eligible voters, have access to the process, using things like e-Poll books to ensure that people do not sign on the wrong line in a paper poll book, which can lead to these problems. Things like online voter registration, which can actually walk someone through the voter registration process, require that they affirmatively click on and check a box that clearly describes what the eligibility requirements are before they proceed, and as you pointed out, often accidentally come into a violation of the law. Things like ERIC, which can help whittle down the number of people that might be reached out to that should not be—that are not eligible to vote and should not be encouraged to register. Doing that, all these things can help ensure that all eligible, but only eligible, can take part.

And, I think a very important thing that technology can also do is ensure that we correct some of the data collection problems that we currently experience. So much of data collection right now is done after the election, where local election officials have to reconstruct the election after the fact, report up to the State election officials, who then report that to the Election Assistance Commission, often without many checks in between in each of those processes. So, the data often is not of high quality. We have to go through and reconnect with all of the States and many of the localities to ensure that the data is correct and up to date.

And what we see with technology now is there are systems put in place—election management systems, e-Poll books, et cetera—that can be designed at the start with collection of data in mind. So, the data is collected as it is ongoing and you can just push a

button and report it out after the fact. I think Wisconsin has done some tremendous things in that regard.

Senator KLOBUCHAR. You know what I love about this data collection is that you can then get the information out there and then it creates incentives—as opposed to bribes, Mr. Kennedy——

[Laughter.]

Senator KLOBUCHAR. It creates incentives for States, because they want to compete with each other. And, I just think about when we talked to our electric companies, one of the things they found is the best way to get people to turn down the heat and save electricity—it is so interesting—it is not, oh, it is good for the environment. It is not, oh, you can even save money, and showing them how much money they save. It is showing what an unknown neighbor saves in a similarly sized house. And then they see that and they think, well, why am I not saving that much?

And with elected officials, of course, it is much more public, so that if you have a State, like your story of Florida, where the lines are so much longer than other places and you can get that data out, it creates incentives for the citizenry to start asking their elected officials, what are you going to do to improve this? This is outrageous.

So, when I hear this, in a very marketplace way, Mr. Riemer, I am thinking that there is a huge advantage to getting this data out, just to create the incentives so the States can change their processes. But, if we do not get the data out, we are just putting our heads in the sand and hiding.

So, I assume most of you agree with that, but, so, what do you think is the best thing we can do? I know—if we could go down the line here, from the Federal Government perspective. It is keeping on funding the Voter Survey. Is it also expanding into Census, from your line, Ms. Gerken, from your perspective, or what can we be doing?

Ms. GERKEN. Well, I have already given a little bit of my spiel on this one, but the one thing I will add is just to build on the point that you made. It is remarkable how much the right to vote is protected by a well-run bureaucracy that believes in best practices.

Senator KLOBUCHAR. Yes.

Ms. GERKEN. And one of the things you quickly learn about election administration is that it does not have yet the sense of robust professional practices the way, for example, lawyers or doctors or accountants do. Anything that the Federal Government can do to support that—and that means something as simple as providing a clearinghouse with a menu of options for different States, because States do look to one another in trying to figure out what they do. The peer pressure that you described works as well for States and institutions as it does for teenagers, and as a result, they will look to each other.

Giving them an accessible, easy to use system where they can see what other States are doing to solve the same problems is very, very useful. That is something the Election Assistance Commission is all but built to do. It is nonpartisan. It does not interfere with States' decision making. It just helps them make better decisions.

And so I would certainly encourage the Federal Government to do that, as well.

Senator KLOBUCHAR. Mr. Stewart.

Mr. STEWART. Much of the same record. The clearinghouse and research function of the EAC are invaluable, and that is really the core of the EAC. They do this one big election data gathering effort and they fund basic research. I think if that core can be maintained and developed, that would be a——

Senator KLOBUCHAR. How about getting the research out there? So, you get the research. So, I am finding this out for the first time. I kind of watch the news, read things probably more than a lot of people, very aware of the States that are at the top for voting. And, I even gave, like, an hour-long talk on this, but I did not really have—I was not conversant with which States had these long lines and things like that. How do we get that out there nationally so it gets States to have that incentive to move themselves up in the rankings?

Mr. STEWART [continuing]. Well, part of it is the Election Performance Index and ideas in Professor Gerken's book. Another thing I have seen develop which I mention in my testimony is that we need a marriage of election officials and researchers together who can understand each others' worlds. Quite frankly, there has been mistrust between the two, because researchers oftentimes just want data to write papers and do not understand the challenges that are faced by local election officials. So, part of it is the creation——

Senator KLOBUCHAR. And there are a lot of challenges.

Mr. STEWART. Yes. Part of it is creation of this network of people with shared interests and concerns with each others' problems. That is an important thing. The EAC has a role in that, but universities and foundations also have a role in that, too.

Senator KLOBUCHAR. Mr. Kennedy.

Mr. KENNEDY. I would say that the States have a very prominent role that needs to be done here. You know, one, the Wisconsin idea in our education has always been to bring the University of Wisconsin and its satellite campuses into the communities, and one of the reasons we are very successful is that we have a tremendous relationship with the University of Wisconsin's political scientists and they show a lot of interest. We have been trying to feed their needs by giving them a lot of data. So, the marriage that Professor Stewart talked about is very important and it is something that comes natural from our experience.

The other thing is for the State to be taking a leadership role. I mentioned in my testimony how important it is to get buy-in from our local election officials, giving them reasons why this data is important, addressing their very real concerns about, well, it is not fair that we are getting compared against each other, and it is, like, well, this is part of the exchange of information. It is going to help you improve and it forces you to explain your case, why your costs might be higher, for example, because it is something we have gotten a lot of data on.

But, the other thing is the State can take a leadership role in the technology that we are talking about. Electronic poll books, we have been talking about, is going to make sure that that data is

collected in real time. We know what time people are coming into the polling places with electronic poll books. Making sure that the voting equipment that people are using has—will also show the kind of data that can then be—you know, the State can take the lead in taking it, as long as it is in electronic format, leveraging technology. So, this is where the State provides a leadership role to the locals on that. So, that is where I would see it.

Senator KLOBUCHAR. Okay. Thank you.

Mr. Becker.

Mr. BECKER. Well, I would say several things. First, obviously, we should make everyone aware that there is a baseline that exists out there. At pewstates.org/EPI, the Index exists. And not only the 17 indicators, but you can isolate any particular indicator. If you just want to look at wait times or voter registration rates or turnouts, or look at a combination, or compare States, that is all available.

And I think one of the things that comes up——

Senator KLOBUCHAR. Well, maybe we could have, like, some kind of a little press event on the Hill when the numbers come out, or——

Mr. BECKER [continuing]. We have got them——

Senator KLOBUCHAR [continuing]. The Rules Committee, we could do a very exciting press conference——

Mr. BECKER. We have got a wonderful interactive that people can play with that enables them to compare regions, States, one State over time, look at any particular indicator or combination of indicators.

Senator KLOBUCHAR. Yes.

Mr. BECKER. You know, some of the interesting things that come out of it is though Florida was the worst on wait times in 2012, Florida actually performed about in the middle of all the States——

Senator KLOBUCHAR. I saw that in the thing. So, I did not mean to, like——

Mr. BECKER [continuing]. No, I——

Senator KLOBUCHAR [continuing]. There are a bunch of people from my State who move down there and everything, but I——

[Laughter.]

Mr. BECKER. A bunch of people from every State move down there.

[Laughter.]

Mr. BECKER. But, it is one of those things, that if anecdotes drives this debate, everyone would think Florida is ground zero for worst election administration——

Senator KLOBUCHAR. No, but there are other issues, and so it is trying to rationally get that out there, and hopefully in a bipartisan way——

Mr. BECKER [continuing]. Exactly.

Senator KLOBUCHAR [continuing]. Which was so much of the issue with this. It can be very—okay.

Last, Mr. Riemer, and then I have to go to another hearing on bulletproof vests, which will be a little different than this one.

Mr. RIEMER. Thank you, Senator. I think the combination of the EAC survey, the Census data, combined with organizations like Pew doing these performance index measures, is the way to go.

And, I think the States are beginning to produce better data. The EAC survey was, in many ways, just—it floored State election officials about the amount of data that was asked for, and I think, while we have been doing this for a decade, it is only done once every Federal election. So, this survey has only been done four or five times and States are getting progressively better at it.

I know in Virginia, our first EAC survey response was, frankly, a joke. I do not think—I think we only reported about a quarter of the information that was asked for. Now, we are getting much better at it. We have made changes to our database and polling place practices to obtain this data. So, I think we are getting there.

And, I think what has been discussed is the more that things are automated at the polling place, from electronic poll books, to scanning IDs, to the equipment having better metrics, I think we are going to get there——

Senator KLOBUCHAR. Right, and you have all these decentralized local election people that are really into this stuff. As much as some of them are overburdened, they do like to—I think it is their thing they do. And, I would think that, eventually, for some of them, getting that data is kind of fun and interesting and they are able to look at what is going on across the country and how the State, at least, measures up. So, do you think that is true, or is it not fun, Mr. Riemer?

Mr. RIEMER. Virginia is a very diverse State——

Senator KLOBUCHAR. Yes.

Mr. RIEMER [continuing.] From very cosmopolitan and urban in Northern Virginia——

Senator KLOBUCHAR. Yes.

Mr. RIEMER [continuing]. To Appalachian——

Senator KLOBUCHAR. Right. Well, we have this, too. Yes.

Mr. RIEMER. Exactly. So, I think some definitely are. You have election policy wonks that are the local registrars. And then some, frankly, are just there—some of them are part-time. We have 17 part-time registrars in Virginia——

Senator KLOBUCHAR. Yes.

Mr. RIEMER [continuing]. And, I will be honest, they are not really that interested in what you are talking about.

Senator KLOBUCHAR. What is happening across the thing, yes.

Mr. RIEMER. Not all of them, and I do not mean to——

Senator KLOBUCHAR. I will have to check in on Finland—Finland, Minnesota. I just know the rural ones that I have worked with, they get really concerned about the cost issue, and so they are interested in it that way, that if they think things can make it better or things can make it worse, they are going to be outspoken. So, in that way, I just think that while they may not be into the wonkish part of it, they actually may be into knowing some facts about how it is going and what is working and what is not working, because they do speak out on it. I know that from having been around our State, and I am sure you know that, too, so——

Mr. RIEMER [continuing]. Absolutely. They care very much about the process.

Senator KLOBUCHAR. They do.

Mr. RIEMER. They still want to fix the process, it is just——

Senator KLOBUCHAR. They do, and so that is why I think getting that information out there is a good thing.

Well, with that, I am going to include Senator Schumer's statement, without objection, that he asked to have entered into the record.

[The prepared statement of Chairman Schumer was submitted for the record:]

Senator KLOBUCHAR. And, on behalf of the Rules Committee, I would like to thank all of our witnesses today for their important testimony this morning.

This concludes the panels, and without objection, the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing for our witnesses to answer.

We will miss you, Jean, but we know you are going to do great out there.

Thank you. The hearing is adjourned.

[Whereupon, at 10:51 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Testimony of Professor Heather K. Gerken
J. Skelly Wright Professor of Law
Yale Law School
Submitted to the United States Senate Committee on Rules and Administration
May 9, 2014

We measure what matters. That's an old saw in the private sector and true of most of the public sector as well. Election administration is the mysterious outlier in this respect. We know more about the cars we drive and dishwashers we buy than we do about our precious non-commodity – the right to vote. "Big data" drives financial investments and baseball-team trades, it dictates environmental policy and which pop-up ads appear on your computer screen. And yet we lack access to basic information about how well our election system is working, let alone how to make it work better. Part I of this testimony explains why data collection is essential if we are to have an election system worth revering. Data provide an essential management tool, enabling us to spot, surface, and solve the problems that plague election administration. Good data help us identify problems and find cost-effective solutions. They show us where our policymaking policies should lie and provide realistic benchmarks for solutions. And they provide the allies of reform with the tools they need to push for change. Good data not only set the policy agenda, but push it forward.

Part II of this testimony describes where we are on the data-collection front and where we ought to go from here. Things have improved since I wrote my book, *The Democracy Index: Why Our Election System is Failing and How to Improve It.*[1] There I proposed ranking states based on how well they run their election system. Thanks to the extraordinary efforts of the Pew Trusts, such an index now exists. Pew's Elections Performance Index (EPI) is a crucial first step toward catching election administration up to 21st century management practices. But it is only a first step. As I will explain in this testimony, there is still a good deal more work to do to collect new data and pull together the data that do exist in a form that allows for cross-jurisdiction comparisons.

Finally, Part III will examine federal data-collection efforts not just from the perspective of an elections scholar, but from that of a federalism scholar. The United States has a proud tradition of state-run elections. There is so much variation among and within the states that our election system easily lives up to Justice Brandeis' aphorism about the "laboratories of democracy." But the laboratories of democracy can only work if someone is recording the results. We need consistent definitions and an easy means for collecting and aggregating data so we can draw comparisons across jurisdiction. This is exactly the role that the federal government ought to play in a decentralized system like our own. The federal government can create the lingua franca needed to compare state policies and performance. It can fund standardized data-collection systems to record the results of the states' non-standardized practices. It can help states learn from one another's best practices and fix their own worst ones. It can foster the competition and

[1] Heather K. Gerken, *The Democracy Index: Why Our System is Failing and How to Fix It* (Princeton University Press, 2009). Portions of this testimony is derived from that book.

innovation that federalism is supposed to produce without intruding on state policymaking. We should not mourn the variation in our system. We should *harness* it, fueling the race to the top that federalism is designed to produce.

I. Data: The Essential Ingredient of Good Policymaking

Date collection, analysis, and comparison are routine activities in the private and public sectors, and with good reason.

A. Data-driven management: the norm in both the private and public sector

The private sector measures what matters. My colleague Ian Ayres, has written about how "supercrunchers" use data-driven analysis to build sports teams, diagnose disease, evaluate loan risk, assess the quality of a new wine, predict the future price of plane tickets, choose which passenger will be bumped off an airline flight, and inform car dealers how far they can push a customer on price.[2] Wal-Mart's data are so precise that it knows that strawberry Pop-Tarts sell at seven times their usual rate just before a hurricane. Data-crunching and benchmarking, in short, are routine practices in Fortune 500 companies.

The public sector measures what matters as well. Government agencies at the state[3] and federal levels[4] routinely rely on data-driven analysis to improve their performance.[5] One of the most well-known programs is called CitiStat, which was modeled on the Comstat program that brought the New York Police Department so much success.[6] CitiStat was first used in Baltimore with impressive results.[7] The city's mayor met regularly with department heads to create performance targets and assess progress toward them using data generated and collected by the city. For instance, the mayor decided that every pothole should be fixed within 48 hours of someone reporting it. The city then used performance data to evaluate its progress in reaching that goal.[8] Data-driven analysis has been used in a variety of public institutions, ranging from police departments to housing agencies, from transportation agencies to education departments.

Data-driven analysis has a long and distinguished historical pedigree. Just think about the vast amount of economic data that the government collects. We're all familiar with the GDP, which aggregates the value of goods and services over a set time period.

---

[2] Ian Ayres, *Supercrunchers: Why Thinking by the Numbers is the New Way to Be Smart* (2007).
[3] *See, e.g.,* Julia Melkers & Katherine Willoughby, *Staying the Course: The Use of Performance Measurements in State Governments* (IBM Center for Business and Government 2004).
[4] For a survey, *see* Harry P. Hatry et al., *How Federal Programs Use Outcome Information: Opportunities for Federal Managers* (IBM Center for Business and Government 2003).
[5] For a useful sampling of these programs, *see* Daniel C. Esty & Reece Rushing, *Governing by Numbers: The Promise of Data-Driven Policymaking in the Information Age* (2007).
[6] *See, e.g.,* Paul O'Connell, "Using Performance Data for Accountability: The New York City Police Department's CompStat Model of Police Management" (IBM Center for Business and Government 2001).
[7] For a comprehensive but perhaps unduly cheerful analysis of CitiStat, see Robert D. Behn, "What All Mayors Would Like to Know about Baltimore's CitiStat Performance Strategy" (IBM Center for Business and Government 2007).
[8] *Id.* at 9.

The GDP has become a key metric for evaluating economic performance, providing a universal quantitative reference point for evaluating economic conditions. Without the GDP, we would have no sense of how we are doing economically. The GDP maps where we are and helps us chart our future path.

The economy isn't the only area where our government constantly measures. We conduct a full-blown census every ten years. Almost a hundred federal agencies and programs boast data-collection programs.[9] We collect statistics on the environment, transportation, crime, prisons, farming, disease, housing, childcare, immigration, aging, patents, the labor market, international development, medical services, imports and exports, and gas prices. We even try to measure things that many people believe can't be measured, like the quality of a public education.

B. Election administration: the mysterious outlier

Given how pervasive data-driven policymaking is, the mystery is why something that so naturally lends itself to measurement – election performance -- is not measured consistently. In some instances, as I discuss below, the data aren't being collected. In others, the data are being collected, but they aren't available in a form that is accessible, let alone provides for cross-jurisdiction comparisons.

One might think we don't need more data on our election system. Most of the arguments against data-driven analysis in the public sector boil down to a worry that institutional performance can't be measured. People argue, with some justification, that quantitative measures can't possibly capture how well a school educates its students or whether the government is providing the right social services.

The main thrust of these arguments is that gauging institutional performance requires us to make value judgments, and data can't make those judgments for us. Data-driven analysis may be a natural tool in the business arena, some argue, because the goal is clear: businesses are supposed to make money. Government agencies and educational institutions, in contrast, are supposed to carry out a variety of tasks that necessarily require more complex normative assessments.

While it is plainly true that judging performance requires us to make value-laden decisions about what matters and why, some government activities lend themselves more easily to measurement than others. Election data fall on the comfortable end of this sliding scale. Academics call election administration practices the "nuts and bolts" with good reason. These aren't the issues that have divided the elections community, like campaign finance or felon disenfranchisement. Even if the parties have a tendency to play politics on some issues, there's actually a good deal of agreement on how an election system should work. Moreover, much of what we value in election administration can be captured in a statistic: how long were the lines? how many ballots got discarded? how often did the machines break down? how many people complained about their poll workers?

[9] Federal Agencies with Statistical Programs, http://www.fedstats.gov/agencies/ (last visited May 8, 2014).

C. Good data is necessary for good policy

Just as we measure what matters, it matters what we measure . . . or don't measure. The dearth of data in election administration handicaps our efforts to build a system worthy of our storied democratic traditions.

Without good data, we lack the information we need to be confident that we've correctly identified the problem and chosen the right solution. Take two of the most controversial issues in election administration right now: photo ID and early voting. The conventional wisdom is that the first favors Republicans and the second favors Democrats. But as political scientists have begun to amass data on these issues, they have begun to question *both* conventional wisdoms.

What's true of controversial issues is just as true of mundane ones. We cannot run an election system by relying on necessarily atmospheric judgments about what problems exist and how to solve them. Data provide what we need: concrete, comparative information on bottom-line results. Good data help us figure out not just what is happening in a given state or locality, but how its performance compares to similarly situated jurisdictions'. Good data help us spot, surface, and solve the problems that afflict our system. Data, in short, give us the same diagnostic tool used routinely by corporations and government agencies to figure out what's working and what's not.

Identifying problems and solutions. The absence of good data poses the most basic of dilemmas for those who care about our election system: it is hard to figure out whether and where problems exist in a world without information. Election experts can name the symptoms they see routinely. But if you were to identify a specific election system and ask whether the problem existed there, experts might not be able to answer your question. Problems are hard to pinpoint in a world without data.

Distinguishing between a glitch and a trend. Even when we can identify a potential problem without good data, it's hard to figure out where that problem looms largest or to distinguish between a statistical blip and a genuine pattern. No election system is perfect. Problems occur regularly, if only because human beings are involved in every step of the process. The key is to figure out when the source of the problem is a one-off incident or a systemic error. That cannot be done without good data.

Benchmarking. Good policy requires something more than a bunch of individual jurisdictions collecting data on their own. It requires us to benchmark. Benchmarking is a routine practice in the business world, as corporations constantly compare their performance with that of their competitors to identify best practices and figure out where they can improve.

One cannot benchmark without a large amount of data that can be compared across jurisdictions. Election administration is simply too complex and too varied to be captured by studying a small sample or a single piece of data. As several scholars have

explained, an election system is like an "ecosystem. . . . [C]hanges in any one part of the system are likely to affect other areas, sometimes profoundly."[10] When ecosystems vary as much as they do in the elections context, large-scale, cross-jurisdictional studies are essential.

Put differently, without high-quality, easily compared data, we find ourselves in the same situation as doctors of old. Based on limited information on symptoms (lots of ballots are discarded, the lines seem long), we try to identify the underlying disease (is the source of the problem badly trained poll workers? malfunctioning machinery?). Like the doctors of yore, we may even try one fix, followed by another, hoping that our educated guesses turn out to be correct. The problem is that our educated guesses are still just that . . . guesses.

Even when someone comes up with a good guess as to a solution, we can't tell how much improvement it will bring or how its effects would compare to other, less costly solutions. In today's environment of tight budgets and limited resources, this lack of precision undermines the case for change. What we need is what modern medicine provides: large-scale, comparative data that tell us what works and what doesn't.

Identifying what drives performance. The dearth of data doesn't just make it hard to cure specific ailments in our election system. It also prevents us from inoculating the system against future disease. Put yourselves in the shoes of a reformer or an election administrator and you can see why comparative data are crucial. While you are certainly interested in specific fixes for discrete problems, you really want a robust system capable of self-correction so that problems can be avoided rather than corrected. You want to identify not just best practices, but the basic drivers of performance.

If you are interested in the drivers of performance, absolute numbers matter to you, but comparative numbers are far more useful. After all, if you can't even identify who's doing well, it is hard to figure out precisely what drives good performance. Without comparative data on performance, we cannot know whether, for instance, well-funded systems tend to succeed, or whether the key is centralization, better training, or nonpartisan administration.

D. Good data helps move good policy

Good data don't just help us identify the problems we have and the solutions we want. Data also help us move from problem to solution. As I've written elsewhere, we have a "here to there" problem in election administration. We spend a great deal of time thinking about what's wrong with our election system (the "here") and how to fix it (the "there"). But we spend almost no time thinking about how to get from here to there -- how to create an environment in which reform can actually take root.

---

[10] Steven Huefner et al., *From Registration To Recounts: The Election Ecosystems of Five Midwestern States* v (2007).

Identifying policymaking priorities. Good data are essential if we want reform to take root. To begin, good data are essential to policymakers. Data give policymakers a baseline for refereeing debates between the election administrators who work for them and the reformers who lobby them. Policymakers see plenty of untrustworthy arguments coming from administrators who aren't doing their job properly. But they also grow pretty tired of the insistent drumbeat for change emanating from the reform community. While policymakers may be reluctant to hold election officials accountable based on the necessarily atmospheric judgments of the reform community, they are likely to be convinced by hard numbers and comparative data.

Good data also help policymakers sort through policymaking priorities. Legislators and governors are often bombarded with information. They hear lots of complaints, listen to lots of requests for funding, and sift through lots of reports. What they need is something that helps them separate the genuine problems from run-of-the-mill complaints, a means of distinguishing the signal from the static.

Helping election administrators make the case for change. Good data are just as important for election administrators, the people who do the day-to-day work of running our election system. We usually assume that pressure for change comes only from the outside – from voters or reformers or top-level policymakers. But some of the most effective lobbyists for change are people working inside the system. Moreover, the long-term health of any bureaucracy depends heavily on bureaucrats' policing themselves through professional norms.

Good data arm those existing allies. Hard numbers help election administrators sympathetic to reform make the case for change. They help flag policymaking priorities and give election administrators confidence in their proposed solutions.

Good data also create more allies for change among election administrators. Too often, reformers bombard election administrators with complaints and offer "silver bullet" solutions that don't pan out. Good data tell election administrators when they actually have a problem and, better yet, can point the way to a solution.

Good data can also serve as a shield for election administrators, who often find themselves trapped in a political maelstrom through no fault of their own. The absence of data, combined with the episodic way in which we learn about election problems, poses a terrible risk for election administrators. In a world without data, voters learn about problems only when there is a crisis, and they lack a comparative baseline for assessing what's going on. When an election fiasco occurs, voters tend to leap to the conclusion that the problem was deliberately engineered. After all, voters are operating in a virtual black box – they know there's a crisis, they don't see other places experiencing the same problem, and they may even be aware of the partisan affiliation of the person in charge. It is all too easy to connect the dots.

Good data change the blame equation. Hard numbers enable voters and reporters to distinguish between partisan shenanigans and the ailments that afflict most

jurisdictions. Data thus help us reward the many election administrators doing a good job despite intense resource handicaps.

Developing best practices. Perhaps the most important role good data can play is to help create a consensus on best practices among election administrators. The long-term health of any system depends largely on administrators policing themselves based on shared professional norms. Indeed, professional norms may ultimately be more important to a well-run system than pressures from the outside. They are what my colleague Jerry Mashaw calls "soft law" because they rely on an informal source of power – peer pressure. Professional norms work because administrators are just like the rest of us. They care what other people think, and they are likely to care most about the opinions of people in their own professional tribe. Social scientists have done extensive work identifying the ways in which the pressure to conform affects individual behavior. Many professional groups – lawyers, accountants, doctors -- possess a set of shared norms about best practices. While these norms are often informal, they cabin the range of acceptable behavior. When professional identity becomes intertwined with particular practices, peoples' own sense that they are doing a good job depends on conforming to these norms.

It's not just peer pressure that causes people to conform to professional standards; it's also time constraints. No one has the time to think through all the considerations involved in every decision they make. Like voters, administrators need shorthand to guide their behavior. A professional consensus on best practices can represent a pretty sensible heuristic for figuring out the right choice. Good data help us pinpoint and disseminate best practices.

Even when we cannot reach a consensus on model policy inputs, it is still possible to generate professional norms about performance *outputs*. Good data can create something akin to a *lingua franca* in the realm of election administration, a shared set of performance standards that would apply to localities regardless of their policy practices.

In sum, good data are essential for a great election system. They provide an essential management tool, enabling us to diagnose and treat the problems that plague our election system. Good data help us identify problems and find cost-effective solution. They show us where our policymaking policies should lie and provide realistic benchmarks for solutions. And they provide the allies of reform with the tools they need to push for change. Good data not only set the policy agenda, then, but push it forward.

II. Where We Are and Where We Go From Here

Happily, things have improved since 2009, when I first wrote about election administration as a "world without data." Thanks to public and private efforts, most notably the Election Assistance Commission and the Pew Trusts, we have more and better data on how well our election system is performing. Indeed, we now have sufficient information to create the first index of state election performance.

On the public side, the much-maligned Election Assistance Commission has had its share of controversy. But it has led the way in data-collection efforts, administering a survey of state election practices that has helped jumpstart the important process of baselining state performance. The survey wasn't perfect, nor was it administered perfectly, thus prompting some well-deserved criticism by election administrators. But it was a crucial first step toward identifying the basic information states ought to collect and pulling it together in one survey.

On the private side, Pew has led the way in promoting data-driven management among election administrators. The Pew Center on the States has devoted considerable financial, intellectual, and organizing resources to improving and encouraging state data-collection efforts. It's taken on the daunting task of "scrubbing" and evaluating the extant data sets available, and no organization has done more to promote awareness of the need for data among election administrators.

One of Pew's most important projects has been the Elections Performance Index, which pulls together 17 indicators and aggregates them so we can compare state performance against one another and across time. Pew has thus given us what we've never had before – the election administration equivalent of the GDP measure. We now have the ability to baseline state performance, track the effects of policy change, and evaluate the drivers of performance.

While I'll leave it to the Committee's other witnesses to describe the EPI in full, let me just note that we are already reaping the benefits of the index. For instance, we've begun to learn things we didn't know before. States with high obesity rates, for instance, seem to have trouble getting their voters to the polls. So too, we're shaking loose some of our assumptions about which systems are working and which aren't. For instance, a number of states with long lines in 2012 ranked pretty high on the EPI. Ohio and Florida, the perennial objects of late-night comedy during elections season, were somewhere in the middle of the pack. Moreover, we see rich states and poor states performing well and badly on the list, something that at least raises questions about the real drivers of election performance.

The EPI hasn't just given us a new diagnostic tool. It also seems to be pushing reform forward.[11] Indeed, now that we can assess state performance across two comparable elections (the 2008 and 2012 presidential elections), we see states paying close attention to the rankings. In the first few weeks after the release of the 2012 EPI, there were lots of stories about states touting their rise in the rankings or grumbling about their scores, with more discussions happening behind the scenes.

Secretary of State Jon Husted, for instance, noted that one of the reasons that Ohio didn't rank higher on the EPI was its failure to keep up with other states in creating an online registration system and urged his legislature to take up the bill. Iowa is paying

[11] The next three paragraphs were drawn from a post on the Election Law Blog entitled "The EPI and Election Reform: The Early Returns are Promising," which is available at http://electionlawblog.org/?p=60357. That post contains links to the relevant stories.

special attention to military and overseas balloting, which pushed its rankings down. Florida was working with Pew in advance of the EPI's release and promises that it has *already* enacted transparency and access reforms that will improve its rankings next time. Indiana's Secretary of State tells us that, as we speak, the state is working on a post-election auditing process in order to up its ranking. The state also issued "a call to action" suggesting further improvements. Georgia insists that it's going to do a better job on data collection in the future in order to increase its score.

We see the same thing happening at the top of the rankings, also as I predicted. For example, the Secretary of State of Montana – which now ranks near the top – is not resting on her laurels. She called for additional reform so that Montana could maintain its position. So, too, the Secretary of State of top-ranked Michigan, which fell just shy of the top five, has called for online voter registration and changes to absentee voting in order to move the state higher up the list. Twelfth-ranked Washington is on the hunt for ways to improve its already strong ranking. And in North Dakota, which ranked first in the nation, policymakers who oppose voting rules recently enacted in North Dakota are using the EPI as a cudgel to beat the other side, arguing that those changes put the state at risk of losing its treasured number one spot.

If the EPI continues to develop into the touchstone for measuring election performance, it should matter more in these debates, and the pressure will continue to mount for low-performing states. States improved an average of 4.4 percentage points between 2008 and 2012. As Doug Chapin noted, "even states showing modest improvement run the risk of being left behind." A spokesperson for Washington State has plainly gotten the message: "[M]uch of what we've done is outstanding" but "others are catching up . . . We're still a high performing state [but] other states are making rapid improvements. Essentially, all boats are rising . . ." Moreover, as I noted above, even if the EPI doesn't prod a single state to do a single thing, it will still matter a great deal to election reform. That's because it provides an essential tool for data-driven policymaking: a baseline.

There are other sources of data as well, in large part due to the efforts of savvy local administrators. But these data aren't readily accessible, let alone provided in a form that would allow cross-jurisdiction comparisons.

In sum, while we've made important strides in collecting data on election performance, much work remains to be done. Let me describe three main areas where the data we have are decidedly sub par.

Cost. The information we have on the cost of administering elections -- one of the most important factors in the reform equation – is woefully incomplete. At present, we have no reliable means of measuring the costs of running elections from state to state. During a period of tight budgets and financial restraint, it is essential to compare the relative costs and benefits of the systems we use and the reforms we seek. That's why even the granular information we have on cost is already driving reform forward. Many Secretaries of States, for instance, are turning to online registration systems because they

reduce both human error *and* financial costs. The price tag for online registration is substantially smaller for traditional registration processes. Sometimes dollar and cents align with good sense in the policy world. Without more and better data on cost, however, we cannot identify the cost-effective interventions that would make our system better.

Local variation. We can also do a better job collecting data on local performance. While we've begun to gather sufficient information to draw some cross-state comparisons, we have no comparable means of assessing the considerable variation that exists locally. Local comparisons, of course, would give us a far richer set of information on what works and why. It should also help us identify policymaking priorities going forward. Virtually every Secretary of State will tell you that he or she worries most about one or two local outliers whose performance falls considerably below the statewide average, and state policymakers often offer gloomy predictions about which city or county will convert their state into the next Florida or Ohio. Without local performance data, however, we cannot identify the localities that put our system most at risk.

Needless to say, we cannot expect every locality to provide fine-grained data on every issue. Happily, we don't need massive amounts of data from every single jurisdiction to get a good read on whether the system is working or not. In collecting data at the local level, we should think like the Census Bureau.[12] The Census Bureau knows that it needs certain data from everyone. It thus sends every household a "short form" once every ten years to ask about basic demographic questions -- age, sex, and race/ethnicity. The Bureau then uses random sampling to gather other information. It sends a long form to a subset of the population to pull together more detailed data issues like education, jobs, and housing. We should use a similar short form/long form approach for local jurisdictions. We should identify a basic set of information that every jurisdiction ought to collect and then use a random sampling strategy to glean the rest of the information we'd like to have. We could also do a "deep dive" into a small number of jurisdictions, sending out the elections equivalent of McKinsey consultants to get fine-grained data on every aspect of the elections process for a handful of localities.

Customer-service data. In keeping with the recommendations of the Presidential Commission on Election Administration,[13] we should also encourage states and localities to gather more data on the voter's experience. Most Fortune 500 companies pay a great deal of attention to this information; most election administrators, unfortunately, do not.

There are many sensible strategies for figuring out whether, say, the registration system is unduly cumbersome or whether polling places are well designed for the average voter. The first involves testers. In *The Mystery of Capital*, Hernando DeSoto describes his elegant strategy for evaluating the quality of corporate regulations. He simply sent testers to different counties and then asked them to try to register a business. Based on their feedback, he gathered extremely useful quantitative and qualitative data on how

[12] I am indebted to Eric Fischer for suggesting this strategy.
[13] The Commission's excellent report is available at https://www.supportthevoter.gov/.

each process worked.[14] Following DeSoto's example, we could send out a diverse group of eligible voters -- someone who lives in a rural area, someone who lives in the inner city, someone who is blind, someone who has a seventh grade education, someone who requires language assistance, an overseas voter – to see whether they are able to register successfully and assess how long it takes them to do so. So, too, voter surveys can give us helpful information about the voter experience.

Alternatively, as I suggested in my book, we could create the voting equivalent of "Nielsen families,"[15] the randomly selected individuals who record their television watching habits for the Nielsen ratings service. We could ask randomly selected voters to record information about their experiences with the election process. For instance, a Nielsen voter might be asked how long it took her to register, whether she thought her polling place was conveniently located, and whether she found the ballot design confusing.

In sum, while we have come some distance in collecting elections data, there is a good deal more work to be done. As I argue in the next Part, the federal government is well suited to moving this process forward.

III. Why Congressional Data-Collection Efforts Vindicate the Values of Federalism

One might, of course, worry about the federal government intervening in what is largely a state-run endeavor. But federalism values cut the other way in this context. Indeed, were Congress to fund, encourage, or even mandate data collection by the states, it would serve the values of federalism rather than undermine them.

As a federalism scholar, I find much to admire about our decentralized election system. But a well-functioning decentralized system is not the same thing as a system without any national involvement. To the contrary, federalism's fans and foes are united in the view that there is always a role for the national in a federal system. This principle plainly applies to election administration, where one of the most obvious and important roles that federal actors can play is in funding, facilitating, and promoting data collection.

At present, states and localities are performing their storied role as "laboratories of democracy" in our election system. Because of the wide variation in state and local election practices, a huge number of policy experiments are running across the country. There is only one problem: we aren't recording the results of those experiments. Without more and better data on state and local practices, we risk turning the great promise of decentralization – that it can help us identify and implement better policy – into an empty one.

---

[14] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* 28 (2000).

[15] For information on Nielsen families, *see* http://www.nielsenmedia.com/nc/portal/site/Public/. Many thanks to David Schleicher for the great analogy.

The federal government is uniquely well suited to help. Data collection requires shared definitions and common collection protocols -- just what a federal agency can provide. Data collection also involves economies of scale, which is another long-standing justification for federal intervention in state affairs. It would be pointless to have fifty states design their own data-collection systems. As we have seen, the states end up collecting different information, and the data cannot be easily aggregated or compared. Moreover, a great deal of money is wasted when fifty states create fifty different systems where one or two will do.

The federal government can do for states what Fortune 500 companies routinely do for their decentralized units: invest in an integrated, user-friendly data-collection system that makes it easy to collect and aggregate the information we need. Better yet, the federal government can create such a system at a fraction of the cost that the states would pay if they undertook such efforts individually.

The federal government can also encourage, even prod states and localities into 21st century data-collection practices. It can do so through regulatory mandates or through conditional funding. Both are well within Congress's power and both would help states and localities create and maintain a well-functioning election system that redounds to the benefit of us all. At the very least, Congress can continue to fund and support the EAC's survey efforts.

Finally, turning to from the general to the specific, if there were one area where federal support for data collection could play an especially useful role, it is in helping states and localities track voters as they move. Voter mobility causes election administrators huge headaches. It fills voter registration lists with deadwood, eats up precious resources, and results in too many frustrated voters on election day. The private sector has little trouble keeping track of its customers when they move, and the federal government has long dealt with the challenges associated with a mobile population. Solving the problem of voter mobility is just the kind of federal project that would help states do a better job of running state and federal elections.

Conclusion

Data collection efforts in the United States are at an inflection point. Thanks to public and private efforts, we've made important strides in recent years. But there is much more work to do. Now is the time to build on our initial successes and support the type of 21st century data-collection efforts necessary to support a 21st century election system. Gathering information is the first and more important step in the policymaking process, and it should be a top priority for Congress as it strives to promote an election system worthy of our democratic traditions.

EXECUTIVE SUMMARY
Testimony of Professor Heather K. Gerken
J. Skelly Wright Professor of Law
Yale Law School
Submitted to the United States Senate Committee on Rules and Administration
May 9, 2014

We measure what matters. The public and private sector routinely collect and analyze data on virtually every aspect of our lives. Data-driven management isn't the ideal any more; it's the norm for corporations and government alike. Good data help us spot, surface, and solve existing problems. Data don't just allow us to identify policymaking priorities, but help move the policymaking process forward.

Data collection is at an inflection point in election administration. Things have improved in recent years, with a number of dynamic election administrators and astute state policymakers deploying data to identify problems and find solutions. Thanks to efforts by the public and private sector, we now have the nation's first election performance index, an idea I proposed several years ago. For the first time, we have a baseline to compare state performance and evaluate the effects of reform over time. That index will provide a crucial policymaking tool going forward.

Nonetheless, election administration still lags behind many public and private institutions on the data-collection front. We still lack sufficient data on a wide variety of important issues, including the cost of elections, local performance, and the voter experience. In some instances, the data are being collected, but they aren't collected in a form that is accessible let alone one that enables comparisons across jurisdictions. The absence of good data handicaps our efforts to fix the problems we see in the elections process, anticipate the problems we don't yet see, and manage the reform process going forward. Unless we capitalize on the data-collection efforts of recent years, we will never have an election system that lives up to our storied democratic traditions.

The federal government is uniquely well suited to assist the states in their nascent data-collection efforts. The marked variation in state and local election schemes lives up to Justice Brandeis' aphorism about the "laboratories of democracy." But the laboratories of democracy can only work if someone is recording the results. The federal government can provide what the states cannot supply on their own: a cost-effective, easy-to-use strategy for collecting, aggregating, and comparing state and local data. Were the federal government to promote data-collection among states and localities, it would vindicate the most important of federalism values by making it easier for the states do their job. The federal government can foster the competition and innovation that federalism is supposed to produce without intruding on state policymaking. We should not mourn the variation in our system. We should *harness* it, fueling the race to the top to which we all aspire. Good data, in sum, are essential for a great election system.

Biographical Information

Heather K. Gerken is the J. Skelly Wright Professor of Law at Yale Law School. Professor Gerken specializes in election law and constitutional law. She has published in the *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Review*, *Political Theory*, and *Political Science Quarterly*. Her most recent scholarship explores questions of election reform, federalism, diversity, and dissent. Her work has been featured in *The Atlantic*' "Ideas of the Year" section and the Ideas Section of the *Boston Globe* and has been the subject of a festschrift and a symposium. Professor Gerken clerked for Judge Stephen Reinhardt of the 9th Circuit and Justice David Souter of the United States Supreme Court. After practicing for several years, she joined the Harvard faculty in September 2000 and was awarded tenure in 2005. In 2006, she joined the Yale faculty. She has won teaching awards at both Yale and Harvard, has been named one of the nation's "twenty-six best law teachers" by a book published by the Harvard University Press, and has won a Green Bag award for legal writing. Professor Gerken served as a senior legal adviser to the Obama for America campaign in 2008 and 2012. Her proposal for creating a "Democracy Index" was incorporated into separate bills by then-Senator Hillary Clinton, then-Senator Barack Obama, and Congressman Israel and turned into reality by the Pew Trusts, which created the nation's first Election Performance Index in February 2013.

Written Testimony of Charles Stewart III
Kenan Sahin Distinguished Professor of Political Science, MIT
Co-Director of the Caltech/MIT Voting Technology Project
Before the U.S. Senate Committee on Rules and Administration

May 14, 2014

Chairman Schumer, Ranking Member Roberts, and distinguished members of the Committee: thank you for the opportunity to speak with you today about the collection, analysis, and use of election data to improve elections for all Americans.

I am a professor of political science at MIT, where I have taught and conducted research about American politics for twenty-nine years. For the past decade, I have also been the co-director of the Caltech/MIT Voting Technology Project (VTP).

In my association with the VTP, I have been especially interested in the challenge of creating metrics so that we can know whether the efforts we undertake and the dollars we spend to improve elections are actually doing the job. I have also had the privilege of working with the Pew Center on the States to help bring to fruition their Elections Performance Index (EPI, which David Becker will speak more about), and have co-edited (with Prof. Barry C. Burden of the University of Wisconsin) a forthcoming book about the use of metrics to assess the quality of elections in America. (The book's title is *The Measure of American Elections,* and will be published by Cambridge University Press at the end of the summer.)

The remarks I will make today are drawn heavily from these experiences. I also rely on a white paper I coauthored with Professor Daron Shaw of the University of Texas for use by the Presidential Commission on Election Administration (PCEA) about the use of election data in election administration. I would happily make available to the committee the draft of the book with Professor Burden and the PCEA white paper, if the committee would find them useful.

In today's testimony, I want to touch on three major points.

1. There is a need for a more data-centered approach to election administration in the United States.
2. The federal government is responsible for the two most important data-collecting efforts related to election administration; these efforts need to be supported and strengthened.
3. Local governments need help in converting the mountain of data that is generated in the conduct of elections into information they can use to better manage elections.

1. THERE IS A NEED FOR A MORE DATA-CENTERED APPROACH TO ELECTION ADMINISTRATION.

How well are American elections run? How would we know the answer to this question?

In my experience, whenever this question is posed, it is common to answer from the position of deeply held beliefs, but rarely from the position of a systematic analysis of facts. These beliefs might arise from partisanship, such as when we are happy to judge an election well-run when our candidate wins. Or, these beliefs might be based on tradition — a well-run election is one that is conducted the way we have always done things.

Rarely are answers to the question about how well elections are run rooted in hard facts, such as statistics about how easily people could find their polling place, or how many voters were confused by ballot design, or how long people had to wait to vote.

When facts intervene, they rarely are presented in a systematic fashion. Opinions about levels of voter fraud might be due to a viral YouTube video. Satisfaction with a new electronic voting machine may be illustrated by a picture of a smiling citizen coming out of the precinct with an "I Voted" sticker stuck to her lapel. Disdain about the ability of local governments to run elections might follow from a newspaper article detailing yet another season of long lines outside polling places in Florida (or South Carolina, or Maryland, or ...).

This approach is evaluation-by-anecdote.

In contrast, consider how we approach similar questions about other policy areas: "How good are America's prisons?" or "How good are America's schools?" or "How good is America's health care system?"

Some people surely would respond based on fact-free beliefs, and others would respond with a random story about the experience that one's cousin had with one of these institutions. However, it would not be difficult to discover basic facts about these other policy domains. It would take little effort to find out, for instance, what the re-incarceration rates were in each state, or the ranking of fourth graders on the reading portion of the National Assessment of Educational Progress, or the infant mortality rate in each state.

None of the statistics just referenced is the be-all-and-end-all of the questions about how well the prison systems, schools, and health systems work in the states. The point is that in each of these policy domains, significant effort is poured into defining measures of policy input and output consistently across states, multiple measures of system performance are regularly reported through a federal agency, and entire professions have grown up to analyze these data. Despite the fact that answers to policy questions about criminal justice, education, and health care are legitimately informed by political values and deeply held personal beliefs, even committed ideologues ground their appeals in statistics when they argue about policy; some

will even be convinced they are wrong if the facts are against them. The data provide a common starting point.

In other words, an obvious way to begin addressing questions about the state of public policy in these other important areas would be to draw upon a large body of data about the performance of these institutions and policy systems.

To return to elections, the correct strategy to overcome debilitating partisan conflict over election administration involves grounding debates over policy in hard facts. The success of the PCEA and the widespread embrace of its report, no doubt, are due to the Commission's attention to the facts — some of which challenged conventional orthodoxies. The task before us is perpetuating the model provided by the PCEA of bipartisan problem-solving guided by data.

The good news and the bad news

There is good news and bad news in the effort to make election administration and election policymaking more fact-based. The good news is that elections are awash in data, more attention is going into collecting and reporting data that can be used to help manage elections than a decade ago, and there is a growing network of election officials, academics, and other experts who are dedicated to the cause of a more metrics-based approach to diagnosing and fixing problems in the administration of elections.

The bad news is that there are challenges and barriers to the further development of a metrics-based approach to election administration. The big barrier is continued uncertainty about the future of the EAC, which threatens the future of the most important data collection effort in the area of election administration and has slowed down the development of data sharing standards that would facilitate innovation, in translating election data into useful management information.

There are smaller barriers, too. One of these is the role of localism in the conduct of elections. Elections are primarily a state responsibility, which most states have addressed by making election administration a local responsibility. There are benefits to such decentralization, including greater trust among voters in the fairness of the voting process. But there are costs, too, that must be accounted for.

From the perspective of developing a metrics-centered approach to election administration, localism makes it more difficult for similarly situated jurisdictions to learn from each other, because similarly situated jurisdictions often use different vocabularies to talk about the same things. (George Bernard Shaw's quip about Great Britain and the United States being nations separated by a common language seems apt here.) Election administrators in small jurisdictions are often poorly equipped to use modern management approaches to conduct elections. Finally, an under-appreciated consequence of localism is that it creates a fragmented

market for election equipment manufacturers, which hinders the development of information-technology solutions that might help local officials manage based on systematic measures of performance.

A map of election administration data

For data to be useful in improving any area of public administration — not just election administration — it must exhibit two critical characteristics. First, it must conform to the units of government where policy is made and implementation occurs. Second, it must be comparable across units.

In the United States, virtually every level of government is in a position to set policy and pass laws that influence how elections are conducted. These different levels of government are all involved in implementing laws that affect the convenience and integrity of elections. In addition, precincts are a unit of government where policy is generally not made, but in which the implementation of federal, state, and local laws can significantly influence the actual experience of voters. A comprehensive data portrait of election administration in the United States would have indicators of the outcomes of election administration at all these levels.

There are, in fact, data sources that address election administration at all these levels, some of which are noted in Table 1 below. Note that the sources at the finer levels of analysis can be aggregated up, the best example being voting machine totals that can be added up to provide election returns at the precinct, county, state, and national levels.

Table 1. Levels of administration and available election administration data

Level of govt.	Data source	Producing agency	Description
State	Current Population Survey, Voting and Registration Supplement	U.S. Census Bureau	Survey data about voter participation and registration patterns
Local (county/ municipal)	Election Administration and Voting Survey	U.S. Election Assistance Commission	Counts of the number of voters participating in elections — registration, absentee, UOCAVA, provisional ballot statistics. Counts of precincts, election workers, and voting machines
Precinct	Election returns	State and local election departments	Number of votes cast for candidates and the number of voters who turned out at the polls
Voting machine	Various log files	Local election departments	Voting machines record "events" associated with using the equipment.

Table 1 contains a row for "voting machine," even though it is not a unit of government. It is included to emphasize the fact that individual items of voting equipment may be the source of

data that provides information about the administration of elections, beyond just the vote totals. I say more about this below.

Table 1 excludes one very useful source of data that is generally maintained in cooperation between state and local governments — voter registration lists. Not only do the registration lists record how many people are registered statewide and in individual jurisdictions, they can also provide information about the number of people assigned to each precinct, how many people voted in each precinct, and (in some cases) the date and location of voting for early voting.

The second important desired feature of policy-relevant data is that it should be comparable across different units. A single data point — such as the number of registered voters in a precinct — is not very informative unless it can be compared to a data point that comes from a similar unit — such as the number of registered voters in another precinct. In addition, comparing two data points is uninformative if the data mean different things in the two places. If the first precinct is in a state that accounts for active and inactive voters in the count of registered voters, while the second precinct is in a state that only accounts for active registrants, the comparison is of limited use.

The issue of comparability is a major one in the field of election administration. For some administrative processes, there sometimes seems to be as many definitions for common terms as there are states or counties.

For instance, in the Election Administration and Voting Survey (EAVS), which is administered biennially by the U.S. Election Assistance Commission (EAC), counties are asked to report "the total number of people in your jurisdiction who participated" in the most recent federal election, a quantity we can use to define "turnout." They are also asked to report the method used to reach this quantity. Of the localities responding in 2012, 1,448 based their turnout report on actual ballots counted, 1,071 based their report on the number of voters checked off the voter list plus the number of absentee ballots, 336 used the total number of votes cast for president, 563 ran a report of the number of voters according to the electronic voter history file, and 518 reported using "other" methods. Experience has shown that these methods all yield similar results, but they do not yield *identical* results.

As mentioned above, localism is a feature of American election administration that hampers the development of a common body of knowledge about how policies affect the convenience and security of voting. Localism also hampers the development of technologies to assist state and local election officials do their jobs better. The EAVS is an invaluable resource in this setting, to the degree it has gotten the election administration community to speak more of a common language — or at least to understand each other's languages better — and has provided hard facts that help similarly situated jurisdictions learn from each other.

2. THE FEDERAL GOVERNMENT IS CURRENTLY RESPONSIBLE FOR THE TWO MOST IMPORTANT DATA-COLLECTION EFFORTS RELATED TO ELECTION ADMINISTRATION; THESE EFFORTS NEED TO BE SUPPORTED AND STRENGTHENED.

The federal government has played an indispensable role in the collection of critical data that informs our understanding of how well elections are conducted in the United States. The most visible of these efforts are two data products, the Voting and Registration Supplement (VRS) of the Current Population Survey and the Election Administration and Voting Survey (EAVS) conducted biennially by the EAC.

The VRS has long been familiar to the election administration and reform communities because it is the most important national survey that tracks voter turnout and registration patterns. As the name implies, it is a supplement to the monthly Current Population Survey (CPS), which is sponsored jointly by the U.S. Census Bureau and the U.S. Bureau of Labor Statistics, primarily to gauge labor market dynamics. Every two years in November, a large subset of the CPS sample is asked a small number of questions, about whether they voted in the most recent federal election, the mode they used to vote (in-person on Election Day, in-person at an early voting site, or absentee/by-mail), whether they are registered, and reasons for non-voting and non-registration (among those who report not voting and not registering, respectively).

The VRS's large sample of voters in each state and the District of Columbia allows the examination of voting and registration trends at a level of detail that is simply impossible through other means. Its long history, stretching back to the 1960s, provides an invaluable time series of turnout and registration patterns that allows policymakers and the public to see clearly the impact of federal election laws over time, such as the Voting Rights Act of 1965 and the NVRA. The VRS's laser-like focus on two questions, turnout and registration, makes it the best data source by which to understand these issues.

Because the VRS has a distinguished history and has been responsible for the core knowledge we have about turnout and registration dynamics, I will say no more about it than to urge its continued support.

<u>The EAC's Election Administration and Voting Survey: An invaluable resource</u>

Instead, I would like to focus attention on a newer data program, the EAC's Election Administration and Voting Survey (EAVS). Beyond the fact that it is a national survey, the value of the EAVS comes in its comprehensive coverage of *all* local election jurisdictions — that is, the units of government that are the most directly responsible for administering elections — and its attention to comparability. Therefore, it is more properly considered a national election administration and voting *census.*

Before the EAVS was begun in 2004, the only data available at the level of the local jurisdiction to help inform election policymaking nationwide was the number of votes cast for candidates

for federal office, but that was available only if scholars and policymakers contacted each state elections division separately. Other basic facts, such as the number of absentee ballots mailed out and returned, the number of voting machines, the number of new registrations that were rejected and the number of overseas military ballots mailed out were simply unknown. The EAVS survey instrument collects data for about 618 distinct metrics that are useful in painting a comprehensive portrait of the performance of American elections.

The EAVS experienced growing pains in its earliest years, both in terms of settling on the items to include in the survey and in the ability (or willingness) of local jurisdictions to respond. These challenges are well documented in the EAC's 2004 "Election Administrator Survey Report." However, the 2012 EAVS saw nearly universal participation by local governments.

One measure of local government participation in the EAVS is the "data completeness" measure that is contained in the Pew EPI. Rather than expect all local jurisdictions to respond to all the minute details of the survey, the Pew data completeness measure identifies seventeen high-level items on the EAVS that are necessary for monitoring the basic performance of elections at the local level. These are items such as the number of new registration forms processed and the number of absentee ballots requested and mailed out to voters. A particular state's "data completeness score" is simply the percentage of these seventeen items that the jurisdiction reported. The nationwide data completeness score is the average of all the local scores, weighted by the size of the jurisdiction.

The nationwide average data completeness scores were 86% in 2008 and 94% in 2010. For 2012, completeness was 95%.

Comparability is another feature of the EAVS that can be easily overlooked. One way that the EAVS helps to ensure the comparability of the data across jurisdictions is through its Statutory Overview. The Statutory Overview, which is published alongside the quantitative data gathered via the EAVS, first of all provides a summary of state laws that are relevant to the conduct of federal elections. But the survey also allows states to provide definitions to common terms used in election administration, so that the quantitative information in the EAVS can be better understood. For instance, Section A of the Statutory Overview instrument asks each state to define nine specific election administration terms, and to provide a legal citation to the definition. The terms include "over-vote," "under-vote," "absentee," and "early voting." Responses to this section provide guidance in moving between state-specific terminology and terminology that is used in national discussions of election administration. For instance, it is through the statutory overview that we learn that states use eight different terms to refer to mail-in voting (including "absentee," "mail-in voting," and "early voting") and eight different terms for early voting (including "early voting," "absentee in-person," and "in-person advance voting").

The EAC issues four written reports that summarize the data collected through the EAVS. These are the reports related to the administration of the National Voter Registration Act (NVRA) and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), plus a report that

summarizes findings about the remaining election administration items in the EAVS and the Statutory Overview report. The EAC also makes the raw data available for use by the general public, available for download in spreadsheet format, and in other formats that facilitate statistical analysis.

A sampling of findings from the 2008 and 2012 EAVS

It is because of the EAVS — and only because of the EAVS — that we know the following facts about the 2012 federal election, with some comparisons to the 2008 election:

- Over 60 million registration forms were processed by the fifty states and the District of Columbia in the two-year election cycle ending November 2012. One-third of these forms were new registrations. Over 40% were address changes.
- In 2012, 65% of voters cast ballots on Election Day, 25% cast ballots absentee or by mail, and 10% cast ballots at early voting sites.
- Over 861,000 UOCAVA ballots were mailed out and nearly 601,000 were returned for counting, for a 70% return rate. This was down from 960,000 mailed out in 2008, with over 702,000 returned for counting (73% return rate) in 2008.
- Fifty-three percent of UOCAVA ballots were sent to military voters in 2012. This is down somewhat compared to 2008.
- Rejection rates for submitted UOCAVA ballots (3.5%) in 2012 were slightly higher than the rejection rates for civilian absentee ballots (2.9%). (Rejection rates for both UOCAVA and civilian absentee ballots were lower in 2012 than in 2008.)
- UOCAVA ballots were most commonly rejected because they were not received on time (42% of rejections) or there was a problem with the voter's signature (14%). In contrast, civilian absentee ballots were most often rejected because of signature problems (36%), followed by being received late (33%).
- Local jurisdictions were divided into over 171,000 precincts. There were 99,000 physical polling places used on Election Day and approximately 2,500 early-voting sites. The number of precincts and Election Day voting sites was down roughly 10% compared to 2008; the number of early voting locations was approximately the same.
- The number of Election Day voters per Election Day polling place grew from 671 in 2008 to 689 in 2012.
- The number of early voters per early voting site in 2012 averaged 1,111 per day of early voting.
- The number of provisional ballots increased in 2012 to 2.6 million, compared to 2.1 million in 2008. The number of provisional ballots eventually counted also increased, from 1.4 million in 2008 to 1.9 million in 2012.

Challenges facing the EAVS

The EAVS remains a work in progress. A handful of states have been persistent non-responders, which means that citizens of those states are in the dark about basic features of election administration. The need to maintain a questionnaire that allows for the diversity of election administration practices in the states and territories creates a large instrument that can be a challenge to administer, respond to, and use. The raw data from the EAVS is generally released between nine months and a year following each federal election. This gap between the general election and the release of the EAVS data makes it difficult to insert nationally comparable election administration data into state debates about changes to election laws in the winter legislative sessions that generally follow November elections.

These are normal, manageable challenges that would face any large federal data collection program. There is one major challenge to the EAVS that is unique to it and beyond the control of the EAC's able staff: the EAVS's existence is threatened by the ongoing uncertainty about the future of the EAC. Despite the uncertainty about the EAC's future, the research staff has soldiered on, continuing to administer the survey after the past two federal elections. Despite difficult working conditions, the EAC staff has to be commended for continuing on with this important scientific activity.

Still, these are not conditions under which any important federal data gathering program can grow, develop, and excel. Whatever the future of the EAC, and however the clearinghouse and research functions of the EAC might be divided up should the Commission ever be abolished — the EAVS needs to be protected. Without an EAVS, we would be flying blind, and would be much more likely to re-experience the types of election administration meltdowns that led to the EAC's creation in the first place.

3. LOCAL GOVERNMENTS NEED HELP IN CONVERTING THE MOUNTAIN OF DATA THAT IS GENERATED IN THE CONDUCT OF ELECTIONS INTO INFORMATION THEY CAN USE TO BETTER MANAGE ELECTIONS.

Anyone who has encountered elections professionally — as a candidate, election administrator, academic, journalist, or citizen volunteer — knows how much data is generated in the course of conducting an election. Ballots cast by voters are quickly translated into election returns, which are often broken down by the precinct in which they are cast. Sometimes these election returns are further broken down by the mode of voting.

Other statistical reports are generated, too. Voter registration databases can be used to generate reports of how many voters live in each precinct — reports that are often further broken down by race, sex, age, and political party. Some states and localities generate other reports that are similarly detailed, such as the number of absentee ballots and number of provisional ballot.

What will come as a surprise to most is that these types of reports generated in the course of conducting an election are only the tip of the iceberg. So much more data is generated in the course of conducting an election than only election returns and turnout reports.

Focusing on Election Day itself, the computer equipment that helps an election official manage an election also records information about each transaction. To be very clear, this is not data about *whom* the voter has voted for. Rather, it is data that records things like the time the voter checked in at the registration table and the time when the voting machine was prepared for the voter to cast a ballot (if it is an electronic machine) or scanned a ballot (if it is an optical scanning machine).

This is the transaction data associated with elections. Retailers know that transaction data can tell managers about the behavior of their customers; the best managers know how to turn this data into changes in customer service that improve the shopping experience. It is not a big stretch to think about voters as customers when they come to the polls, and thus to ask, how can transaction data help improve the convenience and security of voting?

Example: The value of transaction data for addressing long lines at the polls

Why is transaction information important in elections? We can see the potential importance of using voter transaction data if we consider the problem of long lines on Election Day.

Quite simply, a long line occurs when there is not enough equipment or personnel to handle the volume of voters who arrive at a polling place. Defining what is enough equipment or personnel is tricky, however. The science of operations management tells us that to know "how much is enough," we need to know just a few basic things, such as arrival rates and service times (i.e., how long does it take to check in and to mark a ballot?). We need to know how these arrival rates and service times vary over the time of day, how they vary across precincts, and how they vary according to the populations who are served at each precinct.

Based on my talking to election officials and examining many types of data and numerous reports, I am convinced that local officials typically do not know basic facts, like arrival rates and service times, with the degree of precision necessary to plan the purchasing of equipment and deployment of resources so as to keep lines to a reasonable length.

Of course, all officials have a general sense of when voters show up to vote. They will often tell you that the turnout of voters in working class neighborhoods spikes after work hours, while turnout of voters in precincts with a lot of retirees spikes in the middle of the day. However, not many will know how many voters arrive between 7:00 and 7:30 a.m., compared to between 7:30 and 8:00 a.m. And yet, it is precisely this degree of precision that is necessary in order to know if you have enough voting machines to handle the anticipated surge of voters when polls open on Election Day.

This is where arrival rate and service time data from voting equipment could be so useful. Today, officials who oversee elections for half of the American electorate — i.e., the half who already utilize electronic poll books — probably possess all they need to know about the arrival rates of voters to make the calculations necessary to plan for the next election, and to ensure that lines don't overwhelm them.

Why don't election officials use this data more often? Two main reasons dominate.

First, the reporting-functions of election equipment are usually not set up to produce the types of reports that would be useful to election officials as they make their plans to manage future elections. At the risk of getting too geeky, the event logs produced by much of the current voting equipment is oriented around helping local officials diagnose problems with their voting equipment — a critical function, no doubt — and not to help with the forward-looking tasks of knowing how much voting equipment to buy and how to deploy it.

Second, most local election departments do not possess the type of industrial engineering expertise necessary to analyze service data from election machines. In fact, it would probably be impractical for all but the largest of election jurisdictions to maintain such expertise full time, given all their other pressing needs. However, the expertise I am talking about is often possessed by *some* department of most counties, whether in the planning department or the transportation department.

Spurring innovation via targeted federal activity to aid data interchange in election administration

Why should this be of interest to the Congress?

It should be of interest because a few targeted federal actions could help the private sector develop the technological tools that would take service time data and turn it into information that state and local officials could use to improve the experience of voting for all Americans — especially the Americans who experienced the longest lines to vote in 2012. Here, I mention two ways in which the federal government could encourage development in this area.

First, the federal government could fund a small grant program to spur the development of hardware and software tools that would take existing service data and turn it into information that local officials could use to manage elections more effectively. The model I have in mind is drawn from the EAC's Election Data Collection Grant Program, which was aimed at improving the quality of data collected for the EAVS in 2008. These grants, which amounted to $2 million awarded to five states, significantly improved the quantity and quality of data reported by these states, and their ability to gather data related to election administration down to the precinct level.

Of particular note is the success of Wisconsin — the state with the most decentralized election administration system in the country — in developing systems to ensure uniform reporting of election data in the Badger State, despite its extreme decentralization and variability in technical capacity of the local jurisdictions that manage elections.

The model I have in mind would grant relatively modest amounts (around $1 million) to five states which, in consultation with university partners, would develop software systems that could convert the service data produced by voting equipment in the normal course of conducting an election into information that would give officials deeper insights into how to manage the logistical side of elections more efficiently. If the grants were awarded to states with a diversity of voting equipment, the end result would be software systems that could eventually be utilized in a variety of jurisdictions beyond those that received the grants.

Second, the federal government could continue to support and encourage the efforts currently under way to establish standards that would allow the seamless sharing of data across different types of computers that are involved in administering elections. (The way to think about this is creating the same types of standards that allow a computer user who creates a spreadsheet using a database program on one brand of computer to share the spreadsheet with a colleague who uses a different brand of computer, without loss of information.)

The creation of data sharing standards is a necessary condition for more widespread interoperability of electronic equipment used in the management of elections, as well as the creation of software and hardware systems to help manage elections better.

One example of an effort to establish data sharing standards in the elections field is work being undertaken by a working group (P1622) under the Voting Systems Standards Committee of the IEEE Computer Society. The ultimate goal of this working group is to enable the effortless interchange of information across equipment in all areas of election administration, from designing ballots to reporting election results.

The value of this effort goes beyond the issue of using data to better manage elections. Currently, the election equipment used by local jurisdictions usually uses proprietary data formats that cannot be directly transmitted to any other electronic equipment. As a consequence, if jurisdictions want to use equipment from different manufacturers, they often have to translate data files from one format to the other, which risks the corruption of data as it moves between platforms. The time and effort necessary to move information between different brands of computer equipment leads to a lock-in of states and local jurisdictions into particular equipment and manufacturers. This ultimately discourages the use of commercial off-the-shelf equipment in election administration, thus increasing costs and reducing innovation.

This IEEE effort to create a common data standard for election administration is valuable to the effort to better utilize data in managing elections, because it would lead to faster innovation in

software and hardware systems that would take information generated by one manufacturer's equipment and turn it into useful management information for election officials.

What is the federal role in this effort? Because the IEEE is a private organization, this is not a project of the federal government, per se. However, scientists from the National Institute of Science and Technology (NIST) participate on this working group, providing valuable leadership in the process. Furthermore, the EAC's Voluntary Voting System Guidelines, should they be updated, will undoubtedly contain a requirement that election equipment manufacturers use a common data format, such as the one being developed by the IEEE working group.

Again, we find ourselves back to wrestling with the lack of a functioning EAC. Without a functioning EAC, it is impossible to approve a new set of voluntary voting system standards. Without these standards, the work of creating a common data format for elections-related data will be incomplete. Without a common data format, development of systems to help local officials manage elections better will be slowed significantly.

Therefore, as with the matter of encouraging the future survival of the EAVS, the ultimate success of a common data format for election data depends on a resolution to the current gridlock over the future of the EAC. Regardless of how this gridlock is resolved, the development of common data standards in the elections field will languish so long as the voluntary voting systems standards cannot be officially updated by any process.

A final note: Helping local election officials

I want to add one final observation about the collection and use of election data for the better management of elections. In order for the management of elections to become more data-driven, it is important that we find ways to inject relevant data into the decisionmaking process *without adding further burdens to local election officials.*

Local election officials already have a lot to do without adding significantly more requirements on them to gather and report data. It is therefore imperative to find ways to make the gathering and reporting of management-related election data an automatic byproduct of conducting elections. In other words, the challenge of creating systems to facilitate the gathering and reporting of data needs to be met by equipment manufacturers and vendors, who should be encouraged to create systems to make the jobs of election administrators easier. One of the ways of doing this is to create data standards so that innovation can proceed within the private sector and the academic community to develop the tools that local election administrators need.

* * *

To conclude, I thank the committee for their time and for holding hearings on an important range of issues pertaining to the improvement of elections for all Americans. Election administration is too important not to work to elevate it into the ranks of policy areas that are guided by data-driven analysis. In this field more than most others, good data can be an antidote to partisan bickering.

The role the federal government can play in encouraging the development of a data-centered approach to election administration and election policy is subtle, but quite traditional. The federal government is in a unique position to gather and disseminate data in the field of election administration, in the same way it gathers and disseminates large amounts of data related to areas of public policy and commerce. It is also in a unique position to facilitate the coordination of private and public entities to set a framework for technological innovation, through the setting of standards. By playing both roles, the federal government can provide a rich environment in which private initiative and public purpose can productively meet.

EXECUTIVE SUMMARY
Written Testimony of Charles Stewart III
Kenan Sahin Distinguished Professor of Political Science, MIT
Co-Director of the Caltech/MIT Voting Technology Project
Before the U.S. Senate Committee on Rules and Administration

May 14, 2014

THERE IS A NEED FOR A MORE DATA-CENTERED APPROACH TO ELECTION ADMINISTRATION.
Election policymaking would greatly benefit from metrics-based policymaking, and the development of measures similar to those in policy areas like education and health care.

Elections are awash in data, managing elections is increasingly metrics-driven, and a growing network of experts is dedicated to a metrics-based approach to improving elections.

A major barrier to the development of metrics-based election administration is uncertainty about the future of the EAC.

THE TWO MOST IMPORTANT DATA-COLLECTION EFFORTS IN ELECTION ADMINSITRATION ARE FEDERAL PROGRAMS THAT NEED TO BE SUPPORTED AND STRENGTHENED.
Two federal data programs, the Voting and Registration Supplement of the Current Population Survey and the Election Administration and Voting Survey (EAVS) conducted by the EAC, are indispensable data tools for the assessment of election policy in the United States.

The EAVS is the only federal statistical program that gathers data about election administration across all local units of government in the U.S.

The future of the EAVS is jeopardized because of gridlock surrounding the EAC's future.

LOCAL GOVERNMENTS NEED HELP IN CONVERTING THE MOUNTAIN OF DATA GENERATED IN ELECTIONS INTO USEFUL INFORMATION TO BETTER MANAGE FUTURE ELECTIONS.
Local governments need better access to transaction data generated by voting equipment on Election Day in order to manage administrative burdens in conducting elections.

There may be a federal role for the creation of a focused grant program aimed at creating computer applications to turn transaction data into useful planning information.

The federal government should continue to support and encourage efforts to establish data standards that would allow the seamless sharing of data across election equipment platforms.

Systems need to be developed so that the gathering and reporting of data for the purpose of running elections more effectively do not add even more burdens to local election officials.

Biographical Information

Charles Stewart III is the Kenan Sahin Distinguished Professor of Political Science at the Massachusetts Institute of Technology, where he has taught since 1985. His research and teaching areas include voting technology, election administration, congressional politics, and American political development.

Since 2001, Professor Stewart has been a member of the Caltech/MIT Voting Technology Project, a leading multidisciplinary research effort that applies scientific analysis to questions about election technology, election administration, and election reform. He is currently the MIT director of the project. He has provided assistance to the Pew Charitable Trusts in the development of the Election Performance Index. Professor Stewart is an established leader in the quantitative analysis of the performance of election systems and administration.

Professor Stewart has published numerous scholarly books and articles. Most recently he has co-edited *The Measure of American Elections* (with Barry C. Burden, Cambridge University Press, forthcoming) co-authored *Fighting for the Speakership* (with Jeffrey A. Jenkins, Princeton University Press, 2013), and authored *Analyzing Congress* (Norton, 2nd ed., 2012).

Professor Stewart has been recognized at MIT for his undergraduate teaching, being named to the second class of MacVicar Faculty Fellows in 1994, awarded the Baker Award for Excellence in Undergraduate Teaching, and received the Class of 1960 Fellowship. Since 1992, he has served as Housemaster of McCormick Hall, along with his spouse, Kathryn Hess.

Professor Stewart, a Fellow of the American Academy of Arts and Sciences, received his B.A. in political science from Emory University, and an S.M. and Ph.D. in political science from Stanford University.

Testimony of Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

United States Senate Committee on Rules and Administration
May 14, 2014

Collection, Analysis and Use of Elections Data: A Measured Approach to Improving Election Administration.

Chairman Schumer, Ranking Committee Member Roberts and Committee Members:

Thank you for the opportunity to provide information to the Senate Committee on Rules and Administration about the collection, analysis and use of elections data. It is an honor to be here. This is a subject state and local election officials in Wisconsin recognize as an essential element in conducting elections. Please allow me to provide a brief background on the organizational structure of elections in Wisconsin along with a description of our approach to collecting, analyzing and utilizing data to improve the administration of elections in Wisconsin

Introduction

I have served as Wisconsin's non-partisan chief election official for more than 30 years. I am also a member of the National Association of State Election Directors (NASED). I served as NASED President in 2006 and currently serve on the NASED executive committee.

I am currently appointed by and report to a non-partisan, citizen board of six former circuit court and appellate judges who comprise Wisconsin's Government Accountability Board. The Board oversees the state's elections, campaign finance, ethics and lobbying laws.

The Board has general supervisory authority over the conduct of elections in the State of Wisconsin. The Board has delegated to me its compliance review authority over Wisconsin's 1,924 local election officials and their staffs. This means any complaint alleging an election official has acted contrary to law or abused the discretion vested in that official must be filed with the Government Accountability Board before it may proceed in court. I have the authority to order local election officials to conform their conduct to law.

The Board has developed comprehensive training programs for local election officials. The Board is also required to certify the chief election inspector, the individual in charge of each of the state's 2,822 polling places. The Board is required to emphasize the integrity and importance of the vote of each citizen in its training programs. Wis. Stat. §5.05 (7)

Wisconsin's elections are administered at the municipal level in our 1,852 towns, villages and cities. The municipal clerk, an elected or appointed non-partisan public official, is responsible for processing all absentee ballots, including those for Wisconsin's uniformed services and overseas voters.

The State of Wisconsin has arguably the most decentralized election system in the nation. The State administers elections with the support of 72 counties, and Wisconsin's 1,852 municipalities conduct each election. About 62 percent of municipal clerks serve part-time. Wisconsin has 6,752 wards (precincts) organized into more than 3,500 reporting units for each election, and a voting age population of more than 4.3 million people. Wisconsin implemented Election Day registration in 1976, and required voter registration for all electors statewide since 2006. Despite the challenges of such a diversified election system, Wisconsin experiences consistently high voter turnout – usually first or second nationally, and ranked in the top five among all states in the Election Performance Index published by the Pew Charitable Trusts for 2008, 2010, and 2012.

Background

Since at least 1979, Wisconsin has statutorily required election data collection. Reporting has expanded from collecting voter turnout and voter registration statistics to include absentee voting information and further to meet the reporting requirements of the U.S. Election Assistance Commission (EAC) and the Federal Voting Assistance Program (FVAP), encompassing over 600 data points, as well as compliance with the Help America Vote Act of 2002 (HAVA).

Wisconsin's data collection and analysis efforts would not have been possible without a $2 million grant from the EAC in 2008. Wisconsin used this grant to modernize data collection and analysis from a paper-based system to an electronic system. We developed the Wisconsin Election Data Collection System (WEDCS) for election statistics reporting, and the Canvass Reporting System (CRS) for election results certification. These systems now serve as models that other states can easily replicate. In 2012, Wisconsin became the first State in the country to collect election cost data from every county and municipality for statewide elections.

Wisconsin's Data Collection Process

The primary method of elections data collection in Wisconsin comes from analyzing transactional information in our Statewide Voter Registration System (SVRS), where clerks manage voter records including registrations, polling places, contests and candidates. Some clerks use SVRS to manage absentee ballots. Wisconsin created its SVRS in 2006 to comply with HAVA. Much of our successful collection and use of elections data is because of two key factors: Wisconsin manages elections and election systems top-down, and our elections management systems are coordinated rather than segregated.

Since Wisconsin began collecting election related data, we identified some gaps in data collection and analysis, both for general business purposes and for compliance with federal reporting requirements. WEDCS helps to bridge that gap by collecting data from municipal and county clerks that is not readily available through SVRS, as well as providing the opportunity to audit some SVRS data quality.

Wisconsin's statutory requirement for election data collection is instrumental in achieving 100 percent reporting compliance from all counties and municipalities. The statutes also

standardize the required information, when the reports are required (whenever there is a federal or state contest or statewide referendum on the ballot), and the deadline for reporting the required information (within 30 days of the election). Wisconsin also established an administrative policy of standardizing the required election cost data and reporting deadlines. Also critical to Wisconsin's successful data collection efforts is using standardized reporting formats, continuously asking the same questions in a logical order, while providing clear and detailed instructions and training materials to county and municipal clerks.

Wisconsin's election data collection leverages modern technology, replacing the previous paper-based reporting with an online data collection system. The process is simplified and improved by reducing data entry errors, eliminating the need for staff to attempt to decipher difficult-to-read handwriting, and shifting resources from data entry to auditing compliance and data quality. WEDCS and CRS utilize XML coding for data transmission and SQL Server Management Studio for auditing and analysis. By using readily available and widely used technology, we can develop cost-effective systems, easily find qualified IT personnel, and train program staff.

Election Cost Data

In 2011, the Wisconsin State Legislature wanted estimations of the fiscal impact of a statewide recall election. We surveyed county and municipal clerks in order to provide a cost estimate. In 2012, Wisconsin's Government Accountability Board used its statutory authority to require counties and municipalities to provide information for the purpose of election administration to require election cost reporting for every state and federal election. While the total amounts between the estimates in 2011 and the cost reports in 2012 were reasonably similar, we found that the categorical totals in some cases varied substantially. Wisconsin counties and municipalities now report election-specific costs after each Spring Election and General Election within 60 days, as well as general costs annually by January 31 for the preceding year.

While these cost reports do not represent an exact financial audit of election costs, they do provide an invaluable tool for policy analysis. The value of the data is greatly enhanced by providing clear and detailed instructions and training materials to county and municipal clerks, just as we do for statistical reporting. Like any undertaking, it is essential to articulate the purpose of collecting this data in order to achieve buy-in from clerks so they have a stake in accurate reporting and can benefit from their efforts. Data provide a common format for allowing each municipality or county to tell their story in a way that is relatable to other jurisdictions. We were able to eliminate the need to collect cost data after every election because we were able to identify from our 2012 cost data how costs fluctuated based on voter turnout and the complexity of the ballot. Separating out annual costs also provides a fiscal estimate of general election administration costs and long-term costs (e.g., personnel costs, voting equipment purchases, and maintenance).

Wisconsin's Data Analysis Process

Eliminating the need for staff to review hand-written reports by requiring municipal and county clerks to enter their own data, staff can focus on reporting compliance and auditing data quality. Even with the large number of municipalities, reporting units, and data points,

leveraging technology facilitates detailed auditing and analysis. Wisconsin law allows municipalities with a population less than 35,000 to create reporting units, combinations of wards with the same contests, for simplified reporting of election results and statistics. From these reporting units, we can compile statistics for any ward-based district from aldermanic to congressional districts.

We conduct both internal and external data validation in order to improve data quality. Internal data validations consists of using logical comparisons within each WEDCS report (e.g., making sure that the total number of absentee ballots counted is not more than the total number of absentee ballots issued). External data validation involves comparing information in each WEDCS report to information in SVRS and CRS. We compare the number of voters reported in WEDCS to the number of voters with participation reported in SVRS, and the total number of votes cast for the office with the highest turnout. The analysis of these comparisons includes thresholds for identifying reporting units that require follow-up in any or all three systems. We currently identify reporting units where there is a difference of at least 1 percent and 10 voters.

Perhaps one of the best ways to improve data quality and analysis is to make sure the information is readily accessible to the public. This creates an incentive for those who provide the data to ensure its accuracy. This also allows the media, academics, and the public to review and help audit the information.

As we modernize our elections management systems, we plan to automate the internal validations (clerks would not be able to submit a report that does not validate without acknowledging a warning message), and building reports that clerks can run themselves to verify the external validations. This would also allow staff to focus on more detailed auditing, as well as facilitate more detailed analysis into correlations between challenges and potential causes, for example, we could look into jurisdictions with high absentee ballot rejection or unreturned rates.

Uses for Improving Election Administration

Wisconsin is able to use a combination of SVRS transactional data (e.g., voter registration applications) and about 50 data points from the WEDCS reports to provide responses to more than 600 data points in the U.S. Election Assistance Commission's (EAC) biennial reporting requirement, the Election Administration and Voting Survey (EAVS). This process is substantially more efficient and results in much more accurately reported data than having each of Wisconsin's 72 county clerks and 1,852 municipal clerks individually report these statistics. Pew's Election Performance Index notes that Wisconsin's data completion increased from about 88 percent in 2008 and 89 percent in 2010 to virtually 100 percent in 2012.

There is considerable potential to use elections data to identify performance challenges and successes. We can analyze voter turnout by ward, municipality, county, or any other district level. We also look at voter registration rates, as well as absentee ballot return and rejection rates for regular, military, or permanently overseas voters. From this analysis, we can identify areas facing challenges, but also look to areas having considerable success for

possible improvements, and develop best practices to share across Wisconsin and the entire country.

Having elections data that is complete, of high quality, and meaningful allows us to provide quantifiable and informative data to policymakers. Being able to quantify and present information provides important perspective for decision-makers. Local governments are primarily responsible for paying the costs of administering elections in Wisconsin. However, saying that elections require considerable time and resources from local governments is far less informative than stating the county and municipal governments reported spending more than $37 million for five statewide elections in 2012, of which nearly $14 million was for a recall primary and election for which many jurisdictions did not budget.

Here is another example. Intuitively, elections are very dependent on interpersonal interactions, even as the use of technology increases. One position could be that a potential way to reduce the cost of election or identify savings that could support other improvements is to seek ways to reduce required staffing. Another perspective might argue for focusing on improving voting equipment programming. The personnel-focused perspective is much more compelling when showing that in 2012, personnel represented more than 65 percent of all reported election-related costs, compared to voting equipment at about 10 percent and ballots at about 13 percent.

Quality elections data can also provide valuable insight to inform debate. Looking at voter registration, we can show that more than 80 percent of Wisconsin voters' most recent registration was on Election Day. We can expand that to look at the number of registrations that occur within 30 days of an election. In debates about absentee voting by mail or in-person, we can illustrate trends over time about the percentage of voters who vote absentee or at the polling place on Election Day. We can expand on this even further by adding demographic dimensions (e.g., age group, location, etc.).

Another potential use of elections data is to combine statistical and cost data. By combining available data, we can estimate the average cost associated with each absentee ballot issued or cast. We can also estimate the average amount of money spent on training election inspectors or their average wages. Arguably, the best use of elections data is using the data to conduct a cost-benefit analysis (CBA) of a potential policy change. In 2013, Wisconsin worked with two teams of graduate students at the LaFollette School of Public Affairs at the University of Wisconsin-Madison to conduct two CBA studies. The first study compared methods of conducting voter-list maintenance by either sending out mass mailings to voters who had not voted in the previous four years, or by utilizing the U.S. Postal Service's National Change of Address (NCOA) system. The second study compared online versus paper-based voter registration. The complete reports and each team's presentation of their findings to staff are available on our website:
http://gab.wi.gov/publications/other/CBA_projects.

Importance of Data in Shaping Legislative Proposals

In the recently concluded 2013-14 legislative session 18 separate election proposals were acted on in the waning days of the session. With several of the bills, G.A.B staff was able to provide illuminating information about the impact of the proposals. We were able to show

how many voters cast absentee ballots in-person during what time periods to facilitate a discussion on changing early voting hours. G.A.B staff was able to supply detailed information about the costs and timing of conducting voter list maintenance. We were also able to marshal facts to address proposals that were not introduced such as the costs associated with eliminating Election Day Registration.

Conclusion

From our experiences collecting and analyzing election data, we can identify several valuable lessons learned. Data collection should be purpose-driven. With data, more is not necessarily better. Data collection, audit, and analysis requires extensive resources, and that time and effort should be spent wisely. Mission statements, vision statements, performance goals, and objectives should drive the data we collect. Public policy textbooks have often referred to this as focusing on SMART data – data that is simple, measurable, actionable, relevant, and timely. It is also important that those reporting the data clearly understand what you are asking of them and what they are reporting. This requires providing training that is clear, detailed, and easily understood.

Data entry can be susceptible to human error more so than transactional data. Therefore, we seek to minimize data entry and incorporate data collection into our everyday business practices and technology systems. Leveraging technology can also improve data auditing and overall data quality, which is essential for informing the decision-making process and for driving performance management.

Executive Summary
Testimony of Kevin J. Kennedy
Collection, Analysis and Use of Elections Data:
A Measured Approach to Improving Election Administration.

Wisconsin's Data Collection Process

- Wisconsin has the most decentralized election administration system in the nation, with 1,852 municipal and 72 county clerks.
- Wisconsin has statutorily required election data collection since at least 1979 – before NVRA and HAVA requirements – which is instrumental in achieving 100 percent compliance.
- The State's current data collection and analysis efforts were made possible by a $2 million grant from the EAC in 2008, which replaced paper forms with online Wisconsin Election Data Collection System (WEDCS).
- The primary elections data source is our Statewide Voter Registration System (SVRS), where clerks manage voter records including registrations, polling places, contests and candidates.
- Pew's Election Performance Index notes that Wisconsin's data completion increased from about 88 percent in 2008 and 89 percent in 2010 to virtually 100 percent in 2012.

Election Cost Data

- In 2011, the State Legislature requested cost estimates for a statewide recall election.
- In 2012, G.A.B. used its statutory authority to require election cost reporting for every state and federal election.
- Counties and municipalities report election-specific costs after each Spring Election and General Election, as well as general costs annually.

Wisconsin's Data Analysis Process

- Requiring online data reporting by clerks allows G.A.B. staff to focus on reporting compliance and auditing data quality.
- G.A.B. staff conducts both internal and external data validation to improve data quality.

Uses for Improving Election Administration

- SVRS transactional data and WEDCS reports provide responses to more than 600 data points in the U.S. EAC's Election Administration and Voting Survey (EAVS).
- This process is substantially more efficient and accurate than having each of Wisconsin's 72 county clerks and 1,852 municipal clerks individually report these statistics.

Importance of Data in Shaping Legislative Proposals

- The Wisconsin Legislature passed 18 separate election bills.
- G.A.B staff was able to provide impartial data on the impact of the legislative proposals.

Summary Biography of Kevin J. Kennedy

Kevin J. Kennedy is Director and General Counsel for the Wisconsin Government Accountability Board, a position he has held since November 2007. Before assuming the top staff position for the Board, he was Executive Director – and before that Legal Counsel – for the Wisconsin State Elections Board.

Kennedy was in private practice before joining the Elections Board in 1979, and prior to that served as an assistant district attorney in Washington County, Wisconsin. He graduated from the University of Wisconsin-Madison Law School in 1976, and received his Bachelor of Arts degree in Mathematics and Communication Arts from the UW-Madison in 1974.

Kennedy is a member of the National Association of State Election Directors (NASED) and served as NASED President in 2006. He also served as co-chair of the National Task Force on Election Reform established by the Election Center, a non-profit organization dedicated to training and educational opportunities for state and local election officials. Kennedy is also a member of the Council on Governmental Ethics Laws (COGEL) and has served on the organization's Steering Committee.

Testimony of David J. Becker
Director, Election Initiatives
The Pew Charitable Trusts
U.S. Senate Rules Committee
May 14, 2014

Thank you for the opportunity to be here today to discuss this important topic.

We at The Pew Charitable Trusts began to look at the issue of using data to measure performance in the field of election administration several years ago, partially in response to what we heard from election officials who felt bombarded by news stories driven by anecdotes, not data. These stories, about long waiting times to vote, or polling places opening late, or registration problems, are important but it is never clear whether they truly represent systemic problems or if they are simply one-time challenges. We knew that as in other policy areas, such as health and education, there must be a way to use data and empirical evidence to get a clearer picture of what is happening across the states.

Following important research by Professor Heather Gerken and many others in the elections field, Pew partnered with Professor Charles Stewart III and MIT in 2010 to pull together an advisory group of state and local election officials from around the country, as well as leading academics in the field of elections and public administration, to determine what data was available to accurately and objectively measure performance in this field.

In 2013, Pew unveiled the results of this collaboration and our research – the Elections Performance Index, or EPI, the first comprehensive assessment of election administration in all 50 states and the District of Columbia. The release introduced the index's 17 indicators of performance, including such data relating to wait times at polling locations, voter registration rates and problems, military and overseas voting, and mail ballots. This data, collected from five different and credible data sources, including the Census and the EAC, provided a baseline of performance using 2008 and 2010 data, giving users a way to evaluate states' elections side by side.

Pew's latest edition of the index, released just over a month ago, adds analysis using data from the 2012 election. This provides the first opportunity to compare a state's performance across similar elections—the 2008 and 2012 presidential contests—and presents a rich picture of the U.S. democratic process that will be enhanced as new data are added each election cycle.

The results from the 2012 EPI were generally good news for the states and for voters, as elections performance improved overall. Nationally, the overall average improved 4.4 percentage points in 2012 compared with 2008, and the scores of 21 states and the district improved at a rate greater than the national average.

In addition, we found that:

1. *High-performing states tended to remain high-performing and vice versa.* Most of the highest-performing states in 2012—those in the top 25 percent—were also among the highest performers in 2008 and 2010. The same was true for the lowest-performing states in all three years.

2. *Gains were seen in most indicators.* Of the 17 indicators, overall national performance improved on 12, including a decrease in the average wait times to vote and an increase in the number of states allowing online voter registration.
3. Wait times decreased, on average, about 3 minutes since 2008.
4. Although voters turned out at a lower rate in 2012, fewer of those who did not vote said they were deterred from the polls by illness, disability, or problems with registration or absentee ballots.
5. 13 states offered convenient and cost-effective online voter registration in 2012, compared with just two in 2008, which may have contributed to the reduction in voter registration problems.
6. More states offered online voter information tools in 2012.
7. States are reporting more complete and accurate data. 18 states and the district reported 100 percent complete data in 2012, compared with only seven in 2008.

We present all these data in an interactive report – which can be found at pewstates.org/epi – that allows policymakers, election officials, and citizens to dig through each piece of information. This tool even allows users the opportunity to isolate any indicator, or compare states and regions, or look at elections in a particular state over time.

We make a series of recommendations in this report, but two are particularly relevant to this hearing. First, states should work to upgrade their voter registration systems. By adopting innovative reforms, such as online voter registration, better sharing data intrastate, and using a tool like the Electronic Registration Information Center (or ERIC) to better share interstate voter registration data – all recommendations of the bipartisan Presidential Commission on Election Administration – states can see a marked improvement in their performance. For instance, of the bipartisan group of seven states who founded ERIC in 2012, five of those states were among the highest performers that year.

Second, we encourage that states report and collect even more elections data. Several states, such as Wisconsin, have pioneered efforts to better collect source data from local election jurisdictions, but many do not. As the Presidential Commission notes, "If the experience of individual voters is to improve, the availability and use of data by local jurisdictions must increase substantially."

And we continue our work towards this end. Just last week, we released a report entitled "Measuring Motor Voter," where we attempted to rate how well the states were providing voters with the opportunity to register or update their registrations at motor vehicles offices. What we found was that states' performance in this area could not be fully measured, because states were not collecting or reporting adequate data to document the provision of these important services. We therefore made several recommendations, including that states prioritize, automate, and centralize Motor Voter data collection and increase coordination among licensing agencies and election administrators. We went on to highlight several states, such as Delaware, Michigan, and North Carolina, that have already made great strides in this area.

Pew continues to see this data-driven approach lead to higher performance in the states. The EPI is being cited by policymakers and others in official testimony, and is being used in a geographically and politically diverse group of states to help inform policy and technology in election administration. We will continue this work as we look forward publishing the 2014 edition of the index and ensuring that data-driven performance measurement is enshrined in this field for years to come.

Thank you and I look forward to your questions.

David J. Becker

Director, Election Initiatives

The Pew Charitable Trusts

www.pewstates.org/elections

David Becker is director of Election Initiatives for The Pew Charitable Trusts. He supervises all of Pew's work in election administration, including using technology to provide voters with information they need to cast a ballot; assessing election performance through better data; and upgrading voter registration systems.

As the lead for Pew's analysis and advocacy on elections issues, Becker oversees research and directs Pew's partnerships in the states, and with private sector partners like Google, IBM, and others. He also testifies before Congress and state legislatures and other government entities, presents at relevant conferences across the country, and serves as a media resource.

Before joining Pew, Becker served as a senior trial attorney in the Voting Section of the Department of Justice's Civil Rights Division, where he led numerous investigations into violations of federal voting laws regarding redistricting and minority voting rights. He served as lead counsel for the United States on litigation over statewide redistricting in Georgia in 2001, which was ultimately decided by the Supreme Court in *Georgia v. Ashcroft*. In addition, he supervised federal monitoring of elections and helped direct Department of Justice policy on enforcing the Help America Vote Act.

Becker received both his undergraduate and law degrees from the University of California, Berkeley.

Testimony of J. Justin Riemer
Before the U.S. Senate Committee on Rules and Administration
Re: Collection, Analysis and Use of Data:
A Measured Approach to Improving Election Administration
May 14, 2014

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to appear before this distinguished committee to discuss the report of the Presidential Commission on Election Administration (PCEA), specifically regarding its call for the improved collection and reporting of election-related data from state and local election officials.

I speak to you today as a former state election official in the Commonwealth of Virginia, an attorney with experience in election law, and as the Editor and co-author of a recent report from the Republican National Lawyers Association (RNLA) that reviewed the PCEA's report and offered additional recommendations to improve our elections. With a few exceptions, the RNLA agreed with most of the PCEA's recommendations and we thank the commission for its work. While RNLA's report did not address all of these specific issues, the availability and quality of election data is an important issue and one that I have experience in from serving at the Virginia State Board of Elections.

I would like to discuss three issues. First, is to provide a summary from a former election official's perspective of why obtaining accurate data from the states is such a challenge. Second and related, is to provide an overview of the significant and ever increasing data obligations imposed on state and local election officials and how it impacts their ability to perform their core job functions and make necessary improvements. Third, is to express concern and make recommendations regarding the criteria used in election performance indexes to assess state election performance.

Data Collection Challenges at the State and Local Level:

There are a number of obstacles that have prevented state and local officials from collecting and providing accurate and comprehensive election data and two are particularly worthy of highlighting. The first stems from limitations in state election databases. Challenges in the design and implementation of states' voter registration systems (VR systems) mandated by the Help America Vote Act (HAVA) of 2002 are at the root of many of the election data problems seen today. HAVA required that all states develop "a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the state level." 42 U.S.C. § 15483. HAVA's specific requirements for VR systems are as follows:

> The list must be centrally managed at the State level in a uniform and non-discriminatory manner. The list must be computerized and technically capable of providing immediate electronic access to appropriate State and local election officials; assigning unique identifiers; affording local officials expedited entry of voter registration information; allowing voter registration information to be verified with other State, local and Federal agencies; providing a means for list

maintenance; tracking appropriate voting history; and ensuring appropriate system security.[1]

In many states, the VR system is much more than just a database used to administer voter registration activities. With the exception of campaign finance functions, Virginia's system, the Virginia Election and Registration Information System (VERIS), essentially runs the Commonwealth's entire elections process. VERIS is used to implement redistricting and precinct changes, administer absentee voting, produce poll books, and collect and report election results. Consequently, VERIS also serves as the warehouse for most election-related data in Virginia.

As is common for extensive state Information Technology (IT) projects, Virginia and other states faced delays and other significant hurdles in launching their VR databases. In the race to launch the database by the statutory deadline, considerations related to building in analytics and data-reporting capabilities took a back seat to more immediate concerns. These priorities included complying with the basic HAVA statutory requirements for the databases, meeting minimum IT security standards, and ensuring the system was functional and user-friendly enough for local election officials to use. Many states, including Virginia, missed the deadline for implementation and one state, California, still has not launched a HAVA-compliant VR database.

After VERIS was launched it was simply impossible to reverse-engineer the system to efficiently and accurately collect and report much of the data sought by the EAC and other stakeholders. While Virginia officials have made significant improvements to the system's data-reporting capabilities since its launch, those concerns are still secondary to more pressing concerns including changes to the system to comply with state legislative changes and to comply with IT security standards.

A second obstacle in the way of obtaining good data is that much of the data used to analyze our elections is collected on Election Day by poll workers who receive limited amounts of training, work only a few days out of the year, and essentially serve as volunteers. Poll workers in Virginia work a 14 to 16 hour day, sometimes longer, and then at the end of the long day must complete a significant amount of complex paperwork that becomes the source of polling place election data. Already exhausted, these officials' first priority is to ensure they report election returns quickly and accurately to the local registrar or clerk. There must then complete a variety of additional wrap-up steps before moving on to some of the supplemental data-reporting, including ensuring security and the chain of custody for ballots, electronic pollbooks, voting equipment memory cards, and other election materials.

These poll workers are asked to perform many functions and they will inevitably make mistakes, particularly when recording data beyond that necessary to finalize the actual vote totals. Since much of the data sought by stakeholders need to be accurately collected at the polling place on Election Day, there is often no way to go back fix mistakes or retrieve missing information. Much of the data is gone forever and we are forced to rely on anecdotal evidence to measure important metrics such as wait times. Finally, many poll workers and local election

[1] U.S. Election Assistance Commission, Voluntary Guidance on Implementation of Statewide Voter Registration Lists, July 2005 available at: http://www.eac.gov/assets/1/workflow_staging/Page/330.PDF

officials will bluntly explain that they are asked to provide what they view as an impractical and unnecessary amount of data and that the essential functions described earlier will take precedence.

A final challenge stems from keying errors and inaccurate data input that plague the voter registration system. Paper-based voter registration results in keying errors that infect the system with inaccurate and incomplete voter registration records. Moreover, inadequate list maintenance efforts in many jurisdictions distort registration figures. This is best exemplified in jurisdictions with more registered voters than residents of voting age.

Fortunately, state and local officials are gradually overcoming some of these hurdles. The adoption of electronic pollbooks will result in better data from the polling place and the nationwide trend towards online voter registration and the electronic transmission of registration applications completed at the DMV to registration officials will also help improve the quality of voter registration records. Multi-state data sharing programs like the Interstate Voter Registration Crosscheck Program (Crosscheck) and the Electronic Registration Information Center (ERIC) are further helping improve the quality of state voter registration data. The PCEA and RNLA both endorse these various reforms. RNLA additionally recommends pairing electronic pollbooks with identification card bar code scanners to speed the voter check-in process and improve voter history data.

In addition, in Virginia, officials have made upgrades to VERIS since its launch to improve its data reporting and analytics capabilities and has improved in its federal survey responses with each subsequent federal election. Plans in Virginia for poll workers to complete some of the additional required paperwork on the electronic pollbooks should also help improve the data collected on election night.

Voting equipment manufacturers incorporating better data-reporting capabilities into their machines as recommended by the PCEA would also help although I am not aware of their specific plans to do so.

Increasing Demands for Data and Records and its Impact on Election Officials:

The ever increasing demands for data and records is a significant burden on state and local election officials and there is concern that these obligations have begun to detract from officials performing some of their core functions. First, are the federal data-reporting requirements established with the 1993 National Voter Registration Act and expanded with HAVA which established what is known today as the Election Administration and Voting Survey (EAVS), a comprehensive multi-section survey administered by the Election Association Commission (EAC) and completed by state and local election officials following each federal general election.

Fully complying with the EAC's data-reporting requirements is a difficult task for many states. In Virginia, the EAC survey takes an estimated one month's worth of work each from two high-level IT staff members. The survey imposes additional obligations on local election officials to provide data that state officials cannot retrieve from VERIS either due to the system's limitations or because VERIS does not house the data asked for in the survey. Completing the survey is largely a labor-intensive process where staff must manually pull data from the system

and format it to match the requirements of the survey instrument. Tedious online surveys to the local election officials are also typically needed to gather the remaining data not contained in VERIS.

In addition to the EAC report, there are required surveys from the Department of Defense's Federal Voting Assistance Program (FVAP) seeking data from state and local officials on overseas and military voting. While there are efforts for FVAP and the EAC to combine their surveys, up to now it has been an additional report states must complete. More recently, the Department of Justice has opened up another stream of data requests to the states related to compliance with the Military and Overseas Voter Empowerment (MOVE) Act.

Many state laws impose additional data-reporting obligations on its election officials. In Virginia, the State Board of Elections is required to provide two annual comprehensive reports with voter registration and other data to the state General Assembly. Many state and local governments have also implemented performance measure reporting requirements for agencies that include quarterly or monthly data reporting obligations. Virginia's performance measures require the agency to report election data on a quarterly and annual basis. State officials also impose additional data-reporting obligations on localities beyond the federal requirements discussed earlier.

Moreover, with increasing public scrutiny and policy battles over election administration, data requests through states' applicable Freedom of Information Act (FOIA) laws, NVRA public records disclosure provisions expanded by recent court decisions, and discovery demands from ongoing litigation have further heightened demands on election officials. In addition, more organized and tech-savvy political parties have increased demands for public election data. Finally, private organizations and academics also regularly submit detailed survey and data requests following elections.

Discussions with a cross-section of election officials reinforce my belief that these various data-reporting obligations have increased significantly in recent years. Unfortunately, this has coincided with budget cuts and an increasingly shorter off-season from elections. If election administration was ever meant to be a part-time job, it certainly is not now as elections have grown in their length and complexity. Election officials often joke about the common perception that they only work a few days out of the year with many being asked some variation of: "What do you do the other 364 days?" Those familiar with the business are well aware of the demands on officials to run multiple elections a year, administer voter registration processes, and manage their office business affairs usually with fewer resources than the year before.

Many states have expanded early voting and federal law now requires the preparation and mailing of overseas absentee ballots at least 45-days prior to an election meaning the election quite literally starts earlier. Consequently, political parties and candidates also start their campaigns sooner putting officials on an election-footing months prior to the first Tuesday in November. Accounting for primaries and special elections, it is not uncommon for many Virginia election jurisdictions to be administering an election more days out of the year than not. In addition, Virginia's status as a battleground state has resulted in closer elections, more frequent recounts, and additional public scrutiny that has further expanded the calendar when officials are on an election footing. Finally, Virginia has yearly statewide elections so there truly is no break.

What results when you combine a shorter election off-season, increased burdens to provide data and records, and fewer resources? Election officials have less time to implement improvements, including those outlined in the PCEA report and from their own internal audits. Implementing good policy recommendations remains aspirational as the short window of relative inactivity needed to make these important changes quickly closes with election officials lamenting, "maybe next year".

Certainly, every profession has its peaks and valleys of activity and its share of unpleasant "bureaucratic-make work" as one local election official described it to me. As public servants and because the law requires it, officials should respond to these requests with complete and accurate data. It is part of the job. However, policymakers need to be aware that to many election officials these obligations have shifted from a minor inconvenience to a significant roadblock that combined with a shorter off-season prevents them from performing their core functions and making important improvements to their local election practices.

Concerns Regarding Indexing Elections Performance:

Indexing election performance can serve a valuable function to identify both best practices and deficiencies in election administration. However, there is some concern from election officials and other stakeholders in the elections process regarding the criteria used to judge a state's performance.

In its response to the PCEA report, the RNLA outlined its opposition to some policies that may be used as measuring stick for how well a state runs its elections. For example, including criteria such as the availability of Election Day or automatic voter registration or expanded early voting would be met with opposition and would seriously diminish the credibility of any performance index. Similar is the fear that graders will penalize states for implementing voter integrity measures such as reasonable identification requirements and enhanced voter registration list maintenance programs.

Finally, including some indicators about states' efforts to guard against fraud in the electoral process will increase the credibility of performance indexes. Election officials and other organizations concerned with the integrity of our voting process will be more likely to embrace these efforts with at least some minimal acknowledgment that preventing fraud should be an important policy goal. While some dismiss both the electoral system's vulnerability to and the existence of voter fraud, it is undeniable that fraud does take place and that our system remains susceptible to those who wish to exploit it. We can and should measure those vulnerabilities as well as state efforts to protect against threats to the integrity of our elections. For example, those states that fail to take steps to remove ineligible and deceased voters from the rolls or choose to not participate in programs like Crosscheck or ERIC, both endorsed by RNLA and the PCEA, should be judged accordingly.

Once again I thank this honorable committee for the opportunity to appear before you and am more than happy to answer any questions you have on these important issues.

Executive Summary for Testimony of Justin Riemer

Distinguished committee members, thank you for the opportunity to address you regarding data in elections. I am a former Virginia election official and co-author and Editor of a recent report from the Republican National Lawyers Association (RNLA) reviewing the Presidential Commission on Election Administration's (PCEA) report and providing additional suggestions to improve election administration in the United States.

To begin, it is important to highlight two issues why the collection and reporting of accurate and comprehensive data is a significant challenge for election officials. First, statewide election databases created as a result of Help America Vote Act (HAVA) requirements suffered from many problems commonly associated with large government IT projects. In the scramble to meet implementation deadlines, building in adequate data-reporting capabilities became a secondary concern to complying with the specific HAVA requirements. In Virginia, it was impossible to reverse-engineer the system after its launch to add better data collection and reporting capabilities. While HAVA's database requirements mostly addressed voter registration functions, many states designed their databases to run various other election processes. Consequently, these systems house not only voter registration records but also information related to absentee voting, data collected at the polling place, and other functions of the electoral process. While Virginia has made many improvements, significant challenges in extracting data from the system remain.

A second challenge is that much of the data used to analyze elections is collected on Election Day by poll workers who receive inadequate training, work only a few days out of the year, and are paid very little. Poll workers must complete a significant amount of complex paperwork after a long day and frequently make mistakes or leave out important information that is often impossible to collect later if not captured on election night.

Another issue for policymakers to consider is how increasing demands for data and records impose significant administrative burdens on election officials. Survey obligations from the Election Assistance Commission, Federal Voting Assistance Program, and other stakeholders are tedious but manageable. However, adding increased FOIA requests, state and local data reporting obligations, litigation, and requests through other record disclosure provisions such as in the National Voter Registration Act (NVRA) have turned basic data and records reporting obligations into a significant administrative burden. Combined with an increasingly shorter election off-season because of 45-day absentee ballot mailing deadlines and expanded early voting, these obligations make it more difficult for officials to perform their core job functions and make improvements to their election practices.

Finally, using data to rank states' election performance has value to identify both best practices and deficiencies, but there are also concerns. First, is the worry that graders will penalize states for not adopting policies such as expanded early voting, vote-by-mail, and Election Day Registration. The RNLA, many non-partisan election officials, and other stakeholders have significant policy reservations regarding these issues and they should not be included as indicators of performance. Similarly, graders should not penalize states for implementing voter integrity measures such as reasonable voter identification requirements and enhanced voter registration list maintenance programs.

Thank you again for the honor and opportunity to appear before this committee.

J. Justin Riemer Biography

Justin Riemer previously served as the Deputy Secretary and Governor's Confidential Policy Advisor at the Virginia State Board of Elections from 2010 to 2014. Mr. Riemer was the Editor and Co-Author of the Republican National Lawyers Association's (RNLA) recent report: "RNLA Response to the Report and Recommendations of the Presidential Commission on Election Administration: The Republican Legal Community on the PCEA Report with Additional Prescriptions for Reform" available at www.RNLA.org.

Mr. Riemer has an extensive background working in election law, election administration, and political campaigns. Mr. Riemer also previously served as the Deputy Director for the RNLA and as Associate Counsel for John McCain's 2008 Presidential Campaign. Riemer currently works as a consultant for Democracy.com, the first social network for politics, connecting candidates, political organizations and voters from the national to local level.

Mr. Riemer received his Bachelor of Arts Degree in History and Religion from Gettysburg College in 2003 and his law degree from the University of Baltimore School of Law in 2007. Mr. Riemer is admitted to practice law in the Commonwealth of Virginia, State of Maryland, and District of Columbia (inactive status). Mr. Riemer resides in Richmond, Virginia with his wife Rebecca and daughter Julia.

The Center for
Voting and Democracy

6930 Carroll Ave., Suite 610
Takoma Park, MD 20912 - (301) 270-4616
(301) 270-4133 (fax) - info@fairvote.org
www.fairvote.org

May 20, 2014

Senator Charles E. Schumer
Chair, Senate Committee on Rules and Administration

Dear Senator Schumer,

On behalf FairVote, I respectfully submit this testimony to the Senate Committee on Rules and Administration, to be included in the hearing record for the hearing held on May 14, 2014 titled *Collection, Analysis and Use of Data: A Measured Approach to Improving Election Administration*.

We recommend exploration and advancement of two reforms that will improve the effective participation of military and overseas voters while also promoting participation of resident voters: (1) the expanded use of voter guides, at least in online form; and (2) expansion of the increasingly common practice of sending ranked choice ballots to overseas voters in elections that may result in a runoff election and in presidential primaries.

We believe that federal research and recommendations regarding options for overseas and military voters have not devoted the warranted time and attention to these solutions. In order to better appreciate the value of this option, we ask that your Committee recommend federal research into these topics:

- Participation rates among military and overseas voters in runoff elections generally;
- The impact of the use of ranked choice voting ballots for participation by military and overseas voters in runoff elections;
- The impact of shorter runoff periods on turnout among in-person voters;
- The disproportionate percentage of votes cast by overseas voters for withdrawn presidential candidates in presidential primaries;
- The costs, if any, associated with the use of ranked choice voting for overseas and military voters and for the expanded use of voter guides.

It is our sincere hope that this testimony is helpful to the Committee in crafting its response to the continuing administrative hurdles faced by voters, especially those in the military and overseas.

Sincerely yours,

Rob Richie
Executive Director

FairVote Board of Directors: Krist Novoselic (Chair) o Edward Hailes (Vice-Chair)
John B. Anderson o Katie Ghose o Timothy Hayes o Hendrik Hertzberg o Paul Jacob
Esperanza Tervalon-Daumont o William Redpath o Cynthia Terrell o David Wilner

Proven Innovations to Uphold Voting Rights for Overseas Voters

The Value of Ranked Choice Ballots for Presidential Nomination Contests and Federal, State and Local Runoff Elections and of Voter Guides in All Contests

Testimony Submitted by FairVote Executive Director Rob Riche to the Senate Committee on Rules and Administration, May 19, 2014, as part of its May 14, 2014 hearing on Collection, Analysis and Use of Data: A Measured Approach to Improving Election Administration

Overview: Nearly five million American citizens of voting age do not live in the United States, including more than 150,000 active members of the armed services. Federal laws in recent years directly sought to address the difficulties such voters often face in casting ballots, but there remain major gaps that must be filled. Too few jurisdictions appropriate funds for printed or online voter guides that provide substantive information about voters' ballot choices. These guides would be particularly helpful to overseas voters, who are less likely to receive information from traditional media sources and campaigns. Moreover, many jurisdictions hold runoff elections and presidential nomination contests with rules that can make it either impossible for overseas voters to cast ballots or unnecessarily diminish their vote.

We propose expanded use of voter guides, at least in online form, and expansion of the proven practice of sending ranked choice ballots to overseas voters in elections that may result in a runoff election (one described by South Carolina election officials this year as an "unqualified success"), as well as in presidential nomination caucuses and presidential primaries. These ranked choice ballots make it far more likely that overseas voters will have a vote that counts in runoff elections and a vote that counts for an active candidate in presidential nomination contests.

Ranked choice ballots already has a proven record of success. This year they will be used as an effective way for runoff jurisdictions to comply with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment Act (MOVE) in all congressional primary elections with more than two candidates in Alabama, Arkansas, Mississippi and South Carolina and in all of Louisiana's congressional elections in November. Some localities in Illinois and Arkansas also use ranked choice ballots, but because local elections are not covered by UOCVA, they will not be used in most local runoff elections, even in the many instances where such runoff elections occur less than three weeks after the first voting round.

This ranked choice ballot solution provides better inclusion of military and overseas voters than the more typical response of extending the time between the first election and the runoff election. In contrast to delaying the runoff, it drives up participation among both overseas voters – who may vote in both elections simultaneously – and in-person voters, who benefit by being more likely to participate in a runoff with a shorter period between elections.

In order to make clear that this is an option for states and to highlight its real practical benefits, we ask that the Committee recommend that the federal government look to those states using this option to gather additional data on overseas voter participation rates, cost to the jurisdiction, and participation of in-person voters under shorter runoff periods. We urge the Committee to consider legislation to expand this practice in more congressional elections, to encourage a form of it in presidential primaries, and create incentives for its use in local and state elections.

Full Testimony

I have been executive director of FairVote since 1992. FairVote is a non-partisan, non-profit think tank and advocacy organization that focuses on electoral reform and election analysis, with attention to voter turnout, voter choice and fair representation. We have played a central role in the introduction of a number of significant electoral reform and voting rights proposals that many American cities and states have debated and subsequently adopted.

The focus of my written testimony today is on the difficulties that so many military and other eligible voters living in other nations face in casting meaningful, effective votes, with particular attention to runoff elections and presidential nomination contests. I propose a major expansion of the practice used this year in congressional elections in Alabama, Arkansas, Louisiana, Mississippi and South Carolina in all of their congressional election runoffs that might go to a runoff. The practice is the result of state law in Arkansas, Louisiana and South Carolina, and the result of court orders in 2013 and 2014 in Alabama and Mississippi. When sending voters their ballots for the primary (or, in the case of Louisiana, the general election), these states also include a separate ranked choice ballot (see attachment for an example from South Carolina) that can be tallied in a runoff election without having to send voters a whole new mailing after the first round of voting. In explaining the value of this approach, I contrast it with the problematic change the federal government imposes on many states: forcing an extension of time between election rounds, which can unintentionally result in decreased voter participation in primaries and runoff elections. I also address the particular value of voter guides for overseas voters and, indeed, all absentee voters.

We currently have more than 150,000 active members of the armed forces serving in other nations, and, according to the United States Election project, a total of 4,737,600 eligible voters in the 2012 presidential election were living in other nations. The usual burdens faced by absentee voters are exacerbated by living outside the United States, particularly for members of the military who change addresses frequently. Despite protections provided by important federal laws such as Uniform and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment Act (MOVE), overseas voters are too often effectively disenfranchised from our elections, particularly in state and local elections not covered by UOCAVA and MOVE.

Under our current rules and procedures, the problems for overseas voters are particularly acute in two forms of elections: presidential nomination contests and state and local runoff elections held separately from federal elections. For both of these elections, the problem is largely one of timing.

- ***Runoff elections***: Any runoff election that is held close to the first round of elections can make it extremely difficult to accommodate timely transmission and collection of ballots sent overseas. As suggested by the examples from the locations of your opening field hearings, many localities hold runoff elections less than a month after the first round. A prominent example the primary runoff in the 2013 New York City election for public advocate which took place three weeks after the primary election and in the past has been just two weeks after the first round. In reviewing runoff elections in Miami-Dade County (FL), we found that six municipalities holding elections in 2013 had runoff elections scheduled only 14 days after the first election, with two other municipalities holding runoffs less than a month after the first election.

- ***Presidential nomination contests***: Presidential nomination contests unfold quickly after initial contests in the opening states of Iowa, New Hampshire, South Carolina and Nevada. Those early contests always lead major presidential candidates to withdraw from the race, but ballots with those candidates' names will have already been sent to overseas voters, who may cast them and mail them before those candidates drop out. In 2008, for example, 25 states and territories held nomination contests on February 5, only a few days after the withdrawal of Democrat John Edwards and Republican Rudy Giuliani. Furthermore, parties usually fail to provide overseas voters with an opportunity to participate in privately-administered caucuses that involve in-person voting.

Ranked Ballots for Overseas Voters in Runoff Elections and Primary-General Elections:

In 1986, Congress passed the Uniformed and Overseas Absentee Voting Act (UOCAVA) to protect the voting rights of citizens who submit ballots from abroad, including military service members. In 2009, Congress reinforced UOCAVA by passing the Military and Overseas Voters Empowerment Act (MOVE). The MOVE Act mandated that jurisdictions mail ballots to overseas voters at least 45 days before a federal election to allow sufficient time for these voters to receive and return their ballots. This requirement has the practical impact of requiring many states to move their primary elections to before Labor Day and to extend time between the first and final round of runoff elections. Four years later, these laws have not yet achieved full compliance, and they do not cover state and local elections held separately from the federal elections.

When forcing changes in election dates, these laws also have had negative consequences. For example, a large number of states were forced to change traditional primary dates in September to earlier dates. Voter turnout in primary elections has already declined precipitously in recent decades, yet holding primary elections in the summer months of July and August results in even lower turnout than September primaries. Moving primaries before July can interfere with state legislators' lawmaking duties in the spring. Any earlier primary date extends the election season and contributes to the need for candidates to raise and spend more money than would be the case in a more concentrated election season.

The impact on when federal primaries are held likely contributes to lower turnout in runoffs. Last July, FairVote issued a report that analyzed the last 171 regularly scheduled primary elections for U.S. House and U.S. Senate nominations in elections from 1994 to 2012. The report found that these primary runoff elections generally result in lower turnout. All but six of these runoffs resulted in a turnout decrease between the initial primary and the runoff, with a median turnout decline of 33.2 percent. The turnout decline was strongly correlated to the length of time between runoff rounds. The 56 primary runoffs occurring more than thirty days after the first round had a median decline in turnout of 48.1 percent, while the 11 runoffs with a gap of twenty days or less had a median decline of only 15.4 percent.

One response to such numbers would be to suggest that runoff elections themselves are problematic. But there is real value in requiring winners of nominations and general elections contests to earn more than half the vote. Allowing winners with well under 50 percent of the vote can allow for unrepresentative outcomes in which people end up being represented by someone whom a majority of voters saw as their last choice. It also results in charges that certain candidates

are "spoilers" and should withdraw to avoid splitting the vote.

Fortunately, policymakers have other options for upholding the voting rights of overseas voters and complying with the UOCAVA and MOVE laws. Jurisdictions can adopt the increasingly common practice of having military voters, overseas voters, and early or absentee voters use ranked choice ballots. As implemented for all runoffs for federal offices and for many state and local offices in Arkansas, Louisiana, South Carolina, and, this year, Alabama and Mississippi, overseas voters would receive two ballots at the same time: one standard ballot and one ranked choice ballot. The ranked choice ballot would include all candidates from the first election (whether for a primary or first-round before a runoff), and voters would be asked to rank them in order of preference. Voters return both ballots simultaneously to election officials. The standard ballot is counted in the first election according to normal procedures. In the second election, the ranked choice ballot is counted toward the highest ranked candidate who advances to the second round.

This practice has been used for more than six years in congressional and state primary elections in South Carolina, in general elections for Congress and state offices in Louisiana, and for congressional, state, and local primary elections in Arkansas. On July 26, 2013, a federal judge ordered Alabama to use a ranked choice ballot for overseas and military voters for the Fall 2013 congressional District One special election in order to comply with UOCAVA, an order that the judge extended to cover the Republican primary in the sixth congressional district in 2014 (the only Alabama primary with more than two candidates). In March 2014, Mississippi's Board of Elections preempted a lawsuit by the Department of Justice by adopting ranked choice ballots for overseas voters. The one time the proposal appeared before voters as a ballot measure, in Springfield, Illinois, it passed with a whopping 91 percent in support. In 2011, FairVote addressed legal questions associated with the proposal in this report: http://www.fairvote.org/legality-of-the-use-of-ranked-choice-absentee-ballots-for-military-and-overseas-voters.

Speaking about South Carolina's experience with the use of ranked choice ballots for overseas voters, Chris Whitmire, Director of Public Information of the South Carolina State Election Commission had this to say in a May 8, 2013, message, which we share with his permission:

> We consider it an unqualified success. We've heard nothing but good things from voters about it. In the past, UOCAVA voters had a very difficult time participating in runoffs due to the two-week turnaround time. In the June 2012 primary, 92.5 percent of UOCAVA primary voters also participated in the runoff. That is exceptional, and that doesn't even take into account those voters who may not have had a runoff to vote for. The real participation rate could be closer to 100 percent.

Compare this proposal to the recent order by a federal judge to resolve a UOCAVA challenge to Georgia's runoff schedule. In what could be a nightmare for administrators and for voters being asked to vote so many times, the schedule for the 2014 election season for the moment has voters being asked to vote in separate state and federal primary runoffs and general election runoffs. Even if the state runoff dates are changed to accommodate the new federal primary dates ordered by the judge, the state will likely have lower turnout in its runoffs for Election Day voters, and it will have to hold its congressional runoffs after the start of the new Congress.

Ranked Ballots for Overseas Voters in Presidential Nomination Contests:

Using ranked choice ballots for overseas and military voters would also allow a more meaningful vote for the millions of Americans who vote absentee in presidential elections. On March 1, 2012, I coauthored an op-ed for *Roll Call* with Paul Gronke, a highly regarded professor of political science at Reed College and director of the Early Voting Information Center. We focused on the problem of how in presidential elections overseas and military voters are far more likely than Election Day voters to cast a ballot for candidates who withdrew from an election.

The straightforward solution is to have these voters send back a single ranked choice ballot and to establish a practice where withdrawing candidates formally submit their withdrawal to states with upcoming contests where the candidate remains on the overseas ballot. Rather than have a ballot count for a withdrawn candidate, it instead would count for the highest ranked candidate on the ballot who remains an active candidate. We also suggest that parties give overseas voters registered with their party the same opportunity to return a ranked choice ballot, with it counting for the highest-ranked active candidate on the ballot..

Voter Guides for Voters in All Elections:

In most elections, voters must rely on getting information about their ballot choices from private media sources or directly from campaigns. The media disproportionately covers some candidates and issues and not others, while campaigns attempt to push a particular agenda, and may even provide deceptive information to manipulate voters. These problems are exacerbated for overseas voters, who usually do not have the same opportunity to receive this private information nor interact directly with candidates and watch debates.

FairVote has long proposed that all jurisdictions invest in democracy by creating voter guides, as is currently done in California, Oregon, and Washington. State or local election officials would provide a comprehensive guide to all voters explaining which candidates are running, which initiatives are on the ballot, and the effect a "yes" vote or "no" vote will have on each ballot measure. Ideally, each candidate would be able to include a statement describing themselves and their platform, as would the official "yes" and "no" campaigns on ballot measures. The guide would also provide a comprehensive explanation of how to vote. While such guides ideally would be mailed (at least to currently registered voters, but potentially to all households with additional information on how to register to vote), they should be online at the very minimum, potentially with additional features like "talking head" videos where candidates and ballot measure proponents and opponents would have an opportunity to make a case for their position or candidacy.

Requested Actions

As demonstrated above, these actions may provide the best option for jurisdictions in fully including military and overseas voters in all elections. So far, however, federal research and recommendations regarding options for overseas and military voters has not devoted the warranted time and attention to these solutions. In order to better appreciate the value of this option, we ask that this Committee recommend federal research into at least the following topics:

- Participation rates among military and overseas voters in runoff elections generally;
- The impact of the use of ranked choice voting for participation by military and overseas

voters in runoff elections;

- The impact of shorter runoff periods on turnout among in-person voters;
- The disproportionate percentage of votes cast by overseas voters for withdrawn presidential candidates in presidential primaries;
- The costs, if any, associated with the use of ranked choice voting for overseas and military voters and for the expanded use of voter guides.

Conclusion

I applaud this Committee for seeking to improve the voting experience for voters and to take steps to facilitate voting. I ask that you recommend that states and localities use ranked choice ballots for overseas voters in any election that might go to a runoff taking place less than two months after the first election and in presidential nomination contests. I also ask that you recommend that voter guides become a common practice, at least in creative online forms. Certainly we all agree that our men and women in uniform should have their votes count meaningfully in all elections, especially as they protect and defend our country from abroad.

I would be happy to provide additional information about these proposals and to address any other questions about the voting process.

Attachment: Example of ranked choice voting ("instant runoff") ballot for overseas voters from South Carolina when first using the system in 2006.

INSTANT RUNOFF BALLOT

Official Ballot Republican Party Primary
{insert county name here} County, South Carolina
June 27, 2006

Absentee Precinct

INSTRUCTIONS TO THE VOTER: The Instant Runoff Ballot will be used only in the event that no candidate seeking their party's nomination to run for a particular office receives a majority of the votes in the Primary thus forcing a runoff. Instant Runoff Ballots will not be opened if there is no need for a runoff.

For each office on the Instant Runoff Ballot, indicate your order of preference for each candidate whose name is printed on the ballot by filling in the circle in the corresponding column to the right of each candidate. You are not required to indicate a second choice, third choice, and so on. Remember, the more candidates you rank, the more likely your vote will affect the outcome of a potential runoff.

Example

U.S. SENATOR
Rank the candidates in order of preference

Candidate	1st Choice	2nd Choice	3rd Choice
JOHN ADAMS	①	②	●
THOMAS JEFFERSON	●	②	③
GEORGE WASHINGTON	①	●	③

In the Primary election, no candidate received a majority of the votes and the two candidates that received the most votes were John Adams and George Washington, thus eliminating Thomas Jefferson. Therefore, in this example, even though this voter liked Jefferson the best, Washington would receive the vote because the voter ranked Washington the highest of the runoff candidates.

Official Ballot

9

LIEUTENANT GOVERNOR
Rank the candidates in order of preference

Candidate	1st Choice	2nd Choice	3rd Choice
ANDRE BAUER	①	②	③
MIKE CAMPBELL	①	②	③
HENRY JORDAN	①	②	③

SECRETARY OF STATE
Rank the candidates in order of preference

Candidate	1st Choice	2nd Choice	3rd Choice
L W FLYNN	①	②	③
MARK HAMMOND	①	②	③
BILL MCKOWN	①	②	③

STATE TREASURER
Rank the candidates in order of preference

Candidate	1st Choice	2nd Choice	3rd Choice	4th Choice
RICK QUINN	①	②	③	④
THOMAS RAVENEL	①	②	③	④
GREG RYBERG	①	②	③	④
JEFF WILLIS	①	②	③	④

SUPERINTENDENT OF EDUCATION
Rank the candidates in order of preference

	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice

SAMPLE

INSTANT RUNOFF BALLOT
Official Ballot Republican Party Primary
{insert county name here} County, South Carolina
June 27, 2006
Absentee Precinct

No. _____ _____

Initials of Issuing Officer

Candidate					
KAREN FLOYD	①	②	③	④	⑤
ELIZABETH MOFFLY	①	②	③	④	⑤
MIKE RYAN	①	②	③	④	⑤
BOB STATON	①	②	③	④	⑤
KERRY WOOD	①	②	③	④	⑤

S.C. HOUSE OF REPRESENTATIVES, DISTRICT 8
Rank the candidates in order of preference

Candidate	1st Choice	2nd Choice	3rd Choice
DON BOWEN	①	②	③
TED W LUCKADOO	①	②	③
BECKY R MARTIN	①	②	③

SAMPLE

Continue voting on next page

"Supposing is Good, But Finding Out is Better" Data's Vital Role in "Fixing" Election Administration

Doug Chapin[*]

The 2012 election has brought renewed attention to the field of election administration, thanks in large part to President Barack Obama's observation that "we need to fix" issues related to the long lines at the polls experienced in some jurisdictions on Election Day.[1] The general sense is that these long lines—and the lengthy waits for voters they entail—are symptomatic of underlying election problems that need to be fixed.

Accordingly, the President announced during his State of The Union Address,[2] and established by executive order, a bipartisan Commission on Election Administration tasked with "identify[ing] best practices and otherwise make recommendations to promote the efficient administration of elections in order to ensure that all eligible voters have the opportunity to cast their ballots without undue delay."[3]

But what exactly should the Commission examine? And how specifically can we decide how to "fix" election administration?

I believe the answer comes from another well-known American: Mark Twain. Twain once observed that "[s]upposing is good, but finding out is better."[4]

I've always liked Twain's quote because it puts a witty face on a topic that is gaining adherents in the field: evidence-based election administration, which I define as an effort by which election administrators collect a wide range of data on the voting process and then use that data for assessment and improvement of the election system. Momentum for the concept is growing, sparked in large part by Yale Law School's Heather Gerken and her idea of a Democracy Index[5] and brought to life most

---

[*] Director, Program for Excellence in Election Administration, University of Minnesota.

[1] Washington Post Staff, *President Obama's Acceptance Speech (full transcript)*, WASH. POST, Nov. 7, 2012, http://articles.washingtonpost.com/2012-11-07/politics/35506456_1_applause-obama-sign-romney-sign.

[2] Richard Wolf, *Obama Proposes Commission to Address Long Lines at Polls*, USA TODAY, Feb. 12, 2013, http://www.usatoday.com/story/news/2013/02/12/obama-voting-election-commission-lines/1914249/.

[3] Exec. Order No. 13,639, 50 Fed. Reg. 19,979 (Mar. 28, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/03/28/executive-order-establishment-presidential-commission-election-administr.

[4] MARK TWAIN, MARK TWAIN IN ERUPTION 324 (Bernard DeVoto ed., 3d ed. 1940).

[5] The Democracy Index, YALE L. SCH., http://www.law.yale.edu/faculty/democracyindex.htm (last accessed July 19, 2013).

recently by The Pew Charitable Trusts through their initial Election Performance Index based on data from the 2008 and 2010 elections.[6]

We are also seeing increasing interest in other methods of obtaining data about elections. MIT Professor (and fellow symposium participant) Charles Stewart has, for two consecutive presidential elections, conducted a Survey of the Performance of American Elections, which asks voters about their experiences at the polls.[7] He has also helped to develop a key metric, the "residual vote," which measures the proportion of ballots cast that are actually counted in a given election.[8] Finally, the U.S. Election Assistance Commission, created in 2002 with passage of the Help America Vote Act, has since 2004 been collecting data from state and local election authorities as part of its clearinghouse responsibilities.[9]

All of these sources—and more at the state[10] and local[11] level nationwide—have begun to allow the field to harness election administration data to improve the voting process. Even better, it is happening in a wide variety of ways:

1. *Data raises awareness—and thus salience—of key aspects of election.* Quite simply, it is human nature to mind what you measure; whether it is a dieter keeping a food diary or a new business tracking expenses, focusing on a topic raises its salience in our everyday activities. The result is akin to the phenomenon where you meet someone at a party and suddenly begin to see them all over town. So, too, with election administration—by focusing on a topic like lines or residual votes, election officials can begin to see the connections between that data and all the different aspects of the voting process.

---

[6] Election Performance Index, THE PEW CHARITABLE TRUSTS, http://www.pewstates.org/research/reports/elections-performance-index-85899445029 (last accessed July 19, 2013).

[7] Charles Stewart III, *A Voter's Eye View of Election Day 2012*, ELECTIONLINEWEEKLY, Dec. 20, 2012, http://www.electionline.org/index.php/2012/994-electionlineweekly-dec-20-2012.

[8] CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS/WHAT COULD BE 20 (2001), *available at* http://www.vote.caltech.edu/sites/default/files/voting_what_is_what_could_be.pdf.

[9] Election Administration and Voting Survey, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/research/election_administration_and_voting_survey.aspx (last accessed April 5, 2013).

[10] *See, e.g.*, *G.A.B. Releases 2012 Local Election Data and Costs*, STATE OF WIS. GOV'T ACCOUNTABILITY BD., Feb. 19, 2013, http://gab.wi.gov/node/2760 (Wisconsin data from 2012 election).

[11] *See, e.g.*, Stephen L. Weir, Contra Costa Cnty. Clerk-Recorder Dept., *November 6, 2012 Presidential Election Absentee and Provisional Ballot Voting Report*, available at http://www.cocovote.us/getdocument.aspx?id=810 (Contra Costa County, Cal. data from 2012).

2. *Choosing and formulating a data metric requires a useful attention to process.* It is not enough simply to start measuring numbers; the trick is to choose data that capture one or more important attributes, desirable or undesirable, and be clear about how—and more importantly, why—the data are saying what they do. This attention to the relationship between the election process and the data it generates is useful in focusing attention on long-running or well-established practices. In turn, this allows everyone concerned to ask whether "the way we've always done it" is still the way to go.

3. *Data can allow comparisons between jurisdictions and over time.* One of the most powerful aspects of the new emphasis on evidence-based election administration is the ability to compare performance from place to place and election to election. The decentralized nature of American election administration is well-established—I often joke that the only uniformity exhibited is the stubborn insistence on each community going its own way—yet, as data becomes more and more prevalent, it is possible to compare a measure, such as line length, across jurisdictions and ask why the numbers are different from place to place. Similarly, jurisdictions committed to data collection can also monitor their own operations from election to election, identifying improvement or emerging problems over time. These comparisons, geographic or over time, are not in and of themselves dispositive; however, the opportunity for diagnosis and further inquiry are invaluable.

4. *Data provides a "way in" to resolving difficult questions for policymakers—and courts.* Steve Weir, who recently retired as Clerk-Recorder of Contra Costa County, California, once observed at a meeting I attended that "election data is the perfect antidote to an anecdote."[12] What he meant was that most discussions about election policy we usually hear are driven by stories about individuals—like 102-year-old Desiline Victor, who was held up as an example of the need for reform during the State of Union for her lengthy wait to vote

[12] *See* PEW CENTER ON THE STATES, DATA FOR DEMOCRACY: IMPROVING ELECTIONS THROUGH METRICS AND MEASUREMENT 2 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Final%20DfD.pdf.

on location in 2012.[13] The problem with such stories is that they often lack context—in Ms. Victor's case, the fact that her wait was on the Sunday before Election Day at an early voting location—and hides the complexity of any question involving election administration.[14] This lack of a firm footing can make policymakers—and more importantly, courts—unsure of how to intervene when problems arise. While legislatures often respond with high-volume rhetorical disagreements (as I like to say, politics adores a factual vacuum), courts are usually far more reticent to get involved absent what the U.S. Supreme Court calls "judicially discoverable and manageable standards" for resolving conflicts.[15] Readily-available data not only gives policymakers something substantial to discuss, it allows judges to evaluate arguments and make decisions about election controversies based on evidence instead of rhetorical conjecture.

What, then, does this emerging emphasis on evidence-based administration mean for those brave souls in the legal community who wish to litigate or follow election administration cases?

First and foremost, it requires lawyers to get comfortable with a level of numeracy that is not always emphasized in the profession. Years ago, *Saturday Night Live*'s Chevy Chase lampooned then-President Gerald Ford in a debate sketch by responding to a complicated economic question, "it was my understanding that there would be no math."[16] That approach simply will not work in the new era of evidence-based election administration; while it is not necessary for attorneys to perform multivariate regressions, it will be crucial for them to become comfortable with concepts like confidence levels and measures of central tendency. Those ideas will, increasingly, provide compelling storylines in election cases that rival that of Ms. Victor.

In addition, it will require attorneys to listen to—and ask—their election clients about different data elements in a given case and to use those

---

[13] Nadege Green, *At Age 102, Her 15 Minutes of Fame Comes from Hours of Waiting to Vote*, MIAMI HERALD, Mar. 13, 2013, http://www.miamiherald.com/2013/03/12/3282440/north-miami-dade-woman-102-becomes.html.

[14] Doug Chapin, *102 Year-Old Desiline Victor Highlights Complexity Facing Election Reform*, HUMPHREY SCH. OF PUB. AFFAIRS ELECTON ACAD., Feb. 12, 2013, http://blog.lib.umn.edu/cspg/electionacademy/2013/02/102-year_old_desilene_victor_h.php.

[15] Baker v. Carr, 369 U.S. 186, 217 (1962).

[16] *See* Video embedded in Ed Driscoll, *High School Kids, NYT Confused by Definition of 'Caveat Emptor'*, PJMEDIA (May 17, 2012, 7:28 PM), http://pjmedia.com/eddriscoll/2012/05/17/high-school-kids-nyt-confused-by-definition-of-caveat-emptor/.

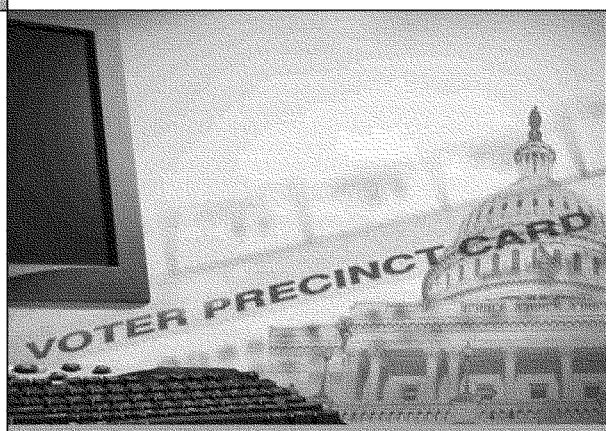
discussions to drive decisions about what arguments to pursue. Sometimes, the attention to process (as described in point 2, above) can be useful in uncovering helpful evidence to support a client's case or identifying a serious hole in the opponent's argument. In other words, it is no longer enough to consult statutes and casebooks: Lawyers must also be willing to wade into the numbers.

William Edwards Deming, the godfather of the evidence-based management movement, is reported to have once observed that "in God we trust, all others bring data."[17] That same spirit now drives the emergence of evidence in elections. As policymakers, including the new presidential commission, begin to grapple with the issues raised by the 2012 election, they will need to acknowledge and embrace the new role that data plays in the field of election administration.

[17] TREVOR HASTIE ET AL., THE ELEMENTS OF STATISTICAL LEARNING vii (2d ed. 2009), *available at* http://www-stat.stanford.edu/~tibs/ElemStatLearn/printings/ESLII_print10.pdf.

JULY 2005

The Next Big Election Challenge: Developing Electronic Data Transaction Standards for Election Administration



R. Michael Alvarez
Professor of Political Science and
Co-Director, Caltech/MIT Voting Technology Project
California Institute of Technology

Thad E. Hall
Assistant Professor
Department of Political Science
University of Utah

IBM Center for
The Business
of Government

E-Government Series

E-GOVERNMENT SERIES

The Next Big Election Challenge: Developing Electronic Data Transaction Standards for Election Administration

R. Michael Alvarez
Professor of Political Science and
Co-Director, Caltech/MIT Voting Technology Project
California Institute of Technology

Thad E. Hall
Assistant Professor
Department of Political Science
University of Utah

July 2005

IBM Center for
The Business of Government

TABLE OF CONTENTS

Foreword 5

Executive Summary 6

Introduction and Overview 7

Standards in the E-Government Context 12

The Election Context 14

Standardization of Election Management Protocols 16

The Impact of Standardization: Three Case Studies 19
- Case 1: Voter Registration 19
- Case 2: Innovation and Election Administration 21
- Case 3: Election Data and Election Results 21

Conclusions and Recommendations 23

Appendix I: Standards and Standards-Setting Processes 25

Appendix II: Standards in E-Government Networks—The Case of HIPAA 29

Appendix III: Summary of the Help America Vote Act of 2002 32

Endnotes 35

About the Authors 37

Key Contact Information 38

FOREWORD

July 2005

On behalf of the IBM Center for The Business of Government, we are pleased to present this report, "The Next Big Election Challenge: Developing Electronic Data Transaction Standards for Election Administration," by R. Michael Alvarez and Thad Hall.

This new report continues the Center's interest in meeting the challenge of bringing the nation's election administration systems into the 21st century and taking advantage of the rapid advances in technology over the past decade. In 2002, the Center published "Internet Voting: Bringing Elections to the Desktop" by Robert S. Done. In that report, Professor Done addressed the challenges facing the nation in moving toward electronic voting via the Internet.

In this report, Professors Alvarez and Hall discuss the challenge of moving toward the implementation of a set of electronic transaction standards (ETS) for election administration across the nation. According to the authors of the report, such a standard would allow election management systems to communicate seamlessly and share data to create "a more accurate, cost-effective, and accessible election process and voting experience." Such a standard would enable state and local governments to adopt a modular approach to better integrate election management and voting products, make possible the development of truly integrated voter registration systems, and enhance the ability to conduct consistent and effective post-election audits of elections.

The report highlights an expanded role for the new federal Election Assistance Commission, created by the Help America Vote Act (HAVA), to facilitate the implementation of new electronic transaction standards across the nation. The authors also call upon Congress to strongly encourage states and localities to adopt such new standards.

We trust that this report will be highly informative and useful to election officials across the United States as they face the challenge of improving our election administration systems to meet the needs of 21st century government.

Albert Morales
Managing Partner
IBM Center for The Business of Government
albert.morales@us.ibm.com

Frank Marzolini
Executive, IBM National Election
Modernization Practice
marzolin@us.ibm.com

EXECUTIVE SUMMARY

The world of electronic technology—from e-mail to the Internet—works because of the existence of basic standards of data exchange. In many areas of commerce and government there exist electronic transaction standards (ETS) that facilitate electronic data interchange (EDI). An EDI provides a defined format for the exchange of data for every specific transaction in question. These standards allow for a marketplace full of different products and services that give end users the ability to communicate with other users who also purchase software with the same EDI.

Having an ETS for public elections would improve all aspects of election management. An ETS would allow election management systems to communicate seamlessly and share data to create a more accurate, cost-effective, and accessible election process and voting experience. The lack of such standards has several ramifications. First, it is difficult for a local election official to integrate election management and voting products acquired from different vendors into a single unit, making any sort of "plug and play" or modular approach impossible for election systems. Second, the lack of standards affects the ability of states to develop truly integrated voter registration systems. A complete voter registration system needs to be able to pull data from agencies across state government and to share data across states. Third, the lack of an ETS limits the production of consistent and effective post-election audits of elections.

In three case studies, we examine the problems associated with the lack of an ETS in three policy areas: voter registration, innovation and election administration, and election data and election results. We also examine several ongoing efforts to create uniform standards for exchanging election data. The first is being conducted under the auspices of the Organization for the Advancement of Structured Information Standards (OASIS) and uses an interoperable Election Markup Language that would facilitate data exchange. The second is being developed by the Institute of Electrical and Electronics Engineers (IEEE). Both of these standards-setting activities are open, collaborative efforts that bring together experts from around the world to develop new standards. Regardless of whether either of these two protocols is adopted (or a new protocol is developed and adopted), the move to an ETS will streamline election data transfer. An ETS can encourage innovation in election management by increasing competition and lowering barriers to entry and also can facilitate local and state election officials who want to add new services to expand the franchise to traditionally disenfranchised populations.

A federal approach to comprehensive standards for electronic data transmission can be facilitated by the Election Assistance Commission in the following ways: (1) working with IEEE, OASIS, the National Institute of Standards and Technology, and others to develop a standard ETS for election data; (2) including a requirement for voting systems to have a common electronic-data-exchange component in the revised voting system standards; (3) including a similar requirement in the guidance given to states regarding what makes a statewide voter registration system compliant with the Help America Vote Act (HAVA); and (4) developing a process to encourage states to share voter registration data to improve the maintenance of voter registration rolls. Additionally, the U.S. Congress should consider requiring all states and localities to adopt all federal voting system standards, and making future voting systems standards binding. Finally, the U.S. Congress should strongly encourage all states and localities to adopt these new standards and empower the Election Assistance Commission to issue regulations for voting system standards and standards for voter registration systems.

Introduction and Overview

Today few of us think twice about sending an e-mail across the country or around the world. We routinely open a web browser to see the headlines of newspapers from far-flung locations, to shop across the nation, and to see the pictures of a newborn family member whose parents live thousands of miles from us. We use electronic technologies without thinking twice about them (except when they don't work). Nor do we think about how it is possible to use a Macintosh PowerBook or an IBM ThinkPad to access a Dell e-mail server (running Linux or Microsoft Windows), which itself communicates with e-mail and web servers throughout the world using a multiplicity of different computer hardware and software applications.

What makes all of these electronic transactions work are basic standards of data exchange. What allows all of these different computer hardware platforms, running different operating systems and sometimes proprietary software applications, to communicate together are fundamental protocols like TCP/IP (Transmission Control Protocol/Internet Protocol) and HTTP (Hypertext Transfer Protocol). These two protocols are fundamental building blocks for the development of the transfer of data over the Internet (TCP/IP) and the World Wide Web (HTTP). These basic standards and protocols—and many others like them—allow information to be passed from one computer system to another quickly, efficiently, and with very little error. They let people communicate electronically, allow for e-commerce, and provide the means for many governmental activities, allowing citizens to communicate with their elected officials quickly and effectively, enabling the electronic filing of tax returns, and even allowing the Armed Forces to communicate through highly secure channels.

This report is about the need for similar electronic transaction standards (ETS) in the realm of public elections. All aspects of election management—from managing voter registration to preparing ballots, managing precinct information, and counting and auditing election data—are moving toward complete automation. As this transition occurs, standards are necessary to ensure election data outputs are uniform, so that election management systems can communicate with each other seamlessly and various election management and voting technologies can interface automatically. This seamless communication also will allow election officials to share data—such as voter registration information—that will help produce a more accurate, cost-effective, and accessible election process and voting experience. In Appendix II, we explore the benefits that came to the healthcare industry when ETS protocols were required. This report shows how ETS protocols will improve voting and elections.

We wish to note at the outset that this report and the issue of ETS are distinct from the current controversy in electronic voting surrounding voter verification and voter-verified paper audit trails. ETS in election management is intended to allow election officials to exchange data, like voter registration files, and to allow different voting management systems developed by different vendors to communicate seamlessly. It also allows election data from different states or localities to be aggregated easily as well, which facilitates the reporting of and evaluation of election results. However, because ETS will facilitate the development of "plug and play" software—software solutions that can easily interface with any other software using the same data exchange standard—an ETS in elections could stimulate further the development of voter-verification

Acronyms and Abbreviations

ANSI: As the American National Standards Institute describes itself, ANSI is a private, nonprofit organization—501(c)3—that administers and coordinates the U.S. voluntary standardization and conformity assessment system. It is the official U.S. representative to the International Accreditation Forum (IAF) and the International Organization for Standardization (ISO).

DRE: Direct Recording Electronic voting machine, which is sometimes referred to as a touch-screen voting machine, allows a voter to vote without using a paper ballot. The voter's choices are recorded directly into the memory of the voting machine's computer system.

EAC: The Election Assistance Commission was created by HAVA. It is the federal entity that is now in charge of promoting election reform, distributing federal funds to states, and developing new standards in elections.

EDI: Electronic data interchange is the exchange of data using ETS.

EML: OASIS defines Election Markup Language as a standard for the structured interchange of data among hardware, software, and service providers who engage in any aspect of providing election or voter services to public or private organizations.

ETS: Electronic transaction standards are a common protocol for exchanging data. The protocol includes common standards for how data will be formatted and for how it will be exchanged across electronic platforms.

HAVA: The Help America Vote Act is federal legislation enacted in 2002 in response to the problems that occurred in Florida in 2000. HAVA created the Election Assistance Commission, required the development of a state plan for election reform, and provided federal funding to states to support these reforms.

HIPAA: The Health Insurance Portability and Accountability Act is a broad healthcare reform package passed by Congress in 1996.

HTTP: HyperText Transfer Protocol is the protocol used on the World Wide Web to define how messages are formatted and transmitted, and the actions web servers and browsers should take in response to various commands.

IEEE: The Institute of Electrical and Electronics Engineers is an international NGO that develops standards for electronic and electrical domains, including computer hardware and software.

LEO: Local Election Officials are the individuals or board who implement elections at the county or city level.

NGO: Non-governmental organization is a more general term for nonprofit and charitable organizations. Political parties and election-related interest groups are considered NGOs.

NIST: The National Institute of Standards and Technology is the federal agency charged with developing standards and measures for everything from what it exactly means for something to weigh "one pound" to the development of usability standards that define when a product is most easily used by specific populations.

OASIS: The Organization for the Advancement of Structured Information Standards, better known as OASIS, is a nonprofit, international consortium of suppliers and users of products and services that support open structured information standards (both de jure and de facto). It provides members with an open forum to discuss market needs and directions, and to recommend guidelines for product interoperability. This work complements that of standards bodies, focusing on making structured information standards easy to adopt and standards-based products practical to use, in real-world, open system applications.

SEO: State Election Officials are the individuals or board who implement elections at the state level.

SERVE: The Secure Electronic Registration and Voting Experiment was intended to allow eligible UOCAVA voters to register and cast votes using the Internet in the 2004 elections. The system was not deployed.

TCP/IP: Transmission Control Protocol/Internet Protocol is a communications protocol that was developed to connect dissimilar systems through a Unix standard. TCP/IP is a routable protocol, because the header prefixed to an IP packet contains not only source and destination addresses of the hosts, but also source and destination addresses of the networks they reside in. Data transmitted using TCP/IP can be sent to multiple networks within an organization or around the globe via the Internet, the world's largest TCP/IP network. (source: http://computing-dictionary.thefreedictionary.com/TCP/IP)

UOCAVA: The Uniformed and Overseas Civilian Absentee Voting Act encourages special voting assistance to military personnel, their dependents, and citizens living overseas.

VSS: Voting system standards are documented agreements containing technical specifications to be used consistently as guidelines to ensure that automated voting systems (both those that use a paper ballot and all electronic systems) are accurate, reliable, and secure.

XML: Extensible Markup Language is a flexible way to create standard information formats and share both the format and the data on the World Wide Web.

systems that offer solutions to the voter-verification problem, both procedural and technical.[1]

Historically, American elections have been a highly decentralized affair. For much of the nation's early history, government officials did not even provide voters with ballots. It was the parties, not the election officials, who printed ballots and did a wide range of the election activities we now attribute to elected or appointed local election officials.[2] As states moved to the Australian ballot—which listed candidates from both parties on a single ballot—election officials gained more control over the elections process. Today, with elections becoming more mechanized and computerized, this area of government has become more complex. The introduction of lever machines, which require maintenance and upkeep, and punch cards, which brought computer technology to elections management, greatly changed the landscape of elections and set the stage for the current world of electronic election management systems.

Over the past three decades, election management has been a part of the transition that governmental units have taken toward e-government. This transition began in the 1960s, when election officials started using electronic vote tabulation equipment. Given the massive media coverage that occurred in 2004 surrounding the use of direct recording electronic (DRE) voting equipment in the election and its possible pitfalls, it would not be unreasonable for someone to think that DREs were the primary component of computer technology in election management. As we will show, nothing could be further from reality.

Today, in most election jurisdictions, much if not all of the election process is being done using e-government solutions. This e-government solution typically begins with a system that contains all candidate and precinct information. The information provides a basis for using computers for ballot design, voter registration data management, precinct and early vote casting, vote tabulation, data reporting, and electronic auditing. The reason for using e-government in elections is simple: It allows local election officials to better manage the elections process and elections information. It also allows election results to be reported faster than before, something that candidates, the media, and the public demand in the current instant news environment.

But election administration is a niche market in the e-government arena. So as state and local election officials have moved into the electronic realm, they have been forced to select systems in a marketplace dominated by a relatively small number of vendors of proprietary systems; in some cases, they have developed their own applications for components of the election administration process. Many private vendors sell systems that require much, and sometimes all, election administration processes to be served exclusively with their proprietary system. One exception is in the case of voter registration applications, which are often today managed with one system while all other election management processes—from ballot design to reporting election outcomes—are managed solely through a second system.

The use of solely proprietary e-government solutions in elections has created a systematic problem in e-government: There is not a common standard or set of standards for sharing election data across these proprietary systems. The problems associated with this lack of electronic data exchange standards manifest themselves in several ways.

First, it makes it difficult for a local election official to integrate various election management and voting products acquired from different vendors into a single unit. For example, an election official would be hard-pressed today to get one vendor's ballot design product to work with a different vendor's electronic voting equipment, or to get one vendor's electronic voting equipment to work with a different vendor's tabulation product. The local official would literally have to get computer programmers from both companies to work together to build a new integration tool that would allow one company's product to "talk" to the other, a costly and difficult process. The lack of a data exchange standard makes virtually impossible any sort of plug and play or modular approach for the development of election administration electronic solutions.

Second, the lack of standards affects the ability of states to develop truly integrated voter registration systems. The Help America Vote Act (HAVA) requires states to develop electronic statewide voter registration databases. Therefore, states are now integrating voter registration data from local election officials (typically counties) into these new databases, a process that is raising the issue of inconsistent data formats for this particular component of election

administration. Also, the statewide voter registration files, once complete, must integrate with other databases, most importantly state department of motor vehicles files, federal Social Security Administration databases, as well as existing election administration databases in each state and county. Some election officials have even talked about setting up mechanisms so that states can share election administration data, for example, so that they can check the authenticity of newly registered voters and verify that they are not currently registered to vote in another state.

Third, the lack of election data transfer standards hinders the capabilities of election administrators and others to produce consistent and effective post-election audits of election practices and procedures. Currently, the quality and consistency of information reported by election administrators is highly variable; it can be exceedingly difficult for third parties interested in auditing election practices and procedures to obtain even rudimentary data from many state and local election officials.[3] By developing a standard format for data exchange, election administrators will be able to provide easily and efficiently a consistent reporting of election administration information that can be used to appropriately audit election practices and procedures.

The need for comprehensive standards for electronic data transmission calls for federal action. The solution to this problem is for the Election Assistance Commission (EAC) to:

- Work with the Institute of Electrical and Electronics Engineers (IEEE), the National Institute of Standards and Technology (NIST), the Organization for the Advancement of Structured Information Standards (OASIS), and others to develop a common ETS for election data.
- Include a requirement for voting systems to have a common electronic data exchange component in the revised voting system standards.
- Include a similar requirement in the guidance given to states regarding what makes a statewide voter registration system compliant with the Help America Vote Act (HAVA).
- Develop a process to encourage states to share voter registration data to improve the maintenance of voter registration rolls.

Additionally, we recommend that the U.S. Congress consider requiring all states and localities to adopt all federal voting system standards and make future voting systems standards binding (not voluntary). States and localities also need to be encouraged to exchange data to improve the quality of the voting experience. When ETS protocols are included in all e-voting systems, states can use the system to improve the quality of their voter registration lists, and local governments can use the technology to innovate and improve their overall service to voters. Finally, the U.S. Congress should strongly encourage all states and localities to adopt these new standards and empower the EAC to issue regulations for voting system standards and standards for voter registration systems.

Standardization creates the potential for a future election model where this interoperability allows election officials to offer a wide array of services to voters, as well as improve election management across jurisdictions. Consider the following examples:

- Local election officials could share or borrow voting equipment from others with confidence that the data exchange from their ballot definition software and vote tabulation software would be compatible with the data exchange in the voting equipment.
- It would allow for registration data to be more easily exchanged and compared between a state and its localities, and among states.
- It would let election officials consider the acquisition of more modular election administration technologies; they would not necessarily be required to purchase a single, end-to-end election administration solution.
- As states move to attempt to add other electronic voting experiences, such as Internet voting for Uniformed and Overseas Civilian Absentee Voting Act (UOCAVA) voters, these new technologies would be able to use a common data exchange protocol to integrate with the existing system.

The creation of standard, interoperable data exchange protocols can also encourage innovation in election management by increasing competition and lowering barriers to entry for firms interested in providing component or modular services rather than complete end-to-end election management systems. It can also facilitate local and state election officials who want to add new services—such as experimentation with Internet voting for military personnel and overseas civilians—that can expand the franchise to traditionally disenfranchised populations.

Standardization often occurs because of political, economic, or social demands. In the case of elections, HAVA and changing socio-demographic trends in the United States are driving the need for standard protocols in election management systems. The move to standards for data exchange in e-government is very similar to shifts in other policy areas. For example, the creation of standard protocols in the area of health insurance and healthcare was driven by a legislative requirement contained in the Health Insurance Portability and Accountability Act (HIPAA); this case is closely analogous to what could occur in election administration. In HIPAA, federal legislation pushed the affected industries to get together and create a standard protocol that addressed federal requirements.

This report begins with an examination of standards in the e-government context, and then considers how the lack of standard integration protocols in the election arena impedes both innovation in this field and effective communications among the various entities involved in election administration. Using three cases—statewide voter registration systems, the Secure Electronic Registration and Voting Experiment (SERVE) Internet voting project, and election data results and reporting—we highlight the difficulties caused by the lack of effective data transfer protocols in this field. We conclude by examining how the future of elections could look with a standard data exchange protocol in place. The report also contains an appendix (see Appendix II), where we illustrate how ETS standards in healthcare are analogous to what is currently occurring in e-voting and the benefits that can accrue from such standards.

Standards in the E-Government Context

Over the last decade, there has been a marked increase in research in the study of e-government.[4] This research has examined an array of issues, from examinations of citizens' usage and attitudes toward e-government to barriers in the adoption of e-government. In general, the focus of this research has been on the issues associated with moving to e-government in various jurisdictions or policy areas and citizen use and approval of this technological change. Interestingly, there have been few studies of e-government in the area of election administration, even though state and local governments have been using e-government technologies since the 1960s.[5]

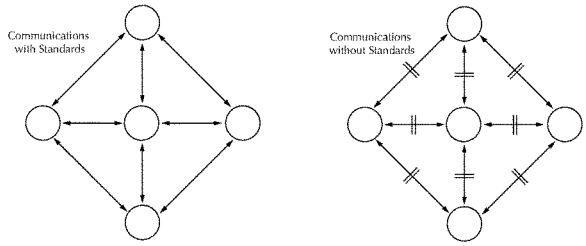
Equally as important, little attention has been paid to the role played by governmental and non-governmental organizations (NGOs) such as the IEEE and OASIS in the establishment of standards and protocols needed to create uniformity across e-government. We generally take e-government standards for granted; we assume that the e-mail recipient can read it and that an Internet connection in Washington, D.C., and Salt Lake City, Utah, are the same as the Internet connection in Pasadena, California. Likewise, when we purchase a computer, we assume that—within certain well-understood limits—we can add software and hardware peripherals to the computer, and they will work. In fact, most computers today work on a plug and play model, where a vast range of items work simply by being plugged into the computer.

We can see the importance of standards when we consider the impact of incompatibility on efficiency and effectiveness. Computers have the capacity to allow organizations to collect and organize vast amounts of information. However, if two organizations have software systems that are not compatible, then the data in one system cannot be easily transferred to or compared with the data in another (see Figure 1). Such problems can be common, especially in proprietary systems. There are many examples of how such incompatibility problems have affected the management of public programs.[6] Typically, one organization has data that a second organization needs, and without a standard data transfer protocol, the only way to share data is to have the data manually re-entered. Too often, the alternative is to not share data at all, resulting in lost productivity and reduced management capacity.

What is required to make this process work smoothly is to have a system that allows for the standard interchange of data between computers without any human intervention. Electronic transaction standards that facilitate electronic data interchange (EDI) are required to achieve this goal. An EDI provides a defined format for the exchange of data for every specific transaction in question. These standards allow for software developers to offer end users an array of different products and services, but with end users knowing that the system they purchase will be able to communicate with others who also purchase software with the same EDI.

In the area of election administration, voluntary standards do exist, with their most important application to date in the area of voting systems. The current voting systems standards (VSS) were adopted by the Federal Election Commission (FEC) in 2002, the first revision of these standards since their initial release in 1990. These standards ensure that voting systems—which include not only the voting technology used in polling places but also the tabulation software used to count ballots and the software used to generate ballots—meet a minimum stan-

Figure 1: Communications with and without Standards



dard. Importantly for our discussion, there are no standards related to electronic data exchange. The standards are open to being updated with improved technical support. Under HAVA, the development of future standards for voting technologies is to be conducted by the new Election Assistance Commission in conjunction with the National Institute of Standards and Technology (NIST).[7]

The role of government in the development of electronic transaction standards, or ETS, and the benefits of such a system can be seen in the healthcare arena, a complex field involving government-to-business interaction. The implementation of federal health policy requires the coordination of federal actors, corporate and not-for-profit healthcare organizations, and information technology solution providers. Without standards, the process of communicating insurance claims or patient health information between the federal government and health providers—or among health providers—was unnecessarily complex, requiring people to convert data from format to format as it went through the system. To bring order to this process, the federal government mandated the development of a standard protocol for all healthcare-related transactions. With a standard protocol, the communications problem that existed in data transmission was eliminated and greater efficiencies were created. In Appendix I, we present a fuller exposition of this case to illustrate how ETS can be developed through government-business partnership.

The Election Context

Elections in the United States have traditionally been run by local governments under a governance system largely embodied by state law. There is not a single set of election procedures and processes in the United States; there are not even 50 sets, or one set per state. Instead, there are several thousands of different ways of running elections in the United States, since local election officials, including both county and city election administrators, maintained their own unique methods of election administration before the 2000 election debacle. The rationale behind this decentralization of election administration is partly constitutional. Article I of the U.S. Constitution allows for a federal role in congressional elections, but typically the federal government has sought to delegate election procedures for federal offices to the states. Therefore, election governance regimes vary broadly across states, and often within states. At the state level, the laws govern every aspect of voting:

- **Who can vote.** For example, in some states, citizens convicted of felony violations can never cast a vote again without going through a rights re-establishment process.
- **When people vote.** Some states allow voting only on Election Day, but others also allow "early voting."
- **Where people vote.** For example, in Oregon, there is no voting at designated polling places; everyone votes through an absentee voting process.
- **How people vote.** Some states, like Georgia, have a single voting system for the entire state, while others, like California, defer such decisions to the county level.

There are similar variations across counties. Counties often have substantial leeway in the manner in which they implement election law, and they historically have been empowered to determine the election management systems that will be used in the county—from voter registration to voting equipment to ballot design and management software. With this control at the county level, in a given state, no two counties may use exactly the same voting equipment, even if two counties have purchased the same type of system from a vendor. Counties often customize these systems so that—even though the systems are produced by the same vendor—they produce output that is not compatible.

The federal government has periodically sought to provide some uniformity in election administration. For example, the Voting Rights Act created more uniform protection of voting rights, and the National Voter Registration Act sought to promote more consistent voter registration procedures across the states. However, until the 2000 presidential election and the passage of HAVA in that election's aftermath, administration of election procedures was largely a matter of county or sub-county administration.

In the area of election administration, the development of standards has been a slow and somewhat controversial process. The first election standards—known as the voting system standards, or VSS—were promulgated in 1990, after NIST completed a feasibility study in this area. The standards were then updated in April 2002, but it is widely recognized that the standards have not remained up to date. As the FEC, which promulgated the 2002 standards, notes:

Players in the Election Administration and Standards Process

As election reform has occurred over the past several decades, the players in election administration have evolved. This evolution has continued with the development of voting system standards and related electronic data transmission standards.

The frontline operators in elections are **local election officials** (LEOs). LEOs are responsible for running elections: They hire the poll workers, select poll sites, generate ballots, maintain and use voter registration rolls, and count and audit ballots. Historically, LEOs have been responsible for the selection of election administration and voting technologies, including voting systems, voter registration systems, and election management software systems.

At the state level, **state election officials** (SEOs) play a key role in election administration, especially since the passage of the Help America Vote Act. Typically, the state election powers are in the hands of the secretary of state, but in some states the lieutenant governor or a state election board holds these powers. Under HAVA, the SEO is responsible for the development of a state election plan, as well as for maintenance of the state's voter registration system. In many states, such as Georgia and Maryland, the state has exercised control over the selection of the voting technology that will be used in the state.

Before the passage of HAVA, the **Federal Election Commission** (FEC) was responsible for providing data, research, and information about election administration to various interested groups. It was also responsible for overseeing the development of the voting system standards (VSS). Under HAVA, these powers have been transferred to the **Election Assistance Commission** (EAC). The EAC is responsible for overseeing the implementation of HAVA, including evaluating state election reform plans, providing funds to states to support HAVA, conducting studies and issuing guidance to facilitate election reform, and overseeing the development of new VSS.

HAVA also formally brings the **National Institute of Standards and Technology** (NIST) into the elections process. NIST is to help in the development of the VSS and to work on supporting other studies on issues such as usability and voting system security. Other independent standards-setting bodies, such as the **IEEE** and **OASIS,** also support the development of standards that are used throughout specific industries, such as the elections management and voting technology industry.

> Standards are not permanent. They must evolve alongside technological advancements. Indeed, it is common practice to review and update technical standards every five years or so. The voting system standards, issued in 1990, are no exception to this rule. Vendors are now using new technology and expanding system functions that are not sufficiently covered by the existing standards.[8]

For example, there are no standards governing Internet voting, even though there have been several trials of Internet voting in the United States. The standards in elections, moreover, have been exacerbated by the decentralized governance structure in the area of voting technology and election administration. Moreover, the voting system standards are voluntary, not mandatory. All states have not adopted the 1990 or 2002 voting system standards, and there is no requirement that states be mandated to adopt them.

What has been the impact of this lack of standards? It has exacerbated many of the recent trials our nation has weathered in election administration. The 2000 presidential election created pressure to overcome the problems that exist in the decentralized nature of American election administration. The Florida election process in 2000 illustrated that there were substantial differences across counties in how administrative procedures were handled; in part, this was the rationale used by the Supreme Court in the *Bush v. Gore* decision that stopped the Florida recount in December 2000. In response to these problems, the federal government acted in 2002 and passed HAVA. This legislation provided for a slightly stronger federal role in election administration, mainly by establishing a new federal entity—the Election Assistance Commission—and by mandating that states work to develop statewide voter registration databases and eliminate inferior voting technologies.

Standardization of Election Management Protocols

One area where there are no election standards is the area of coding standards or electronic data transmission standards. This means that voting systems—even if they complete the same certification standards—do not have to meet specific standards for electronic data transmission or for file coding and formatting. Not surprisingly, the lack of standardization has led to a marketplace dominated by a few vendors who provide end-to-end product solutions. Because these systems are proprietary and typically do not produce a standard output, election officials are often forced to purchase entire election management solutions from a single vendor. It is typically not possible to use the ballot definition software from one vendor with the voting equipment of another vendor and the vote tally and audit software of a third vendor.

Fortunately, there are several efforts to create uniform standards for exchanging election data. Here, we profile two of the most promising. The first is being conducted under the auspices of OASIS and the second by IEEE. Both of these standards-setting activities are open, collaborative efforts that bring together experts from around the world to develop new standards.

The OASIS Election and Voter Services Technical Committee began its efforts in May 2001 to develop an interoperable Election Markup Language (EML) that would facilitate data exchange. Its charge is to:

> develop a standard for the structured interchange of data among hardware, software, and service providers who engage in any aspect of providing election or voter services to public or private organizations. The services performed for such elections include but are not limited to voter roll/membership maintenance (new voter registration, membership and dues collection, change of address tracking, etc.), citizen/membership credentialing, redistricting, requests for absentee/expatriate ballots, election calendaring, logistics management (polling place management), election notification, ballot delivery and tabulation, election results reporting and demographics.[9]

The EML standards have been through four iterations—Version 4.0 was released on January 24, 2005. EML is not updated on a regular schedule, but instead is modified as users and technical experts identify issues with the schema. The EML protocol has been tested in pilot projects in several nations, and edits have been made to EML based on the results of these pilot implementations.

The focus of the EML design is on developing an ETS that has five key characteristics:

1. It can serve as a multinational standard.
2. It can work across various voting regimes—including proportional representation and single-member districts—and across voting platforms—including Internet and traditional paper-ballot voting.
3. It can work in multilingual settings.
4. It is adaptable to both public and private election settings.
5. It can secure data and data interfaces from corruption and manipulation.

One benefit of the EML protocol is that it builds on the existing HTML language that is used extensively as a language on the World Wide Web. This broad usage base means that a wide array of entities can develop using interfaces that use this protocol. This open-source EML protocol also creates the potential for improved interfaces to be developed that may drive improvements to the election process outside of existing technologies.

In September 2002, the IEEE approved a new project in this area: P1622—A Standard for Voting Equipment Electronic Data Interchange. This project follows the same open standards development process outlined before and recognizes the need for broad input in this effort. The P1622 effort begins by recognizing that "the 'Voting System' is composed of a number of components, the voter registration system, the candidate filing process, the petition system, ballot definition, voting, tabulation, and reporting systems." It then states:

> This standard will develop standard data interchange formats to allow the exchange and interoperability of these various systems. The purpose of P1622 is to reach, as nearly as possible, the ideal state, wherein there exists a common definition of the data utilized within election systems and the election industry. This standard would promote interoperability among functional components, reduce complexity, spur innovation, and provide greater assurance within election systems.[10]

One model for meeting this new standard is the Election Data Exchange (EDX) protocol, which has been developed by Hart InterCivic. EDX is an electronic data transmission standard that uses Extensible Markup Language (XML), a common schema that is an integral part of many systems for communicating information over the Internet in real time. The EDX schema is designed to promote electronic data interchange, or EDI, allowing different election management systems to communicate seamlessly at the state level, expanding the reporting and presentation capabilities that were previously available. EDX is designed to define the majority of the data elements for an election, which includes the voter's name and identification number and records of votes cast. A common data interface makes it simple for one county using one election management system to integrate a voter's registration application with a second vendor's election management system. This type of system also can build auditability into the system through enhanced logging functionalities and makes EDI a standard feature of any election management system.

For an ETS to be successful in elections, it has to be broad and encompass the full complement of election activities and complexities, such as multiple ballot languages. The EDX schema provides a complete data format across both voter registration and election management systems. For example, EDX can support:

- Voter registration records (name, address, etc.)
- Poll book data
- Polling place information
- Closed, open, and mixed primaries
- General elections
- Local elections
- Multiple languages
- Fully customized rotation methods
- Graphical images (language based to allow a specific cast vote record for a language)
- Districts—full definitions with relationships to precincts, contests, and ballot styles
- Precinct—support for both reporting precincts and splits
- Summarized tabulation results
- Itemized cast vote records with related associations to handle over vote resolutions
- Ballot style definitions and associated district, precinct/split, and contest relationships
- Dependent, measure, candidate, and single-party contests
- Tabulated results—summary and detailed

Regardless of whether either of these two protocols are adopted (or a new protocol is developed and adopted), the move to an ETS will streamline data transfer of an array of data—from voter registration records to election results on Election Day. Election administration is a field where the ability to transfer and report data quickly, accurately, and efficiently is critical. Prior to Election Day, state and local election officials need to have data transmitted quickly because of the tight deadlines that often exist for closing out voter registration rolls prior to an election or for getting ballots defined and proofed. On Election Day, everyone from state officials and candidates to news organizations and the general public wants election results to be posted quickly and accurately. An ETS can ensure that these activities can be accomplished with minimal or no manual effort, increasing the transparency of the election process and potentially reducing errors as well.

A single ETS will allow various election management systems—including voter registration and broader election management systems—to communicate effortlessly and will avoid local election officials having to replace their legacy election management systems. Election data will have to be entered only once, into a single system, because the ETS will ensure that data can be read accurately in other election management software solutions. Currently, election officials often are forced to enter a single piece of voter information into multiple systems in order to manage their elections. A single data entry system can reduce data entry errors and free local election officials to use their existing resources more efficiently.

This standards effort fits well within the overall environment created by the Help America Vote Act. HAVA encourages technological innovation, especially in the areas of voting equipment and voter registration systems, and opens possibilities for the development of standard protocols for election technologies. For example, HAVA calls for the maintenance and continual updating of the voluntary voting system standards that currently exist. These standards will determine the attributes that are required for a voting system to be used in the states that adopt the standards. Here it is important to note that voting systems are not just the technologies that are used in the polling place but also include the entire system, from ballot definition to election results auditing. And unlike what has been the case in the past, HAVA requires that the voting system standards be reviewed and updated quadrennially, which should help keep the standards relevant in the voting system adoption process.

The VSS provide a mechanism for the Election Assistance Commission, or EAC, to require that all election management systems have an interoperability component. This would ensure that the technology used at each point in the election management process can produce standard output that can then be read by any other election management software. Although the voting system standards are voluntary, the fact that so many states require voting systems to meet these standards before such equipment can be used in their state should lead to an ETS becoming the industry norm. One key issue would be how to get legacy systems covered under this new standard—something that was mandated under HIPAA in the healthcare example—but it might be possible for the EAC to provide local governments with funds to update their system software to meet the new standard.

The Impact of Standardization: Three Case Studies

Electronic transaction standards in election administration would completely change the way in which election data is handled and create a streamlined, uniform process for its transmission. In the three case studies that follow, we show how the current lack of standardization affects a wide array of different election activities. It not only keeps new participants from easily entering to serve a specific niche in this market, but also hinders efforts to innovate, since novel solutions cannot easily be developed that are compatible with the wide range of data formats that exist in the current marketplace.

Just as in the case of the healthcare industry, an election ETS would allow all participants in elections—from the city and county election officials to the state and federal election entities—to communicate from any election management platform to any other platform, without the need for manual data conversion. This interfacing would allow for improved study of election administration, since data collected in a common file format, with common data elements from across jurisdictions, could be easily aggregated to the state and federal level. Such data would allow for the improvement of election administration and better auditing of election outcomes.

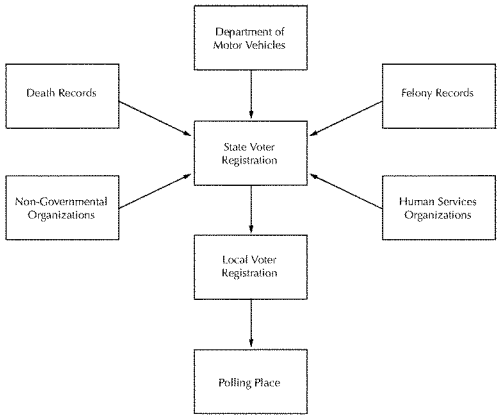
There have been many calls, in the wake of the last two presidential elections, for better reporting of information needed for the detailed auditing of election administration. Therefore, we see the development of standards for the transfer of election data as an important first step toward stronger data reporting, retention, and publication practices by election officials.[11]

Case 1: Voter Registration

In addition to promoting the development of meaningful and modern voting system standards, HAVA requires intra-state uniformity in voter registration by requiring the creation of a statewide voter registration system. According to Section 303, all states with voter registration must have a computerized voter registration system that is centralized at the state level. Section 303 also outlines a set of procedures that requires file maintenance to ensure up-to-date lists. This protocol requires states to link their voter registration system with other state databases, including those governing an individual's felony status (if applicable) and death records. Although not explicitly required, the database also needs to be able to coordinate with the state's department of motor vehicles and the federal Social Security Administration's database; both of these linkages are needed so that information from new registrants can be compared to either of these external databases for verification.

As Figure 2 on page 20 shows, there is a wide array of entities with which a state voter registration system needs to be able to interface in order to keep the voter registration system up-to-date. Without a common protocol, the transmission of data can occur in a couple of ways. First, it can run through a data center, where individuals convert the data from one electronic format to another, which often requires reformatting the data or re-entering parts of the data. Second, the data may have to be completely hand-entered by the election officials in charge of voter registration. This process of reformatting or re-entry introduces opportunities for data entry errors, errors that can result in voters not being listed correctly on the voter rolls at their polling

Figure 2: The Voter Registration Network



place. When this occurs, a voter often has to cast a provisional ballot, which slows polling place operations on Election Day and results in the voter's ballot not being counted.

There are also many legal and social factors that affect the need for data uniformity with voter registration systems across states. For example, mobility impacts election administration, and uniform protocols for voter registration would improve the elections process. Every two years, approximately one-third of the U.S. population moves. Most moves are intra-state moves—often not much farther than three miles—and the concept behind the requirement for statewide voter registration systems is, in part, intended to address the voter re-registration problems associated with short moves. However, on average, 6.87 million people moved to a new state each year in the 1990s, with an additional 1.3 million people moving from abroad to the United States.[12] All of these individuals potentially created a two-part voter registration issue: (1) the need to register to vote in their new state, and (2) the need to un-register to vote in their previous state of residence.[13] This mobility rate means that every presidential election year, up to 27.2 million Americans could be voting in a new state.

Without system interoperability among voter registration systems, it is not possible for the state in which a voter is registering to electronically notify the voter's previous state of residence to remove the voter from the rolls. This notification can be done manually—with a piece of paper sent from one state to another—but this process has relatively high administrative costs. Now consider how this system might look if there was a voter registration ETS and states could use an EDI to transmit this information. When the same voter came in to register in state A, all of the voter's information—sent in the standard file format and with the standard data elements—would be transmitted to state B, the previous place of registration. State A would add the voter to its rolls and state B would be able to remove that voter—and this could be done almost instantaneously.[14]

Because of the inability of states to transmit new voter registrations to the state of previous registration, tens of thousands of voters could be regis-

tered in multiple states and potentially could vote in multiple states. For example, studies by media organizations have found that in the 2000 election, 46,000 people were registered to vote in both Florida and New York. It is estimated that between 400 and 1,000 of these individuals voted in both states. Similarly, 68,000 individuals are registered to vote in both Florida and either Georgia or North Carolina, and it is estimated that 1,650 of them voted twice in 2000 or 2002. An ETS would enable states to overcome this problem and keep voters from being registered twice and voting twice.[15]

Case 2: Innovation and Election Administration

The lack of a common interface is also hindering the development of innovation in elections. One of the problems highlighted by the 2000 election debacle was the plight of overseas and military voters. These voters have a difficult time voting because of an array of issues including ballot transit time: the amount of time it takes for a piece of mail to go from the election official to the voter and return to the election official.

Ballot transit has long been a problem for those who wish to vote from overseas locations, but in recent years efforts have been made to use technology to address this problem. In 2000, the Federal Voting Assistance Program—the component of the Department of Defense in charge of serving the voting needs of uniformed personnel, their dependents, and overseas civilians—initiated an Internet voting project called Voting Over the Internet. This proof-of-concept effort allowed 83 individuals to cast ballots in the 2000 election and showed that Internet voting could be done successfully in a presidential election. Congress subsequently requested that the Department of Defense conduct a second and larger Internet voting trial.

The Secure Electronic Registration and Voting Experiment, or SERVE, was not deployed for use in the 2004 general election. However, the implementation effort for SERVE prior to the project's termination illustrated the problems associated with attempting to add a new technology—an Internet voting system—to the existing election management systems used in counties. As the development team attempted to integrate the SERVE system into the existing technologies used in participating counties, they determined that (1) different companies used different file formats and data transfer protocols, and (2) the same company often used various file transfer protocols across versions of their product or even within the same version of their product. Thus, future attempts to develop innovative, end-to-end voting solutions for particular citizen groups like military personnel and overseas voters will be much easier to develop and implement if election data standards are in place.

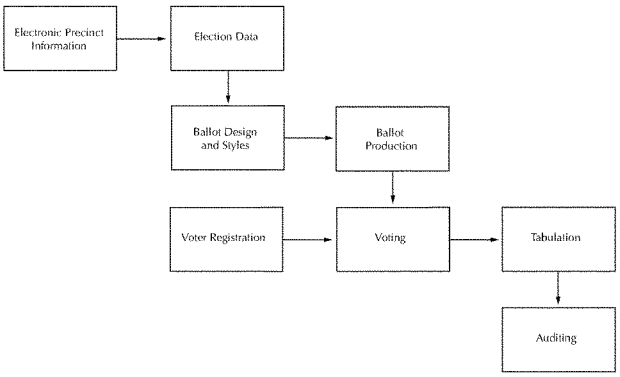
Others have also issued calls for the development of more modular voting systems. In particular, the Caltech/MIT Voting Technology Project in 2001 presented a visionary approach for future voting systems in which voters could use a variety of devices to obtain and manipulate their ballot.[16] This innovative architecture, which they termed "A Modular Voting Architecture" (AMVA), assumes that there are common formats for data exchange between components of election technologies. Thus, for innovative ideas like the AMVA to be viable in the near future, some standards for data interchange between election administration hardware/software platforms is necessary.

Because there is not an electronic transaction standard and common file format for election materials, it is almost impossible to plug and play new innovations onto existing election management platforms. This is a major hurdle that is blocking the development of new e-government solutions for election administration. Figure 3 on page 22 shows the election management processes that localities currently have to manage. This is a multi-stage process that requires the integration of data from multiple sources, with the final output being the ballots and voter data used in polling places on Election Day and the final audited election outcomes. Without a standard means by which to share data across these points in the election process, election officials are not able to use different products or integrate innovations into their current election system, thus significantly inhibiting their ability to produce innovative solutions for their main clients (voters, candidates, and the media).

Case 3: Election Data and Election Results

Election night is a critical time for the Associated Press (AP). They are a primary source of preliminary election results for a large number of media outlets

Figure 3: The Election Management Process



across the country, providing the information you see in the morning paper or on the morning news. The success of this operation is predicated on AP being able to capture data from states and localities across the country and then putting those data into a standard format. This would seem to be an easy task: The state simply e-mails or otherwise transmits a file to the AP, and AP pulls this file into the other state files, creating a single database of election results.

The reality is far from simple. Because of the lack of standards in the capture and transmission of electronic data in elections, the AP cannot simply request a file from each state for the appropriate races and then expect to receive the information in a single file format or even a single data format. Almost every state has election results in a unique file format, and each often uses unique coding schemes even when variables in the results data set are the same. As a result, the AP has to hire programmers that can create unique "data wizards"—small programs that can take the election results from a given state and put those data into a common format. Given the lack of uniformity, almost every state needs its own data wizard program. The data wizards are used in conjunction with the hand-entering of data, because some states lack the ability to transmit election data effectively.

The election night data problems also extend to related work AP does on elections. For example, AP often wants to know whether the votes reported are from absentee voters, early voters, or precinct voters. However, different states use different terms or different coding for the same concept. For example, early voting is called "in-person absentee voting" in several states. In Utah, these early votes are incorporated with the absentee ballots in a precinct, so the state does not collect any information on "early voting."

This case illustrates a second issue associated with the standards-setting process, which is that an ETS also involves the creation of clear definitions of what each part of the data record looks like. Thus, all users of the standard would code the same concept the same way, in the same order, so when these data are aggregated, the result would be consistent and uniform across states. For AP, it would also mean that election data would be easily aggregated for transmission to its customers on election night, without the costly step of having to re-create data wizards and hand-enter data. For other subsequent users of election administration data, like policy makers and researchers, an ETS would allow for easier, more consistent, and highly accurate post-election studies of election practices and procedures.

Conclusions and Recommendations

In many ways, elections have changed little over the past 150 years. Voters assemble at a designated location on a chosen day to select their candidates for office. However, there are growing pressures for this process to change. Voters are demanding that elections be as customer friendly as possible, which manifests itself in demands for more early voting and for no-excuse absentee voting. There is also growing interest in many circles to provide electronic (and possibly Internet) voting services to voters with special needs, such as military personnel and their dependents, and citizens who live overseas. At the same time, the recently passed HAVA legislation—as well as the demands created by partisan politics and the closeness of recent presidential elections—requires that voter registration rolls be as accurate as possible and the voting process as smooth as possible. Accomplishing these dual goals of customer service and the execution of a well-run election requires the smooth communication of data among a broad array of actors.

Over the last several decades, e-government has revolutionized the way in which elections are administered, both in the central election official's office and in polling places. Everything from voter registration to ballot design to vote counting is done using electronic systems. The three case studies illustrate how standards that allow for the easy exchange of election data across software and hardware platforms are an important component of the continual evolution of making the voting process easier and more convenient for citizens. Today, many voters often face long lines when they go to vote on Election Day, and some voters (as many as 4 million to 6 million in the 2000 presidential election) attempt to vote, only to have their votes "lost" due to snafus, mistakes, and errors in the process. Improving the technology of elections can reduce the number of votes lost in future elections—and one aspect of improving the technology will be developing standards for data exchange.

Recommendations

1. The Election Assistance Commission should request that the National Institute of Standards and Technology provide a recommended electronic transaction standard for election data.
2. The Election Assistance Commission, through the voting system standards-setting process, should ensure that all voting systems have a common electronic data exchange component.
3. The Election Assistance Commission should include a similar requirement for an ETS protocol in the guidance given to states regarding what makes a statewide voter registration system compliant with the Help America Vote Act.
4. The Election Assistance Commission should develop a process for encouraging states to share voter registration data to improve the maintenance of voter rolls.
5. The U.S. Congress should strongly encourage all states and localities to adopt all federal voting system standards and should empower a federal government agency like the Election Assistance Commission to develop and issue guidelines for standards for voting systems and voter registration systems.

To achieve the broader goals of a more cost-effective, reliable, and accurate election administration process, standards for data communication are necessary. If standards can be implemented and enforced, this one simple reform should, in the short term, help improve the process of administering elections. Elections could be administered more accurately, because election officials could use the common data formats to better cross-reference elec-

tion data across jurisdictions (for example, election officials would be able to compare voter registration data across counties and states) and against other databases.

To achieve the goal of having ETS protocols that make election data more consistent, more accurate, and easier to transmit, the following recommendations should be implemented.

Recommendation 1: The Election Assistance Commission should request that the National Institute of Standards and Technology provide a recommended electronic transaction standard for election data.
This standard should be similar to the EDX or EML protocols described earlier in this report. These two ongoing standards-setting processes should be used as input to the NIST ETS, similar to the process used for NIST's efforts to update the voting system standards. This somewhat parallel effort would ensure that release of an ETS would be placed on a defined timeline in the event that consensus cannot be reached by the independent standards-setting bodies.

Recommendation 2: The Election Assistance Commission, through the voting system standards-setting process, should ensure that all voting systems have a common electronic data exchange component.
This can be done though revisions to the voting system standards, which are ongoing with the technical support of NIST. The inclusion of an ETS protocol in the system standards will provide vendors with more incentive to incorporate this into their products.

Recommendation 3: The Election Assistance Commission should include a similar requirement for an ETS protocol in the guidance given to states regarding what makes a statewide voter registration system compliant with the Help America Vote Act.
HAVA gives the EAC some control over determining what constitutes a statewide voter registration system, and the EAC should use this to promote an ETS that ensures these systems can communicate easily in a standard format.

Recommendation 4: The Election Assistance Commission should develop a process for encouraging states to share voter registration data to improve the maintenance of voter rolls.
With such a mobile population, state voter rolls can quickly become out of date. For example, voting precincts surrounding colleges and universities often have far more voters on the rolls than are active voters, because students who registered to vote did not change their registration status when they moved. If states could easily transmit data on new registrants to that person's state of previous registration, voter rolls could be much more accurate and the potential for voting fraud reduced. The EAC should publish guidance on best practices for the sharing of voter registration data and consider developing a clearinghouse to facilitate the sharing of new registration information by all 50 states and the District of Columbia to promote the effective maintenance of voter rolls.

Recommendation 5: The U.S. Congress should strongly encourage all states and localities to adopt all federal voting system standards and should empower a federal government agency like the Election Assistance Commission to develop and issue guidelines for standards for voting systems and voter registration systems.
Congress, through its appropriations, can provide states with a strong incentive to adopt these guidelines in exchange for additional resources to improve elections. By allowing a federal government agency like the EAC to issue meaningful guidelines in the area of voting system standards and providing funding to encourage the adoption of these rules, states will have every incentive to use election systems that provide the highest level of benefit to voters and allow for the best possible election administration practices to be implemented.

Data exchange standards may also facilitate other longer-term changes in the election administration process. One important change that might occur is greater competition in the business of voting technologies. If developers of voting technologies can rely on a standard data interface—if they know that election data will have a standard and common format—then they can work to develop specific components for election administration, and thus governments could purchase modular election administration systems. This could spur competition and technological development in this sector of e-government.

Appendix I: Standards and Standards-Setting Processes

So what is a standard? One definition is that "a standard is a deliberate acceptance by a group of people having common interests or background of a quantifiable metric that influences their behavior and activities, permitting a common interchange."[17] Language is a simple example of a standard. Although everyone does not speak the same language, each language has its own set of agreed upon metrics—what letters create what sounds, in what direction they are read—that governs its use. Without these metrics, it would not be possible for us to communicate effectively, because the meaning one person ascribed to a letter or word might not be the same as the meaning ascribed by another.

When we think about standards, it is also important to remember that standards are not the same as regulations. Although some regulations contain standards, not all standards are developed through a legalistic, regulatory framework. Instead, some are developed through non-governmental organizations (NGOs) or are developed by governmental agencies on a voluntary-compliance basis. Moreover, some standards that exist in legal regulations are in fact developed in exactly the same manner as are voluntary standards. The National Institute of Standards and Technology (NIST) has developed a typology of standards that defines the different types of standards and the different development models they employ.

Standards are critical for the promotion of economic development, and have been throughout history. For example, uniform coinage in the ancient world broke down barriers to trade across great distances. A silver Roman coin held the same value in Rome as it did in Greece or northern Africa or Persia, and meant that merchants or average citizens could purchase a certain amount of product for a silver coin, no matter where they might be within the Roman Empire.[18] In more modern times, standardization has driven economic development. For example, the standardization of railroad-track width is credited with transforming the United States. When railroads first began in the United States, different companies had different width, or gauge, of track. A train would travel until it hit a different gauge of track, and the train would have to be unloaded onto anther train that could run along the new gauge. Not only were the unloading and reloading of trains costly, so were having different trains and cars to run on the different gauges. Once the gauge became uniform, people and cargo could move across the country more quickly than ever thought possible. If the Transcontinental Railroad had used different gauges as the railroad was being built, the ride, though faster than the conventional mode of travel to the West, would still have been cumbersome and time-consuming.[19]

The Rise of Standards-Setting Institutions

To overcome the problems associated with the lack of standards, several standards-setting bodies have been created to facilitate the creation and diffusion of uniform protocols. In the area of e-government, three of the more prominent standards-setting organizations are the federally established National Institute of Standards and Technology (NIST); the American National Standards Institute (ANSI), a U.S. NGO, and the Institute of Electrical and Electronics Engineers Standards Association (IEEE-SA), an international NGO. As the history of NIST notes (see "The Origins of NIST and National Standards"), the agency was established in 1901 for just the commercial reasons noted above—to promote

Table A.1: Types of Standards

The NIST has developed a typology of standards. First, it identifies two types of standards—performance and design standards—and then highlights an array of means by which these standards can be developed.

Standard	Description
Performance	Standard used to describe a product's intended function without specifically stating how it might achieve that function. These standards are less restrictive than design standards and encourage innovation.
Design	Standard used to define a product's characteristics or how it is to be built. These standards can be used to test for comparability.
Voluntary consensus	Standards produced by standards developing organizations (SDOs) through a consensus process. Participation in the standards development and compliance with the standards is voluntary, except where government regulatory agencies have adopted or referred to the standards.
Defense	Documents that establish uniform engineering and technical requirements for military-unique or substantially modified commercial processes, procedures, practices, and methods. These standards must be written in performance terms.
Mandatory	Standards that are made compulsory by virtue of a general law or exclusive reference in regulation. These standards are generally published as part of a code, rule, or regulation by a regulatory government body and impose an obligation on specified parties to conform to them.
National Institute of Justice (NIJ)	Standards that determine the technological needs of federal, state, and local criminal justice and public safety agencies. The NIJ sets minimum performance standards for specific devices, tests commercially available equipment against those standards, and disseminates the results to criminal justice and public safety agencies nationally and internationally. Compliance with these standards is voluntary.
Federal	Standards developed and issued by the General Services Administration (GSA) to meet procurement needs of federal government agencies.
De facto	Standards developed through means other than formal standards organizations. These standards are typically open to participation from any interested individuals or organizations.
Consortia	Standards created by groups of like-minded companies that collectively have significant market power to develop a standard outside the formal standards process. These standards provide a complementary vehicle to satisfy the need to create partial-consensus standards in rapidly moving high-technology fields.
Industry	Industry standards come in two forms: company standards and industry standards. Company standards are those developed for use by a single company or organization for its own products. Industry standards are developed by industry standards development groups for use within a particular industry.
International	Standards developed and promulgated by governmental and non-governmental international organizations. These standards may be voluntary or mandatory in nature.

Source: Christine R. DeVaux, National Institute of Standards and Technology, "A Guide to Documentary Standards," December 2001 (http://ts.nist.gov/ts/htdocs/210/ncsci/ir6802.pdf)

The Origins of NIST and National Standards

As NIST notes in its centennial history,

> Chartered by the U.S. Congress on March 3, 1901, [NIST] was the first physical science research laboratory of the federal government, established at about the same time as the nation's first commercial laboratory. At that time, the United States had few, if any, authoritative national standards for any quantities or products. What it had was a patchwork of locally and regionally applied standards, often arbitrary, that were a source of confusion in commerce....
>
> The need for such an organization in the United States was discussed for many years by scientists and engineers. One complained, for example, that he had to contend with eight different "authoritative" values for the U.S. gallon. The growing electrical industry needed measuring instruments and was often involved in litigation because of the lack of standards....
>
> To advance fundamental science, NIST developed increasingly precise instruments, measurement techniques offering greater range than ever before, and wholly new standards such as those for sound, frequency, and radiation.
>
> The need for standards was dramatized in 1904, when more than 1,500 buildings burned down in Baltimore, Md., because of a lack of standard fire-hose couplings. When firefighters from Washington and as far away as New York arrived to help douse the fire, few of their hoses fit the hydrants. NIST had collected more than 600 sizes and variations in fire-hose couplings in a previous investigation and, after the Baltimore fire, participated in the selection of a national standard.

Source: http://www.100.nist.gov/founding.htm

uniformity in a rapidly industrializing America—but its work has had wide-ranging benefits, including improved public safety and quality of life.

Not only was the government moving in this period to develop standards through NIST, but the private sector was doing so as well through professional associations. The IEEE's standards work and the creation of ANSI also occurred in this time period. ANSI was created through the collaborative efforts of a variety of engineering societies, including the forerunner of the IEEE. The goal was to create an organization that could "serve as the national coordinator in the standards development process as well as an impartial organization to approve national consensus standards and halt user confusion on acceptability."[26]

The development of these standards processes has been critical to the advancement of modern society. The transparent, open process that was developed allowed all interests to have a say in the developed standards. Once standards are established in a given area, producers have a common knowledge of the qualities their product should have and buyers have confidence that the product they buy meets a certain minimum set of standards for conformity and performance. In many ways, standards provide the language that is necessary for modern commerce to occur by providing a functional baseline for a given product or service.

American National Standards Institute (ANSI) Process[21]

Throughout its history, ANSI has maintained as its primary goal the enhancement of the global competitiveness of U.S. business and the American quality of life by promoting and facilitating voluntary consensus standards and conformity assessment systems and promoting their integrity. The Institute represents the interests of its nearly 1,000 corporate, organization, government agency, institutional, and international members through its office in New York City and its headquarters in Washington, D.C.

In order to maintain ANSI accreditation, standards developers are required to consistently adhere to a set of requirements or procedures, known as the "ANSI Essential Requirements," that govern the consensus development process. Due process is the key to ensuring that ANSIs are developed in an environment that is equitable, accessible, and responsive to the requirements of various stakeholders. The open and fair ANS process ensures that all interested and affected parties have an opportunity to participate in a standard's development. It also serves and protects the public interest since standards developers accredited by ANSI must meet the Institute's requirements for openness, balance, consensus, and other due process safeguards.

The hallmarks of the American National Standards process include:

- Consensus on a proposed standard by a group or "consensus body" that includes representatives from materially affected and interested parties
- Broad-based public review and comment on draft standards
- Consideration of and response to comments submitted by voting members of the relevant consensus body and by public review commentators
- Incorporation of approved changes into a draft standard
- Right to appeal by any participant that believes that due process principles were not sufficiently respected during the standards development in accordance with the ANSI-accredited procedures of the standards developer

The ANSI process serves all standardization efforts in the United States by providing and promoting a process that withstands scrutiny while protecting the rights and interests of every participant. In essence, ANSI standards quicken the market acceptance of products while making clear how to improve the safety of those products for the protection of consumers.

Appendix II: Standards in E-Government Networks—The Case of HIPAA

A key example of the role that the federal government can play in developing ETS for software and e-government systems in a given policy area is the requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA is generally considered to be one of the most sweeping changes to federal healthcare policy since the passage of Medicare in 1965. Although the initial media coverage of this legislation focused on the portability aspects—the ability of individuals to move their health coverage to a new job by requiring certificates of creditable coverage and by imposing restrictions on pre-existing condition exclusions—one of the most far-reaching provisions has to do with requirements for data exchange. Under HIPAA, all covered healthcare-related organizations, as well as entities that exchange data with a HIPAA-covered organization, are required to use a common data exchange format.

A review of the world before the existence of HIPAA explains why ETS requirements are so important. In the pre-HIPAA world, there were no standards regarding how healthcare organizations were to store, process, communicate, or secure data. This lack of standardization led to the development and deployment of more than 450 different electronic insurance claim formats, with many vendors offering multiple—and often incompatible—formats. Even if software came from the same vendor, management and clinical information software often differed across entities, and the lack of a standard data format was a costly and complex barrier. Without a standard protocol for formatting electronic data, data transactions were difficult and the transaction costs associated with making such transactions work were very high.[22]

The lack of a standard data format was seen as a critical factor in the high overhead costs associated with healthcare. As a report by the Midwest Center for HIPAA Education (MCHE) notes:

> A considerable portion of every healthcare dollar is spent on administrative overhead. In healthcare, this overhead includes many tasks, such as:
>
> - Filing a claim for payment
> - Enrolling an individual in a health plan
> - Paying healthcare premiums
> - Checking insurance eligibility for a particular treatment
> - Requesting authorization for services
> - Responding to requests for additional information to support a claim
> - Coordinating the processing of a claim across different insurance companies
> - Notifying the provider about the payment of a claim
>
> Today, these processes involve numerous paper forms and telephone calls, non-standard electronic commerce, and many delays in communicating information among different locations. This situation creates difficulties and costs for healthcare providers, health plans, and consumers.[23]

Software solution providers have issued numerous white papers touting the benefits of the move in HIPAA to electronic data interchange, or EDI. As one of these papers noted, the healthcare industry requires several hundred thousand medical service providers—many of which are five-person or smaller physician practices—and medical suppliers, hospitals, insurance providers, and others to be able to communicate in a common language.[24]

An EDI overcomes these problems by allowing data transfers to be done with very low cost, because the data exchange occurs instantaneously and without human intervention. Without an EDI, humans must fill the communication gap that exists between incompatible computers. The benefits of the HIPAA ETS requirement are numerous. Some of the more obvious ones are:

- Reduced administrative costs
- Instantaneous transmission of claims and other data
- Improved accuracy in information transmission
- Integration of provider transactions into an entity's overall administrative framework
- Increased security, as fewer individuals have to handle the data when it is transferred

EDI in healthcare has the potential to move this industry toward the model used in retail, where Internet-based networks are being used to bring all aspects of the industry under a single communications protocol that allows data to flow freely across vendors and organizations.[25]

There are other, less obvious benefits as well. The MCHE notes that ETS can facilitate corporate synergies among software development and systems implementation firms, as well as among healthcare firms. Companies now have incentives to cooperate in the development of new products, since they have to use a common ETS. Likewise, EDI features provide companies with incentives to share appropriate data to improve healthcare outcomes, in addition to improving claims processing and benefits delivery. Because a standard set of codes will be used for the processing of health information, the reliability of this data will be increased across providers. No longer will a given illness, procedure, or treatment be coded and labeled differently by different healthcare claims payers or providers.[26]

The actual ETS were issued in 2003, after an extensive rule-making process that began in 1998 and extended through the issuance of a proposed rule in 2002.[27] There were more than 17,000 comments received on the initial proposed rule, and 300 received for the final rule. The process for developing this rule was included in Sections 1171 through 1179 of HIPAA.[28] Specifically, the Act requires

> that any standard adopted by the Secretary of Health and Human Services be a standard that has been developed, adopted, or modified by a standard setting organization (SSO). The Secretary may adopt a different standard if the standard will substantially reduce administrative costs to providers and health plans compared to the alternatives.... The Act also sets forth consultation requirements that must be met before the Secretary may adopt standards. In the case of a standard that is developed, adopted, or modified by an SSO, the SSO must consult with the following Data Content Committees (DCCs) in the course of the development, adoption, or modification of the standard: the National Uniform Billing Committee (NUBC), the National Uniform Claim Committee (NUCC), the Workgroup for Electronic Data Interchange (WEDI), and the American Dental Association (ADA). In the case of any other standard, the Secretary is required to consult with each of the above-named groups before adopting the standard ... [as well as] with the National Committee on Vital and Health Statistics (NCVHS).[29]

So while the ETS under HIPAA are being promulgated through a regulatory process, they are to be developed using a consultative process that is the hallmark of the standards-setting process in the United States.

The final rule has several components. First, it requires all health plans, healthcare clearinghouses, and healthcare providers that transmit transactions electronically to follow the developed ETS. Second,

it requires covered organizations to be able to pay providers, authorize services, certify referrals, and coordinate benefits using the ETS protocol. Third, the ETS creates a standard format for determining eligibility for insurance coverage and claim status, as well as requesting authorizations for services or specialist referrals. All covered entities will use common codes for all transactions, including reporting diagnoses and procedures. Fourth, employers will have a standard electronic format for enrolling or removing employees from insurance coverage, as well as for making premium payments. Finally, it creates a process for keeping the standards up-to-date, using the traditional standards-setting process.[30] This rule is designed to create a comprehensive set of electronic transaction standards and a process for keeping them current. The entire process is designed to be open and participatory, but at the same time using a regulatory framework to push the standards-setting process to a conclusion that is binding on all covered parties.

The development of ETS is just one aspect of the standardization of healthcare data under HIPAA. HIPAA also requires the study of issues associated with the adoption of uniform data standards for patient medical record information and the electronic transmission of these data. As an analysis by PricewaterhouseCoopers noted, the lack of standardization in this area can lead to an array of medical errors, including misdiagnoses, incorrect diagnoses, treatment choices that lead to drug interactions and allergic reactions, and high morbidity rates.[31] It is estimated that medical errors cause 98,000 deaths per year in the United States, making it the fourth leading cause of death. Incredibly, 7,000 of these deaths are associated with providing patients with drug-related medical errors.

Clearly, standardization of data and data transmission has the prospect of improving the lives of all Americans who receive medical care. It can also decrease administrative costs by allowing EDI systems to communicate easily—from the smallest practice group to the largest health insurance payer—and having these systems integrate with other aspects of the business of healthcare. Since healthcare is one of the largest and most complex components of the U.S. economy, the fact that it is possible to standardize electronic transactions across the several hundred thousand entities that are a part of this industry suggests that ETS can be adopted in any industry, including the elections industry.

Appendix III: Summary of the Help America Vote Act of 2002 (HAVA)

The Help America Vote Act was passed in 2002 in response to the election debacle in Florida in 2000.[32] The Act has nine parts, as summarized below.

Title I: Replacement of Punch Card and Lever Voting Machines

This section provides funding to states that used either punch cards or lever voting machines in November 2000 to replace these systems with new voting technologies that meet the requirements of HAVA.

Title II: Establishment of the Election Assistance Commission (EAC)

Title II has two parts. The first part establishes several key institutions for promoting election assistance, and the second calls for the development of guidance and the commissioning of studies related to election reform.

Institutions

The EAC is established as an independent entity that will serve as a national clearinghouse and resource for the compilation of information and the review of procedures with respect to the administration of federal elections. This section also established three boards:

- The Election Assistance Commission Standards Board and the Election Assistance Commission Board of Advisors are to review the voluntary voting system guidelines, the voluntary election administration guidance, and the best practices guidance for facilitating military and overseas voting.
- The EAC is to establish the Technical Guidelines Development Committee to assist the executive director of the Commission in the development of the voluntary voting system guidelines.

Guidance and Studies

The Commission is to provide for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories. HAVA gives states the option of providing for testing, certification, decertification, or recertification of its voting system hardware and software by the laboratories accredited by the Commission. The National Institute of Standards and Technology is tasked with providing a list of independent, non-federal laboratories that can be accredited to carry out such testing, certification, decertification, and recertification. NIST is also asked to monitor and review accredited laboratory performance on an ongoing basis.

The EAC is directed to conduct periodic studies regarding certain election administration issues, including (1) best practices for facilitating voting by absent uniformed services voters and overseas voters; (2) how human factor research can be applied to voting products and systems design to ensure usability and accuracy of voting products and systems; (3) the impact on voters of new requirements governing voter registration by mail; (4) the feasibility and advisability of using Social Security identification numbers or other information compiled by the Social Security Administration to establish voter registration or other election law eligibility or identification requirements; (5) the issues and challenges of incorporating communications and Internet technologies in the federal, state, and local electoral process; and (6) the feasibility and advis-

ability of having the Postal Service waive or reduce the amount of postage applicable to absentee ballots used in federal general elections. The EAC can also make grants for research and development to improve the quality, reliability, accuracy, accessibility, affordability, and security of voting equipment, election systems, and voting technology.

States are required to file a plan for implementation of certain mandatory, uniform, nondiscriminatory administrative complaint procedures, and have such procedures in place. Once these plans are in place, states are eligible to receive payments that can be used to obtain new voting equipment or for other activities to improve the administration of elections for federal office. Separate funds from the Department of Health and Human Services (HHS) are for ensuring that polling places for individuals with disabilities are accessible. In a related matter, HHS also pays the protection and advocacy system of each state to ensure full participation in the electoral process for individuals with disabilities.

Title III: Uniform, Nondiscriminatory Election Technology and Administration Requirements

Voting systems used in *federal elections* must maintain voter privacy and ballot confidentiality. They also must (1) permit voters to verify their votes before the ballot is cast and counted; (2) allow voters to correct any error before the ballot is cast and counted; and (3) notify voters if they select more than one candidate for an office if it has the effect of casting multiple votes for the office. States can create a voter education program if their voting technology does not allow for each of these provisions. Voting systems are also required to (1) produce a record with an audit capacity for such systems; (2) be accessible for individuals with disabilities; (3) provide alternative language accessibility pursuant to the Voting Rights Act; (4) comply with established error rate standards; and (5) operate according to a uniform definition of what constitutes a vote.

Provisional ballots must be provided to individuals who declare that they are registered to vote in a jurisdiction but are not on the official list of registered voters or are otherwise alleged to be ineligible. These individuals are permitted to cast a provisional ballot, which is to be promptly verified and counted if it is determined to be valid under state law. A voter must also be able to learn if the vote was counted and, if the vote was not counted, why it was not counted. States that do not require voter registration for federal elections are exempt from this provision.

States must create a single, uniform, official, centralized, interactive computerized *statewide voter registration list*. State or local election officials must perform list maintenance on a regular basis and ensure that the database is well secured. The voter registration information must include either a driver's license number or the last four digits of a Social Security number. Voters who register by mail must present valid photo identification when voting in person or by mail.

Title IV: Enforcement

The U.S. Attorney General can take action against any state or jurisdiction to compel implementation of the uniform and nondiscriminatory election technology and administration requirements of Title III. States receiving payment under HAVA must have a state-based administrative complaint procedure with respect to violations of title III. States not receiving payments under HAVA must either certify they meet complaint-procedure requirements or submit a plan to the Attorney General describing steps to be taken to meet Title III requirements.

Title V: Help America Vote College Program

The EAC is to develop a *Help America Vote College Program* to encourage college students to serve as nonpartisan poll workers or assistants, and to encourage state and local governments to use the services of the students participating in the program.

Title VI: Help America Vote Foundation

Establish the *Help America Vote Foundation* to (1) mobilize secondary school students to serve as poll workers or assistants; (2) place secondary school students as poll workers in polling places; and (3) establish cooperative efforts to further the purpose of the foundation.

Title VII: Voting Rights of Military Members and Overseas Citizens

The Secretary of Defense is to prescribe procedures to provide the time and resources for voting assistance officers to perform voting assistance duties during the period in advance of a general election. The Department of Defense (DoD) is also to implement measures to ensure that a postmark or other official proof–of-mailing date is provided on each absentee ballot collected at any overseas location or vessel at sea under DoD control. The DoD is also to engage in informational campaigns for the people covered by the Uniformed and Overseas Civilian Absentee Voting Act (UOCAVA). Each state must designate a single office responsible for providing information on registration and absentee ballot procedures for all voters in the state and report to the EAC the combined number of absentee ballots transmitted to and returned by absent uniformed services voters and overseas voters.

Titles VIII and IX: Miscellaneous

The last two sections of HAVA cover miscellaneous information and transfer-of-duty provisions.

Endnotes

1. We will discuss in more detail how an ETS could facilitate development of modular voting systems that would allow for possibly more accessible and secure voting architectures, like the modular voting system outlined by the Caltech/MIT Voting Technology Project in its 2001 report (http://vote.caltech.edu/reports/2001report), or systems of cryptographic verification like David Chaum's (http://www.vreceipt.com).

2. See Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century*, New York, Cambridge University Press, 2004.

3. See R. Michael Alvarez, Stephen Ansolabehere, and Charles Stewart III, "Studying Elections: Data Quality and Pitfalls in Measuring the Effects of Voting Technologies," *Policy Studies Journal*, 33(1), 15–24, 2005.

4. See, for example, Jane Fountain, *Building the Virtual State: Information Technology and Institutional Change*, (Washington, D.C., Brookings Institution Press, 2001); and Mark A. Abramson and Therese L. Morin, eds., *E-Government 2003*, (Lanham, Md., Rowman & Littlefield Publishers, Inc., 2003).

5. There are few works in this area, with the exception of R. Michael Alvarez and Thad E. Hall, *Point, Click, and Vote: The Future of Internet Voting* (Washington, D.C., Brookings Institution Press, 2004); Donald Moynihan, "Building Secure Elections: E-voting, Security and Systems Theory," *Public Administration Review* 64(5): 515–528, 2004.

6. The Government Accountability Office has issued a large number of reports on the impact of data incompatibility on public management. For one example, see Bureau Of Indian Affairs Schools: New Facilities Management Information System Promising, but Improved Data Accuracy Needed, (July 2003) available at http://www.gao.gov/new.items/d03692.pdf (last accessed January 28, 2005).

7. The current standards can be found at http://www.eac.gov/election_resources/vss.html. Information on the NIST role in the future development of voting system standards can be found at http://vote.nist.gov. As we finalize this report, our understanding is that a series of revisions to the current VSS have recently been provided to the EAC and that they should be soon entering a period of public comment. However, there is no indication at this point that the EAC or NIST is considering data exchange standards of the sort we recommend in this report.

8. Federal Election Commission, "Frequently Asked Questions About Voting System Standards," available at http://www.fec.gov/pages/faqsvss.htm (last accessed January 28, 2005).

9. Information on the EML process can be found at http://xml.coverpages.org/eml.html (last accessed April 22, 2005).

10. IEEE: Voting Systems Electronic Data Interchange, Project 1622, available at http://grouper.ieee.org/groups/scc38/1622/index.htm (last accessed January 28, 2005).

11. For example, the Caltech/MIT Voting Technology Project issued a series of detailed recommendations for election data reporting (http://vote.caltech.edu/Reports/auditing_elections_final.pdf). The Election Assistance Commission has worked to implement many of these recommendations during and after the 2004 presidential election.

12. These data are the median figure for the years 1990–1991 to 1999–2000. See "Annual Geographical Mobility Rates, By Type of Movement: 1947–2003," United States Census, available at http://www.census.gov/population/socdemo/migration/tab-a-1.pdf (last accessed January 28, 2005).

13. U.S. citizens living overseas are allowed to maintain their previous residence for voting purposes.

14. State B might want to have a person verify the removal for quality control purposes.

15. Bill Gillford, "People Who Vote Twice," *Slate Magazine*, October 28, 2004, accessible at www.slate.com. It is of course possible that states might allow citizens to be

registered in their state—even if they are also registered in another state—for the purpose of voting only on state and local issues.

16. See "Voting: What Is, What Could Be," available at http://vote.caltech.edu/Reports/2001report.html (last accessed January 28, 2005).

17. Carl Cargill, Information Technology Standardization: Theory, Process, and Organization (Bedford, Mass.: Digital Press, 1989, 13).

18. Cargill, 13–14.

19. Cargill, 15.

20. ANSI—an Historical Overview, available at http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (last accessed January 28, 2005).

21. American National Standards Institute, available at http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1 (last accessed January 28, 2005).

22. New Hampshire Hospital Association, "An Introduction to HIPAA," available at http://www.h2e-online.org/pubs/HipaaIntro.ppt (last accessed January 28, 2005).

23. Midwest Center for HIPAA Education, "The Health Insurance Portability and Accountability Act (HIPAA): Electronic Transaction Standards," available at http://www.mche.us.com/hipaa_edi.shtml (last accessed January 28, 2005).

24. IPNet, "HIPAA: The Changing Face of Healthcare Transactions: An IPNet Solutions White Paper," available at http://www.ipnetsolutions.com/download/pdf/wp_healthcare.pdf (last accessed January 28, 2005).

25. IPNet HIPAA: The Changing Face of Healthcare Transactions.

26. GAO, "HIPAA Standards: Dual Code Sets Are Acceptable for Reporting Medical Procedures," GAO-02-796, (August 2002), available at http://www.gao.gov/new.items/d02796.pdf (last accessed January 28, 2005).

27. "Health Insurance Reform: Modifications to Electronic Data Transaction Standards and Code Sets," 68 Fed. Reg. 8381, 2003 (to be codified at 45 CFR Part 162), available at http://www.cms.hhs.gov/providerupdate/regs/cms0003f_cms0005f.pdf (last accessed January 28, 2005).

28. "Health Insurance Reform: Modifications to Electronic Data Transaction Standards and Code Sets."

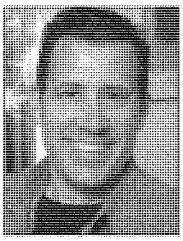
29. "Health Insurance Reform: Modifications to Electronic Data Transaction Standards and Code Sets," 8381.

30. "HHS Announces Electronic Standards To Simplify Health Care Transactions," U.S. Department of Health and Human Services, HCFA Press Office, available at http://www.hhs.gov/news/press/2000pres/20000811.html (last accessed January 28, 2005).

31. Available at http://www.ehcca.com/presentations/HIPAA4/3_07.pdf (last accessed February 3, 2005).

32. The complete text of HAVA, as well as other relevant information about HAVA, is available from http://www.fec.gov/hava/hava.htm.

ABOUT THE AUTHORS



R. Michael Alvarez is a Professor of Political Science at the California Institute of Technology in Pasadena, California. He is currently co-director of the Caltech/MIT Voting Technology Project.

In his academic career, Dr. Alvarez has published three books: two on electoral politics and public opinion, and one on Internet voting. He is currently collaborating with Thad E. Hall on a book on the e-voting controversy, which will be published by Princeton University Press in 2006. The author of scores of research papers and monographs, Alvarez focuses on the electoral process, voting behavior, and public opinion.

Alvarez has received research grants for his work from a variety of sources, including the National Science Foundation and a number of private foundations. He has received numerous awards for his research and professional work, most recently being named as one of the "Scientific American 50" for his work on voting technology in 2004.

Alvarez received his B.A. in political science from Carleton College in 1986 and his Ph.D. in political science from Duke University in 1992.

Thad E. Hall is an Assistant Professor of Political Science at the University of Utah in Salt Lake City, Utah, and a research fellow with the University's Center on Public Policy and Administration.

In his academic career, Dr. Hall has published an Internet voting book with Michael Alvarez and a book on policy making in Congress. His book with Alvarez on the e-voting controversy will be published by Princeton University Press in 2006. Hall has also published numerous research papers and articles, most of them focusing on the electoral process or the public policy process.

Hall has received research grants for his work from several sources, including the Carnegie Corporation of New York. He has been involved with an array of election reform related activities, including testifying before the U.S. Senate Judiciary Committee, serving on the professional staff of the National Commission on Federal Election Reform, and collaborating with the Caltech/MIT Voting Technology Project.

Hall received his B.A. in political science from Oglethorpe University in 1990, his M.P.A. from Georgia State University in 1993, and his Ph.D. in political science from the University of Georgia in 2002.

KEY CONTACT INFORMATION

To contact the authors:

Dr. R. Michael Alvarez
Professor of Political Science and
Co-Director, Caltech/MIT Voting Technology Project
California Institute of Technology
Pasadena, CA 91125
phone: (626) 395-4089
fax: (626) 405-9841

e-mail: rma@hss.caltech.edu

Dr. Thad E. Hall
Assistant Professor
Department of Political Science
University of Utah
260 S. Central Campus Dr., Room 252
Salt Lake City, UT 84112-9152
phone: (801) 585-7344
fax: (801) 587-7861

e-mail: thad.hall@poli-sci.utah.edu

CENTER REPORTS AVAILABLE

COLLABORATION: PARTNERSHIPS AND NETWORKS

Leveraging Networks to Meet National Goals: FEMA and the Safe Construction Networks (March 2002)
William L. Waugh, Jr.

21st-Century Government and the Challenge of Homeland Defense (June 2002)
Elaine C. Kamarck

Assessing Partnerships: New Forms of Collaboration (March 2003)
Robert Klitgaard and Gregory F. Treverton

Leveraging Networks: A Guide for Public Managers Working across Organizations (March 2003)
Robert Agranoff

Extraordinary Results on National Goals: Networks and Partnerships in the Bureau of Primary Health Care's 100%/0 Campaign (March 2003)
John Scanlon

Public-Private Strategic Partnerships: The U.S. Postal Service-Federal Express Alliance (May 2003)
Oded Shenkar

The Challenge of Coordinating "Big Science" (July 2003)
W. Henry Lambright

Communities of Practice: A New Tool for Government Managers (November 2003)
William M. Snyder and Xavier de Souza Briggs

Collaboration and Performance Management in Network Settings: Lessons from Three Watershed Governance Efforts (April 2004)
Mark T. Imperial

The Quest to Become "One": An Approach to Internal Collaboration (February 2005)
Russ Linden

Cooperation Between Social Security and Tax Agencies in Europe (April 2005)
Bernhard Zaglmayer, Paul Schoukens, and Danny Pieters

Leveraging Collaborative Networks in Infrequent Emergency Situations (June 2005)
Donald P. Moynihan

E-GOVERNMENT

Supercharging the Employment Agency: An Investigation of the Use of Information and Communication Technology to Improve the Service of State Employment Agencies (December 2000)
Anthony M. Townsend

Assessing a State's Readiness for Global Electronic Commerce: Lessons from the Ohio Experience (January 2001)
J. Pari Sabety and Steven I. Gordon

Privacy Strategies for Electronic Government (January 2001)
Janine S. Hiller and France Bélanger

Commerce Comes to Government on the Desktop: E-Commerce Applications in the Public Sector (February 2001)
Genie N. L. Stowers

The Use of the Internet in Government Service Delivery (February 2001)
Steven Cohen and William Eimicke

State Web Portals: Delivering and Financing E-Service (January 2002)
Diana Burley Gant, Jon P. Gant, and Craig L. Johnson

Internet Voting: Bringing Elections to the Desktop (February 2002)
Robert S. Done

Leveraging Technology in the Service of Diplomacy: Innovation in the Department of State (March 2002)
Barry Fulton

Federal Intranet Work Sites: An Interim Assessment (June 2002)
Julianne G. Mahler and Priscilla M. Regan

The State of Federal Websites: The Pursuit of Excellence (August 2002)
Genie N. L. Stowers

State Government E-Procurement in the Information Age: Issues, Practices, and Trends (September 2002)
M. Jae Moon

Preparing for Wireless and Mobile Technologies in Government (October 2002)
Ai-Mei Chang and P. K. Kannan

Public-Sector Information Security: A Call to Action for Public-Sector CIOs (October 2002, 2nd ed.)
Don Heiman

The Auction Model: How the Public Sector Can Leverage the Power of E-Commerce Through Dynamic Pricing (November 2002, 2nd ed.)
David C. Wyld

The Promise of E-Learning in Africa: The Potential for Public-Private Partnerships (January 2003)
Norman LaRocque and Michael Latham

Digitally Integrating the Government Supply Chain: E-Procurement, E-Finance, and E-Logistics (February 2003)
Jacques S. Gansler, William Lucyshyn, and Kimberly M. Ross

Using Technology to Increase Citizen Participation in Government: The Use of Models and Simulation (April 2003)
John O'Looney

Seaport: Charting a New Course for Professional Services Acquisition for America's Navy (June 2003)
David C. Wyld

E-Reporting: Strengthening Democratic Accountability (February 2004)
Mordecai Lee

Understanding Electronic Signatures: The Key to E-Government (March 2004)
Stephen H. Holden

Measuring the Performance of E-Government (March 2004)
Genie N. L. Stowers

Restoring Trust in Government: The Potential of Digital Citizen Participation (August 2004)
Marc Holzer, James Melitski, Seung-Yong Rho, and Richard Schwester

From E-Government to M-Government? Emerging Practices in the Use of Mobile Technology by State Governments (November 2004)
M. Jae Moon

Government Garage Sales: Online Auctions as Tools for Asset Management (November 2004)
David C. Wyld

CENTER REPORTS AVAILABLE

Innovation in E-Procurement: The Italian Experience (November 2004)
Mita Marra

Computerisation and E-Government in Social Security: A Comparative International Study (July 2005)
Michael Adler and Paul Henman

The Next Big Election Challenge: Developing Electronic Data Transaction Standards for Election Administration (July 2005)
R. Michael Alvarez and Thad E. Hall

FINANCIAL MANAGEMENT

Credit Scoring and Loan Scoring: Tools for Improved Management of Federal Credit Programs (July 1999)
Thomas H. Stanton

Using Activity-Based Costing to Manage More Effectively (January 2000)
Michael H. Granof, David E. Platt, and Igor Vaysman

Audited Financial Statements: Getting and Sustaining "Clean" Opinions (July 2001)
Douglas A. Brook

An Introduction to Financial Risk Management in Government (August 2001)
Richard J. Buttimer, Jr.

Understanding Federal Asset Management: An Agenda for Reform (July 2003)
Thomas H. Stanton

Efficiency Counts: Developing the Capacity to Manage Costs at Air Force Materiel Command (August 2003)
Michael Barzelay and Fred Thompson

Federal Credit Programs: Managing Risk in the Information Age (April 2005)
Thomas H. Stanton

HUMAN CAPITAL MANAGEMENT

Profiles in Excellence: Conversations with the Best of America's Career Executive Service (November 1999)
Mark W. Huddleston

Reflections on Mobility: Case Studies of Six Federal Executives (May 2000)
Michael D. Serlin

Managing Telecommuting in the Federal Government: An Interim Report (June 2000)
Gina Vega and Louis Brennan

Using Virtual Teams to Manage Complex Projects: A Case Study of the Radioactive Waste Management Project (August 2000)
Samuel M. DeMarie

A Learning-Based Approach to Leading Change (December 2000)
Barry Sugarman

Labor-Management Partnerships: A New Approach to Collaborative Management (July 2001)
Barry Rubin and Richard Rubin

Winning the Best and Brightest: Increasing the Attraction of Public Service (July 2001)
Carol Chetkovich

A Weapon in the War for Talent: Using Special Authorities to Recruit Crucial Personnel (December 2001)
Hal G. Rainey

A Changing Workforce: Understanding Diversity Programs in the Federal Government (December 2001)
Katherine C. Naff and J. Edward Kellough

Life after Civil Service Reform: The Texas, Georgia, and Florida Experiences (October 2002)
Jonathan Walters

The Defense Leadership and Management Program: Taking Career Development Seriously (December 2002)
Joseph A. Ferrara and Mark C. Rom

The Influence of Organizational Commitment on Officer Retention: A 12-Year Study of U.S. Army Officers (December 2002)
Stephanie C. Payne, Ann H. Huffman, and Trueman R. Tremble, Jr.

Human Capital Reform: 21st Century Requirements for the United States Agency for International Development (March 2003)
Anthony C. E. Quainton and Amanda M. Fulmer

Modernizing Human Resource Management in the Federal Government: The IRS Model (April 2003)
James R. Thompson and Hal G. Rainey

Mediation at Work: Transforming Workplace Conflict at the United States Postal Service (October 2003)
Lisa B. Bingham

Growing Leaders for Public Service (August 2004, 2nd ed.)
Ray Blunt

Pay for Performance: A Guide for Federal Managers (November 2004)
Howard Risher

The Blended Workforce: Maximizing Agility Through Nonstandard Work Arrangements (April 2005)
James R. Thompson and Sharon H. Mastracci

The Transformation of the Government Accountability Office: Using Human Capital to Drive Change (July 2005)
Jonathan Walters and Charles Thompson

INNOVATION

Managing Workfare: The Case of the Work Experience Program in the New York City Parks Department (June 1999)
Steven Cohen

New Tools for Improving Government Regulation: An Assessment of Emissions Trading and Other Market-Based Regulatory Tools (October 1999)
Gary C. Bryner

Religious Organizations, Anti-Poverty Relief, and Charitable Choice: A Feasibility Study of Faith-Based Welfare Reform in Mississippi (November 1999)
John P. Bartkowski and Helen A. Regis

Business Improvement Districts and Innovative Service Delivery (November 1999)
Jerry Mitchell

An Assessment of Brownfield Redevelopment Policies: The Michigan Experience (November 1999)
Richard C. Hula

San Diego County's Innovation Program: Using Competition and a Whole Lot More to Improve Public Services (January 2000)
William B. Eimicke

Innovation in the Administration of Public Airports (March 2000)
Scott E. Tarry

Entrepreneurial Government: Bureaucrats as Businesspeople (May 2000)
Anne Laurent

Rethinking U.S. Environmental Protection Policy: Management Challenges for a New Administration (November 2000)
Dennis A. Rondinelli

The Challenge of Innovating in Government (February 2001)
Sandford Borins

Understanding Innovation: What Inspires It? What Makes It Successful? (December 2001)
Jonathan Walters

Government Management of Information Mega-Technology: Lessons from the Internal Revenue Service's Tax Systems Modernization (March 2002)
Barry Bozeman

Advancing High End Computing: Linking to National Goals (September 2003)
Juan D. Rogers and Barry Bozeman

MANAGING FOR PERFORMANCE AND RESULTS

Corporate Strategic Planning in Government: Lessons from the United States Air Force (November 2000)
Colin Campbell

Using Evaluation to Support Performance Management: A Guide for Federal Executives (January 2001)
Kathryn Newcomer and Mary Ann Scheirer

Managing for Outcomes: Milestone Contracting in Oklahoma (January 2001)
Peter Frumkin

The Challenge of Developing Cross-Agency Measures: A Case Study of the Office of National Drug Control Policy (August 2001)
Patrick J. Murphy and John Carnevale

The Potential of the Government Performance and Results Act as a Tool to Manage Third-Party Government (August 2001)
David G. Frederickson

Using Performance Data for Accountability: The New York City Police Department's CompStat Model of Police Management (August 2001)
Paul E. O'Connell

Moving Toward More Capable Government: A Guide to Organizational Design (June 2002)
Thomas H. Stanton

The Baltimore CitiStat Program: Performance and Accountability (May 2003)
Lenneal J. Henderson

Strategies for Using State Information: Measuring and Improving Program Performance (December 2003)
Shelley H. Metzenbaum

Linking Performance and Budgeting: Opportunities in the Federal Budget Process (January 2004, 2nd ed.)
Philip G. Joyce

How Federal Programs Use Outcome Information: Opportunities for Federal Managers (February 2004, 2nd ed.)
Harry P. Hatry, Elaine Morley, Shelli B. Rossman, and Joseph S. Wholey

Performance Leadership: 11 Better Practices That Can Ratchet Up Performance (May 2004)
Robert D. Behn

Performance Management for Career Executives: A "Start Where You Are, Use What You Have" Guide (October 2004, 2nd ed.)
Chris Wye

Staying the Course: The Use of Performance Measurement in State Governments (November 2004)
Julia Melkers and Katherine Willoughby

MARKET-BASED GOVERNMENT

Determining a Level Playing Field for Public-Private Competition (November 1999)
Lawrence L. Martin

Implementing State Contracts for Social Services: An Assessment of the Kansas Experience (May 2000)
Jocelyn M. Johnston and Barbara S. Romzek

A Vision of the Government as a World-Class Buyer: Major Procurement Issues for the Coming Decade (January 2002)
Jacques S. Gansler

Contracting for the 21st Century: A Partnership Model (January 2002)
Wendell C. Lawther

Franchise Funds in the Federal Government: Ending the Monopoly in Service Provision (February 2002)
John J. Callahan

Making Performance-Based Contracting Perform: What the Federal Government Can Learn from State and Local Governments (November 2002, 2nd ed.)
Lawrence L. Martin

CENTER REPORTS AVAILABLE

Moving to Public-Private Partnerships: Learning from Experience around the World (February 2003)
Trefor P. Williams

IT Outsourcing: A Primer for Public Managers (February 2003)
Yu-Che Chen and James Perry

The Procurement Partnership Model: Moving to a Team-Based Approach (February 2003)
Kathryn G. Denhardt

Moving Toward Market-Based Government: The Changing Role of Government as the Provider (March 2004, 2nd ed.)
Jacques S. Gansler

Transborder Service Systems: Pathways for Innovation or Threats to Accountability? (March 2004)
Alasdair Roberts

Competitive Sourcing: What Happens to Federal Employees? (October 2004)
Jacques S. Gansler and William Lucyshyn

Implementing Alternative Sourcing Strategies: Four Case Studies (October 2004)
Edited by Jacques S. Gansler and William Lucyshyn

Designing Competitive Bidding for Medicare (November 2004)
John Cawley and Andrew B. Whitford

TRANSFORMATION OF ORGANIZATIONS

The Importance of Leadership: The Role of School Principals (September 1999)
Paul Teske and Mark Schneider

Leadership for Change: Case Studies in American Local Government (September 1999)
Robert B. Denhardt and Janet Vinzant Denhardt

Managing Decentralized Departments: The Case of the U.S. Department of Health and Human Services (October 1999)
Beryl A. Radin

Transforming Government: The Renewal and Revitalization of the Federal Emergency Management Agency (April 2000)
R. Steven Daniels and Carolyn L. Clark-Daniels

Transforming Government: Creating the New Defense Procurement System (April 2000)
Kimberly A. Harokopus

Trans-Atlantic Experiences in Health Reform: The United Kingdom's National Health Service and the United States Veterans Health Administration (May 2000)
Marilyn A. DeLuca

Transforming Government: The Revitalization of the Veterans Health Administration (June 2000)
Gary J. Young

The Challenge of Managing Across Boundaries: The Case of the Office of the Secretary in the U.S. Department of Health and Human Services (November 2000)
Beryl A. Radin

Creating a Culture of Innovation: 10 Lessons from America's Best Run City (January 2001)
Janet Vinzant Denhardt and Robert B. Denhardt

Transforming Government: Dan Goldin and the Remaking of NASA (March 2001)
W. Henry Lambright

Managing Across Boundaries: A Case Study of Dr. Helene Gayle and the AIDS Epidemic (January 2002)
Norma M. Riccucci

Managing "Big Science": A Case Study of the Human Genome Project (March 2002)
W. Henry Lambright

The Power of Frontline Workers in Transforming Government: The Upstate New York Veterans Healthcare Network (April 2003)
Timothy J. Hoff

Making Public Sector Mergers Work: Lessons Learned (August 2003)
Peter Frumkin

Efficiency Counts: Developing the Capacity to Manage Costs at Air Force Materiel Command (August 2003)
Michael Barzelay and Fred Thompson

Managing the New Multipurpose, Multidiscipline University Research Centers: Institutional Innovation in the Academic Community (November 2003)
Barry Bozeman and P. Craig Boardman

The Transformation of the Government Accountability Office: Using Human Capital to Drive Change (July 2005)
Jonathan Walters and Charles Thompson

2004 PRESIDENTIAL TRANSITION SERIES

Government Reorganization: Strategies and Tools to Get It Done (August 2004)
Hannah Sistare

Performance Management for Political Executives: A "Start Where You Are, Use What You Have" Guide (October 2004)
Chris Wye

Becoming an Effective Political Executive: 7 Lessons from Experienced Appointees (January 2005, 2nd ed.)
Judith E. Michaels

Getting to Know You: Rules of Engagement for Political Appointees and Career Executives (January 2005)
Joseph A. Ferrara and Lynn C. Ross

SPECIAL REPORTS

Enhancing Security Throughout the Supply Chain (April 2004)
David J. Closs and Edmund F. McGarrell

Assessing the Impact of IT-Driven Education in K–12 Schools (May 2005)
Ganesh D. Bhatt

Investing in Supply Chain Security: Collateral Benefits (May 2005)
James B. Rice, Jr., and Philip W. Spayd

CENTER FOR HEALTHCARE MANAGEMENT REPORTS

The Power of Frontline Workers in Transforming Healthcare Organizations: The Upstate New York Veterans Healthcare Network (December 2003)
Timothy J. Hoff

IT Outsourcing: A Primer for Healthcare Managers (December 2003)
Yu-Che Chen and James Perry

BOOKS*

Collaboration: Using Networks and Partnerships
(Rowman & Littlefield Publishers, Inc., 2004)
John M. Kamensky and Thomas J. Burlin, editors

E-Government 2001
(Rowman & Littlefield Publishers, Inc., 2001)
Mark A. Abramson and Grady E. Means, editors

E-Government 2003
(Rowman & Littlefield Publishers, Inc., 2002)
Mark A. Abramson and Therese L. Morin, editors

Human Capital 2002
(Rowman & Littlefield Publishers, Inc., 2002)
Mark A. Abramson and Nicole Willenz Gardner, editors

Human Capital 2004
(Rowman & Littlefield Publishers, Inc., 2004)
Jonathan D. Breul and Nicole Willenz Gardner, editors

Innovation
(Rowman & Littlefield Publishers, Inc., 2002)
Mark A. Abramson and Ian Littman, editors

Leaders
(Rowman & Littlefield Publishers, Inc., 2002)
Mark A. Abramson and Kevin M. Bacon, editors

Learning the Ropes: Insights for Political Appointees
(Rowman & Littlefield Publishers, Inc., 2005)
Mark A. Abramson and Paul R. Lawrence, editors

Managing for Results 2002
(Rowman & Littlefield Publishers, Inc., 2001)
Mark A. Abramson and John M. Kamensky, editors

Managing for Results 2005
(Rowman & Littlefield Publishers, Inc., 2004)
John M. Kamensky and Albert Morales, editors

Memos to the President: Management Advice from the Nation's Top Public Administrators
(Rowman & Littlefield Publishers, Inc., 2001)
Mark A. Abramson, editor

New Ways of Doing Business
(Rowman & Littlefield Publishers, Inc., 2003)
Mark A. Abramson and Ann M. Kieffaber, editors

The Procurement Revolution
(Rowman & Littlefield Publishers, Inc., 2003)
Mark A. Abramson and Roland S. Harris III, editors

Transforming Government Supply Chain Management
(Rowman & Littlefield Publishers, Inc., 2003)
Jacques S. Gansler and Robert E. Luby, Jr., editors

Transforming Organizations
(Rowman & Littlefield Publishers, Inc., 2001)
Mark A. Abramson and Paul R. Lawrence, editors

* Available at bookstores, online booksellers, and from the publisher (www.rowmanlittlefield.com or 800-462-6420).

About the IBM Center for The Business of Government
Through research stipends and events, the IBM Center for The Business of Government stimulates research and facilitates discussion on new approaches to improving the effectiveness of government at the federal, state, local, and international levels.

The Center is one of the ways that IBM seeks to advance knowledge on how to improve public sector effectiveness. The IBM Center focuses on the future of the operation and management of the public sector.

About IBM Business Consulting Services
With consultants and professional staff in more than 160 countries globally, IBM Business Consulting Services is the world's largest consulting services organization. IBM Business Consulting Services provides clients with business process and industry expertise, a deep understanding of technology solutions that address specific industry issues, and the ability to design, build and run those solutions in a way that delivers bottom-line business value. For more information visit www.ibm.com/bcs.

For additional information, contact:
Mark A. Abramson
Executive Director
IBM Center for The Business of Government
1301 K Street, NW
Fourth Floor, West Tower
Washington, DC 20005
(202) 515-4504, fax: (202) 515-4375

e-mail: businessofgovernment@us.ibm.com
website: www.businessofgovernment.org

RNLA Response to the Report and Recommendations of the Presidential Commission on Election Administration

The Republican Legal Community on the PCEA Report with Additional Prescriptions for Reform

Prepared by:

Charles H. Bell, Jr.
Craig S. Burkhardt
Jason T. Hanselman
Larry Levy
Harvey Tettlebaum
Michael Thielen

Justin Riemer, Editor and Co-Author

April 10, 2014

P.O. Box 18965
Washington, DC 20036

http://www.rnla.org
Twitter: TheRepLawyer

Phone: 202-802-0437
Fax: 202-747-2873

Table of Contents

I. Executive Summary **1**

II. Introduction **3**

III. General Principles: Affirmation of Federalism Approach **4**

IV. Reform of State Voter Registration Processes **7**
- **A. Interstate Exchanges for Voter Registration List Maintenance** **7**
  - 1. Overview 7
  - 2. Interstate Cooperation Prevents and Identifies Illegal Double-Voting 8
  - 3. Minimizes Lines and Allows for Better Election Day Planning 10
- **B. Additional Recommendations for Voter Registration List Maintenance** **11**
  - 1. Amend State Laws 11
  - 2. *Intrastate* Cooperation 11
  - 3. Vital Records 12
  - 4. SAVE Database 12
  - 5. Public-Private Partnerships 13
  - 6. Compliance With and Upgrades to HAVA-Mandated Registration Databases 13
  - 7. Use of Bar Code Scanners with Electronic Poll Books 13
- **C. Integration with Department of Motor Vehicles Registration Processes** **13**
- **D. Best Practices for Online Voter Registration** **14**
  - 1. No Automated or Automatic Online Registration 15
  - 2. System Tethered to DMV or Other Official State Database 15
  - 3. Necessity of a Signature 15
  - 4. Adequate Safeguards to Prevent Cyber Attacks 15

V. Improved Polling Place Management **16**
- **A. Polling Place Design and Election Day Preparations** **16**
- **B. Management of Voter Flow** **17**
  - 1. Line Walkers and Greeters 17
  - 2. Electronic Poll Books and Bar Code/Magnetic Stripe Scanners 17
  - 3. Use of Online Tools 19
  - 4. Better Recruitment and Training of Poll Workers 19
- **C. Addressing the Needs of Particular Communities of Voters** **20**
- **D. Additional Recommendations: Reduce Precinct Size and Avoid Co-Located Polling Places** **20**

VI. Early Voting: An Expensive Non-Solution to Lines **23**
- **A. Not a Line Problem-Solver** **23**
- **B. Early Voting is Expensive** **24**
- **C. Does Not Increase Turnout** **25**
- **D. Primary Beneficiaries: Campaign Consultants** **25**
- **E. Convenience vs. Citizenship** **25**
- **F. Focus on Those Who Need to Vote Absentee** **26**

VII. Continued Need to Improve Military Voting Efforts **26**

VIII. Voting Equipment and Technology 29
A. Overview 29
B. The EAC Obstructed Innovation 29
C. HAVA Funds Were Spent on Obsolete Technology 30
D. The EAC is Incapable of Developing Standards 30
E. The EAC Should Be Removed from the Standards Process 31
F. States Should Use Voluntary Consensus Standards 32

IX. Conclusion 32

Endnotes 33

I. Executive Summary

The Republican National Lawyers Association (RNLA) issues this report to offer its perspective on the recent report of the Presidential Commission on Election Administration (PCEA) outlining recommendations to improve election administration in the United States. RNLA agrees with many of the Commission's recommendations, particularly its identification of deficiencies in our voter registration system as a significant contributor to Election Day problems such as long lines at the polls. The PCEA's recommendations to reform voter registration are good ones and, if states adopted them, the reforms should greatly improve citizens' voting experience. RNLA offers other suggestions in addition to adopting many of the PCEA's recommendations. Taken in tandem, these recommendations will result in a secure and voter-friendly voter registration system that provides alternatives to same-day voter registration while avoiding the management issues which historically attend the combining of two functions on Election Day – voting and registration. RNLA also welcomes most of PCEA's recommendations to improve polling place management, including leveraging technology through the use of electronic poll books and ID card bar code/magnetic stripe scanners. RNLA also appreciates the PCEA pointing out the need for continued improvements to the voting experience for our military and overseas voters and generally agrees with PCEA's recommendations in this area. Finally, RNLA agrees that the current voting equipment testing and certification system is inadequate and needs reform. We recommend a move away from the Election Assistance Commission (EAC) certification process in favor of voluntary consensus standards.

While RNLA agrees with a majority of PCEA's recommendations, we caution against the Commission's recommendation that states embrace expanded early voting as a solution to the systemic election administration problems identified in its report. The experience from recent elections demonstrates that early voting does not solve the problem of long lines. It is also expensive, distracts from Election Day preparations, and diminishes the importance of Election Day. Most Americans continue to prefer to vote alongside their neighbors and fellow citizens at the polls on Election Day so reform needs to start there. Accordingly, states should instead invest their limited time and resources fixing the problems at the polling place and ensuring a smoother absentee voting process for those who use it out of necessity, not convenience.

Throughout this document, RNLA offers state and local election officials additional suggestions that will improve election administration. This report also outlines additional policy reasons why states should adopt certain PCEA recommendations. In some places RNLA urges states to use caution or establish minimum safeguards when implementing certain reforms, particularly for online voter registration. RNLA's additional recommendations from those included in the PCEA report include the following:

State and local election officials should do the following to improve the voter registration process:

- Amend their laws so there are fewer restrictions in sharing voter registration, voter history and Department of Motor Vehicles (DMV) data with other states to improve the accuracy of the voter rolls and prevent double-voting.

- States unable to participate in multi-state data-sharing agreements should negotiate one-on-one programs to share data with individual states, particularly neighboring states or voting jurisdictions adjacent to their border.
- Adopt *intrastate* data-sharing, including vital statistics information and work with their DMVs, public assistance agencies and other state agencies to obtain additional data to perform voter registration list maintenance.
- Upgrade statewide voter registration databases and explore public-private partnerships for list maintenance.
- Utilize the Department of Homeland Security's Systematic Alien Verification for Entitlements (SAVE) Database to ensure only citizens are able to register and remain on the voter rolls and to prevent the removal of citizens from the voter rolls who may have been mistakenly identified as non-citizens.
- Adopt RNLA's recommended best practices outlined in this report when implementing online voter registration.

States should do the following to improve Election Day and polling place management:

- Utilize ID card bar code/magnetic stripe scanners with electronic poll books to speed check-in process and improve accuracy of voter history data.
- Develop technology to display voter photographs on electronic poll books to improve the integrity of the check-in process.
- Engage in public-private partnerships to recruit additional poll workers.
- Utilize technology such as online training to better prepare poll workers for Election Day.
- Manage precinct sizes by timely re-precincting, ensuring a manageable number of voters are assigned to polling places and avoid co-locating polling places when possible.

Recommendations to improve the voting experience for our military and overseas voters:

- Simplify and streamline the registration and absentee voting application process for our overseas and military voters, including the use of the Federal Postcard Application (FPCA) and the Federal Write-In Absentee Ballot (FWAB).
- States need to improve their online offerings to our military and overseas voters by placing a higher priority on improving their websites to better explain the voting process to our overseas and military voters.
- Eliminate waiver provision for 45-day ballot mailing deadline to overseas and military voting and require express mail for any ballots mailed late.
- Vigorous enforcement of our federal and state overseas and military voting laws.

Improve the testing and certification procedures for voting equipment:

- Transition from the federal EAC voting equipment certification regimen towards adoption of voluntary consensus standards similar to those used in other manufacturing industries.

II. Introduction

The Presidential Commission on Election Administration (PCEA), a bipartisan and nonpartisan commission set up by President Obama to study problems encountered in the 2012 General Election, released its report in January following months evaluating the state of election administration in the United States. The PCEA, organized pursuant to an Executive Order, was tasked with recommending improvements to elections "to ensure that all eligible voters have the opportunity to cast their ballots without undue delay."[1] While the commission was also charged with identifying and making recommendations regarding a broad array of election administration issues, the commission's main purpose, at least as many understood it, was to make recommendations to prevent long lines and delays at the polls.

The Republican National Lawyers Association (RNLA) shares the President's concerns of long lines at the polls and other election administration problems and appreciates his efforts in organizing the Commission. We also would like to thank the members of the PCEA, particularly its Co-Chairs, Robert Bauer and Benjamin Ginsberg, for their hard work that is reflected in a comprehensive report with useful online tools. RNLA is pleased that it agrees with many of the Commission's recommendations, particularly its straightforward approach to problem-solving and focus on the "nuts and bolts" of Election Day administration. Many of PCEA's recommendations for basic best practices and management techniques should be non-controversial and agreeable to those from across the political spectrum. We also applaud the PCEA's resistance to calls to nationalize our elections by endorsing best practices and state-based solutions instead of federal legislation. While RNLA generally agrees with PCEA's recommendations, we are ambivalent or offer a more qualified endorsement on some others, and there are a few areas where we disagree for reasons explained in this report.

RNLA has issued this report with the goal of making a positive and proactive contribution to the discussion on the future of elections in our country. While the PCEA made many important recommendations, we find it important to include additional suggested best practices in some areas, and in most places our suggestions and discussion complement the PCEA report. In addition, in certain places, RNLA agreed with a recommendation but felt compelled to provide additional reasons why adopting a particular policy is best practice. When necessary, the report attempts to explain the rationale behind why many Republicans and conservatives disagree in good faith with some reform proposals, particularly the wholesale endorsement of expanded early voting. We also thought it important to reiterate our belief that an approach for reform based on principles of federalism is the best one. We believe PCEA's many good recommendations reflect the fact that voters and election administrators do not favor a top-down approach of Congress decreeing elections policy, especially in areas where there is anything but a nationwide consensus. RNLA believes recent progress on issues such as interstate voter registration list sharing demonstrates that states working together voluntarily yield the best solutions.

This report does not attempt to comment on every aspect of the PCEA's report, rather we offer a more targeted approach to highlight specific issues we thought particularly important. Additionally, this report purposefully does not address other areas of election administration that

the PCEA chose not to address, including photo identification laws (which RNLA is on the record strongly supporting) and Election Day voter registration (which we strongly oppose).

Finally, we urge Democrats and liberal groups to join us in support of some of these basic recommendations for reform, particularly PCEA's proposals that states engage in interstate data sharing to improve the quality of their voter rolls. While many on the left give lip-service support to these programs, if recent history is any indication, we do not detect sincere support from Democrats for list maintenance activities. The PCEA chose to highlight voter registration inaccuracies as a chief contributor to long lines and other Election Day problems. Accordingly, we hope for broad bipartisan support so states can enact these important recommended reforms. First, we begin by discussing an important backdrop to any discussion of electoral reform: the necessity to respect the federalism approach in how America conducts its elections.

III. General Principles: Affirmation of Federalism Approach

Federalism – the fundamental architectural principle of the United States Constitution – remains the centerpiece of the PCEA's proposals concerning reforms of our nation's electoral process. Amid fundamental challenges to protecting the vote, liberal reformers' calls to nationalize our voting system threaten this fundamental architectural principle. As the PCEA's report demonstrates, the best path to reform is for interstate cooperation and for states to adopt PCEA and other recommended best practices for election administration, most of which can be agreed upon by those from across the political spectrum.

There were calls for nationalizing our election system after the 2000 Presidential Election. The Carter-Ford Commission rejected that notion in 2001, proposing instead a limited role for a new federal Election Assistance Commission (EAC). The Carter-Baker Commission in 2005 also rejected proposals to expand the powers of the EAC beyond those given to it by Congress in 2002. The 2001 and 2005 Commission reports were prescient about the likely difficulties that would face nationalizing our voting system, as the EAC has proven a complete failure at accomplishing even the limited federal responsibilities it was assigned by the 2002 Help America Vote Act (HAVA). The PCEA report accepts as a given the futility of attempting to nationalize control of elections. Instead, the PCEA rightly recognizes the true progress made when states cooperate with another to enact programs to improve election administration.

The PCEA approaches its charge and tasks in a manner consistent with those of its distinguished predecessors, the 2001 Report of The National Commission on Federal Election Reform (referred to as the "Carter-Ford Commission") and the 2005 Report of the Commission on Federal Election Reform (referred to as the "Carter-Baker Commission").[2] The three commissions fundamentally recognized that our American voting system reflects the federalism principles instituted by the framers of the Constitution, where the states have the primary role in conducting federal elections in conjunction with state and local elections, administered by thousands of local jurisdictions, with the federal government providing default supervision with respect to federal elections. As the Carter-Ford Commission summarized:

> The conduct of federal elections is a federal function ..., states have no reserved

> powers over federal elections because federal elections came into being when the United States Constitution was ratified. Nonetheless, the framers of the Constitution foresaw a federal-state partnership in the administration of federal elections and delegated to the states a substantial role in the conduct of those elections.[3]

The Carter-Ford Commission recognized:

> Even though the federal government has broad constitutional authority to mandate how the states conduct federal elections...*state governments should have a primary role in the conduct of such elections for a simple reason: federal elections are, as a practical matter, conducted in conjunction with a vast array of state and local elections across widely varying conditions.*[4] (emphasis added)

Because of this conjunction, "states are vital partners to the federal government in any plan for nationwide reform. They are also a necessary bridge between federal policy and local administration." The Carter-Ford Commission concluded: "[W]e recommend that state governments should do far more to accept their lead responsibility for improving the conduct of elections, especially federal elections." In taking the lead, "[s]tate governments should ensure uniformity of procedures and standards within the state and provide the essential guidance for the consistent and constitutional conduct of these elections." The Carter-Ford Commission's principal recommendation was to adopt reforms that came to comprise HAVA.

The 2005 Carter-Baker Report had a similar perspective. The Commission described its task "to contribute to building confidence in our electoral process" and its objectives to "assess HAVA's implementation, and to offer recommendations for further improvement."[5] The principal recommendations were those designed to foster "an accurate list of registered voters, adequate voter identification, voting technology that precisely records and tabulates votes and is subject to verification, and capable, fair and non-partisan election administration." The Report affirmed that "[w]hile each state will retain fundamental control over its electoral system, the federal government should seek to ensure that all qualified voters have an equal opportunity to exercise their right to vote. This will require greater uniformity of some voting requirements and registration lists that are accurate and comparable between states." Carter-Baker noted, "Greater uniformity is also needed within states on some voting rules and procedures," and recommended that "[t]he federal government should fund research and development of voting technology that will make the counting of votes more transparent, accurate and verifiable."

The 2014 PCEA report focuses on best practices for election administration: "This Commission's focus...remained resolutely on the voter. We discovered...that voters' expectations are remarkably uniform and transcend differences of party and political perspective. The electorate seeks above all modern, efficient, and responsive administrative performance in the conduct of elections."[6] The Commission focuses on recommendations, not federal mandates, to reduce waiting times at the polls, improvements in the voter registration process to ensure voter list accuracy and enhanced capacity, and reforms to voting equipment standards and certification processes. The PCEA Report also commends the efforts of multi-state cooperative ventures such as the Electronic Registration Information Center (ERIC) and the Interstate Voter

Registration Crosscheck Program (hereinafter referred to as "Crosscheck"). These programs are designed for states to share voter information to ensure that voters who have moved between states register to vote in their new states and are removed from the registration rolls of the departed state, to better prevent double voting. Voter registration improvements were also among the primary objectives of the 2001 Carter-Ford Commission's recommendation to adopt HAVA voter registration improvements and the mandate for states to develop and maintain statewide voter databases and the 2005 Carter-Baker Commission's recommendations for voter registration and identification requirements. PCEA focuses on interstate cooperation and state-based solutions rather than the federal mandates recommended in the Carter-Baker Commission.

This fundamental federalism approach was recently restated by the Supreme Court in its 2013 decision *Arizona v. Intertribal Council of Arizona*:

> The Elections Clause imposes on States the duty to prescribe the time, place and manner of electing Representatives and Senators, but it confers on Congress the power to alter those regulations or supplant them altogether. See *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 804–805. This Court has said that the terms "Times, Places, and Manner" "embrace authority to provide a complete code for congressional elections," including regulations relating to "registration." *Smiley v. Holm,* 285 U.S. 355, 366.[7]

The Court also described the Elections Clause which embodies the federal power in *Foster v Love*, as follows: "In practice, the Clause functions as a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices."[8] The power of Congress over the "Times, Places and Manner" of congressional elections "is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith."[9]

The specter of failure in nationalization schemes is reflected in the abject shortcomings of the EAC in performing even the limited functions that Congress assigned to it in HAVA: to distribute federal funds to states for voting system modernization and to supervise states' implementation of statewide voter databases to improve the effectiveness and integrity of the vote across the nation. The EAC failed in its two primary functions, and even basic HAVA functions assigned to the federal Department of Justice (DOJ), to ensure the implementation of statewide voter databases and voter registration systems, have not been achieved effectively or impartially.[10]

Not only did most states fail to establish operational statewide voter databases for the 2006 elections as mandated by HAVA, nearly 37 states requested waivers of compliance by the 2006 deadline and one state, California is not expected to bring its statewide voter database up to date until 2016.[11] HAVA places most of the responsibility for HAVA compliance on the DOJ and DOJ failed to ensure implementation of the now-12 year old requirement. DOJ's unwillingness and the lack of a private right of action in HAVA ensures that states are able to openly flout this and other federal HAVA requirements for election administration.[12] At present, EAC has no acting commissioners, and is unable to function lawfully and conduct its most limited functions.

Because of the EAC's breakdown, the agency was unable to respond to Arizona and Kansas' respective 2013 requests for permission to adopt separate citizen identification provisions, in the aftermath of the Supreme Court's *Arizona v. Intertribal Council of Arizona* decision. It is no wonder that there was little response from state and local election officials to lobby Congress to save the EAC when Congress has taken steps to eliminate the agency. In fact, the National Association of Secretaries of State (NASS) has adopted resolutions on multiple occasions calling for the dissolution of the agency.[13]

In sum, given our nation's historical reliance on federalism in our electoral process, the federal government's failure to adequately enact reform to our nation's electoral system through the feckless and dysfunctional EAC and DOJ inaction, we applaud the PCEA's emphasis on state-based solutions and its recommendations that states work directly to adopt the best practices and reforms called for in its report.

IV. Reform of State Voter Registration Processes

RNLA generally agrees with the analysis and recommendations to reform states' voter registration processes. Enhancing the integrity of the rolls through the use of technology and interstate and intrastate data sharing, and holding states accountable for compliance with federal law will result in significant improvements to our voter rolls that will ensure reliable rosters for Election Day, thereby ensuring a smoother voting process. RNLA also proposes additional recommendations for states to adopt to improve the quality of their voter rolls.

A. Interstate Exchanges for Voter Registration List Maintenance

1. Overview

RNLA strongly agrees with the PCEA's recommendation that "states join interstate programs to share data and synchronize voter lists so that states, on their own initiative, come as close as possible to creating an accurate database of all eligible voters." The PCEA rightly recognizes that one can directly trace problems at the polling place, including long lines, back to deficiencies somewhere in the voter registration process, often from inaccurate registration records caused by inadequate list maintenance. The PCEA endorses both of the two major interstate registration data sharing agreements: The Interstate Voter Registration Crosscheck Program (hereinafter referred to as "Crosscheck") and the Electronic Registration Information Center (ERIC). RNLA agrees both ERIC and Crosscheck are valuable tools for shoring up the integrity of states' voter rolls. States unable to participate in these programs because of state laws or other constraints need to negotiate one-on-one sharing agreements with other states, particularly neighboring states.

As the PCEA outlines in its report, there are many good reasons to participate in programs like ERIC and Crosscheck. These programs help identify records of individuals registered in a state where they no longer reside who have also registered in their new state of residence. ERIC and Crosscheck allow states to identify these double-registrations giving officials reliable information necessary to cancel the registration record in the previous state or states of residence.

Removing these records from the rolls prevents the possibility of double-voting or from someone using that old registration record to fraudulently vote in that previous resident's name. These programs also allow officials to identify voters with inaccurate registration records before Election Day allowing officials to contact voters and fix those issues before they appear at the polls, the last place where registration problems should be resolved. Related, accurate lists equip election officials to better plan for Election Day since they will have reliable statistics on which to make resource allocation decisions, particularly to better prepare in precincts with a high percentage of registration problems. The programs, particularly ERIC, also help identify unregistered but eligible citizens allowing states the ability to contact individuals directly to solicit their registration rather than reckless third-party groups.

Crosscheck and ERIC demonstrate the progress states can make when working together and in public-private partnerships to solve problems. Both programs were organized and launched without a federal mandate or legislation and are the product of a consensus of states with diverse political landscapes. Both programs give the states accurate data to make decisions in accordance with federal law and their particular state laws and circumstances. As these programs mature and expand there will be little public policy justification for any federal legislation in this area.

The results from the Crosscheck and ERIC programs are at the same time both encouraging and sobering and underscore the need for list sharing expansion to all 50 states. The 2013 Crosscheck consisted of 22 states, compared over 45 million voter records, and identified over five million potential matches of individuals registered in two or more participating states.[14] Highlighting one state's data, Virginia identified approximately 80,000 records in the 2013 Crosscheck with an "extremely high probability" that an individual was registered both in Virginia and another Crosscheck state, a number only accounting for matches from states that shared social security number data for matching. This additional matching criterion excluded almost one-quarter of potential matches so the true number of duplicate registrations was likely much higher.[15] The numbers of voters registered in more than two states was also eye-opening. The Virginia State Board of Elections identified two voters registered in seven different states, ten registered in six different states, 113 registered in five states, 1,123 registered in four states and 16,361 registered in three states.[16] The thousands registered in more than two states demonstrate how long some voters remain on the rolls after moving to a new state and often times multiple states after that. This is only the tip of the iceberg. A 2012 study by the Pew Center on the States estimated that over 2.758 million people are registered in multiple states.[17] These numbers should not be surprising given our nation's transient population. as summarized in the PCEA report and the relatively new phenomenon of organized interstate efforts to combat the problem. Crosscheck was launched in 2005 and ERIC more recently in 2012 and still today almost half of the states are not involved in either program. There is much work to be done and states need to move quickly to join these programs.

While RNLA agrees with PCEA's suggestions for registration reform, we also recommend states take additional steps to improve the accuracy of their voter rolls, many of which relate to states cooperating on an intra-state basis with other state agencies.

2. Interstate Cooperation Prevents and Identifies Illegal Double-Voting

The interstate sharing of voter data equips registration officials with tools to remove voters who remain on a state's rolls after they have moved to and registered in a second state thus preventing the possibility of double-voting. In addition, it prevents fraud by cancelling records that could be exploited by another individual who is aware that someone remains on the rolls yet no longer resides in the state. Finally, these programs compare voting activity for individuals, thus providing evidence of potential double-voting for prosecution after it occurs.

As we have seen with third-party registration groups like ACORN that intentionally or recklessly registered fictitious and ineligible individuals, there are those who will abuse the registration process without adequate safeguards in place. For example, without interstate data-sharing there is nothing to prevent a Florida resident registered in both Florida and Massachusetts from voting at the polls on Election Day in Florida and casting a mail absentee ballot in Massachusetts. Similarly, there is no impediment to Person A from voting as Person B when Person B has moved out of state yet remains registered. It is no more difficult voting as a non-resident who remains on the rolls than it is for a person to vote for a deceased relative who remains on the rolls for years after dying. While photo identification requirement laws may prevent such crimes by positively identifying voters at the polls, it is not far-fetched to consider the scenario where an individual who rents an apartment, receives a piece of official election mail with registration information of a prior occupant, and decides to vote as that person. If states do not have the proper data to identify individuals who should be removed due to non-residency, then double-voting is a very difficult crime to prevent. One cannot retrieve a fraudulently cast vote and at that point costly prosecution is the only remedy.

Nothing illustrates these vulnerabilities better than the situation in New York City uncovered by the city's Department of Investigations (DOI) in a recent audit of the city Board of Elections. After identifying a variety of individuals who should have no longer been on the voter rolls for various reasons (deceased, moved away from the city, ineligible felons), the DOI was able to "vote" for those ineligible yet registered individuals in 97% of their attempts.[18] While no real vote was actually cast in the investigation since the investigators cast write-in votes for a fictitious "John Test" or simply did not vote when inside the voting booth, the exercise underscores the fact that states are at a higher risk for fraud when they are not proactive in maintaining accurate registration records. The problem is exacerbated in New York's case, since the state has no voter ID requirement as a failsafe to prevent any potential impersonation fraud nor does the state participate in ERIC or Crosscheck.

This is not a theoretical discussion since we know illegal double-voting happens. In 2008, for example, Crosscheck data led to the prosecution of six people who voted for President in Arizona and another state.[19] Perhaps the most famous case in recent memory is the former Maryland congressional candidate Wendy Rosen who was charged with illegal voting in two separate elections in the 2006 and 2010 elections in both Maryland and Florida.[20] Rosen ultimately plead guilty as part of a plea deal. There are multiple additional convictions in other states for double-voting, both from individuals voting multiple times within the same state and from voting in two states in the same election. While states participating in Crosscheck have referred dozens of suspected instances of double-voting to law enforcement, we simply do not have comprehensive statistics on how many prosecutions have taken place nor do we know how many instances law enforcement declined to prosecute due to a lack of resources and difficulty in

cooperating with the other state to obtain the evidence needed to prove voting took place in two states. Law enforcement officials have too many competing priorities and many states do not have dedicated resources or investigators assigned to investigate and prosecute election law crimes.

We also know that these data-sharing efforts are relatively new so, historically, it has been difficult to detect the occurrence of double-voting on a national level. Relatively speaking, the ERIC and Crosscheck programs are in their infancy. Almost half of the states are still not involved in either Crosscheck or ERIC, including California, New York, and Texas, the three most populous states whose residents are also highly transient. To date, it is less likely the non-Crosscheck or ERIC states would uncover the existence of double-voting.

In sum, states can protect their citizens' right to vote by engaging in these programs to prevent and deter double-voting from taking place. Accordingly, RNLA strongly urges states to move quickly to join programs like Crosscheck and ERIC and when that is not possible, negotiate one-on-one sharing agreements with neighboring states.

3. Minimizes Lines and Allows for Better Election Day Planning

Improving voter lists through interstate data sharing can help alleviate Election Day problems, particularly in eliminating bottlenecks at the polling place check-in table. Voters who appear at polling places with inaccurate registration records or where they are not registered causes problems and delays in the check-in process. When voters do not appear in the precinct's pollbook or there is a discrepancy between the information on the pollbook and what the voter provides, poll workers are forced to spend extra time resolving those issues before permitting that person to vote. Oftentimes poll workers have to contact the local election office for instructions, request additional information from the voter to resolve the discrepancies, require the voter to complete paperwork such as an affidavit or registration application form, or require the voter to vote a provisional ballot. During a low-turnout election or in small numbers these scenarios do not seriously disrupt the traffic flow at a polling place. However, you have a recipe for disaster in a high-turnout presidential election where many voters in a particular precinct have these problems, each requiring several additional minutes of a poll worker's time. The result is a bottleneck at the check-in table that will slow the processing of voters and begin to cause back-ups and lines. This scenario was a large contributor to many of the long lines shown on television on Election Day 2012.

Using ERIC and Crosscheck data allows local election officials to contact a voter months before an election with information that they may reveal some error in their record that needs correction prior to voting, such as an outdated residence address or a name change. Each voter reached in advance is one less headache for a poll worker to triage on Election Day where many times it is too late to fix the problem. Poll workers are not trained to resolve complex registration problems at the polls on Election Day, nor should they be, and working through these problems leaves both them and the voter exasperated. Local registration officials need to identify those problems in advance in order to avoid delays on Election Day.

ERIC and Crosscheck also aid in preparing in advance for potential Election Day problems. In many respects an election is similar to planning a large party. Planning goes much smoother when the organizers have a good list of the names and number of guests who will be attending and any particular idiosyncrasies regarding the invitees. Without an accurate RSVP list, planning for the right amount of food, beverages, and space would all be very difficult. Similarly, without an accurate record of individuals registered to vote in their given jurisdiction, election officials do not have the tools to adequately prepare for Election Day, particularly if the poll book is riddled with inaccurate information and records of voters no longer living in the precinct.

Voter data sharing agreements give election officials the proper data to better allocate resources based on the needs of a particular polling place. If a given precinct is in a highly transient area and its rolls are either wildly inflated with registrations from individuals who no longer reside there, has many unregistered voters who plan on voting anyway, and/or has voters registered at the wrong address, officials would have to allocate additional staff and resources to head off problems. If local election officials have accurate data from which to determine that a particular precinct has a large amount of transient voters based on information received from ERIC or Crosscheck, then they will be prepared for problem voters who will need extra attention to resolve their problems and redirect them to the proper polling place if necessary. The local election officials can then allocate additional resources to those precincts. Finally, an accurate list will give local governing bodies better data to make informed decisions when redrawing and adjusting precinct boundaries, ensuring a more proportional allocation of voters per precinct across an election jurisdiction.

B. Additional Recommendations for Voter Registration List Maintenance

RNLA proposes states take additional steps to increase the integrity and accuracy of their voter registration rolls:

1. Amend State Laws

Restrictive laws in some states prevent their election officials from joining Crosscheck or ERIC or even from engaging in list exchanges with another individual state. States need to amend their laws to allow the sharing of voter registration and Department of Motor Vehicles (DMV) data with other states. State legislatures need to give their election officials the authority and discretion to share as much data as necessary to accurately identify duplicate voters, including social security information and DMV data since this allows for more accurate matching. Those who have routinely targeted list-sharing programs because they say they yield false matches between voters with similar names and birthdates should support measures to add DMV and other data fields to the matching process to eliminate any potential errors and silence critics' attacks on the standards and matching-criteria in the programs. Finally, when enacting these laws, states need to be particularly sensitive to privacy concerns related to the sharing of any confidential information.

2. *Intrastate* Cooperation

Not only is interstate cooperation critical, states need to work internally through their various public agencies to maintain their voter rolls, particularly with DMVs, public assistance agencies, Departments of Health, tax authorities, public universities, and others. Various state agencies have accurate and reliable databases with records that can be shared to aid election officials in their list maintenance efforts. For example, by now, all states should be incorporating death records from their state vital statistics offices and felony convictions from state law enforcement agencies and courts into their list maintenance efforts. There are additional possibilities states should research including accessing State Treasury tax data and university records for records indicating former residents have moved to a new state. Similarly, registration officials and government agencies at the local level should cooperate in sharing data that may be helpful for list maintenance purposes.

DMVs in particular have an accurate database of state residents whose legal presence in the United States should be verified under federal Real ID requirements.[21] As is done in the ERIC program, state election officials and DMVs should cooperate to compare their lists to identify potential errors and remove non-citizens from the voter rolls. State DMVs should also share information with election officials such as lists of individuals who surrender their license when moving out of state. States need to amend their laws to mandate the exchange of information when DMVs or other state agencies refuse to cooperate voluntarily.

There is another practical advantage to cooperation between state agencies. Interagency data-sharing would help states identify individuals who were casualties of DMV and other state agencies' noncompliance with National Voter Registration Act (NVRA) requirements to offer registration services to agency customers. State agencies often fail to transmit applications from individuals attempting to register to vote when visiting a DMV or other state agency designated under NVRA. These individuals quite reasonably believe that the proper election official will receive and process their registration application. However, we know that often the application never gets delivered to the proper authority for processing either through bureaucratic incompetence or problems with the postal service. Comparing registration and DMV data is essential to maintaining an accurate voter list and ensuring all of those eligible who properly submitted applications through other state agencies are registered to vote.

3. Vital Records

States should make efforts to access state vital records for list maintenance purposes, particularly death and birth records. Similar to ERIC and Crosscheck, states are now beginning to share vital records data under programs such as the Electronic Verification of Vital Events (EVVE) and the State and Territorial Exchange of Vital Events (STEVE), databases which give state officials electronic access to individuals' birth certificates, and other vital records, including death records. State election officials should closely evaluate these programs to determine their potential utility in voter registration list maintenance.[22]

4. SAVE Database

States should utilize the Department of Homeland Security's (DHS) Systematic Alien Verification for Entitlements (SAVE) Database to ensure only citizens are able to register and

remain on the voter rolls. In addition, even though many groups have complained about the use of the database for list maintenance, SAVE is actually a valuable tool to double-check records that may have been mistakenly marked with non-citizen status by another data source such as by DMV. DHS should also stop stonewalling states' efforts to obtain access to the database.

5. Public-Private Partnerships

States should consider utilizing data from private entities that have credible and accurate data identifying inaccurate and outdated addresses and other information. While states should use extra care when using these private data sources, experiences in places such as Orange County, California utilizing commercial data from Experian to update voters' addresses have yielded promising results.[23]

6. Compliance With and Upgrades to HAVA-Mandated Registration Databases

Some states' failure to meet deadlines to comply with HAVA's bare minimum requirements for a "single, uniform, official, centralized, interactive computerized statewide voter registration list" is inexcusable. Even now, one decade after HAVA was implemented, California's statewide registration database is not HAVA compliant. California needs to invest the necessary resources, including spending its remaining federal HAVA grant dollars to comply with this requirement to ensure it has a voter registration database that helps protect the integrity of the state's electoral process.

The other 49 states that have technically complied with the HAVA database requirements should work to make upgrades to their databases. Many of these systems were launched several years ago and it is likely that many are in need of upgrades or replacement to modernize their functions, including enhancements that can better identify and notify election officials of duplicate voter registrations and provide metrics on possible voter registration activity anomalies within the state. Many state's first generation systems developed following HAVA enactment were inadequate to the task even if they technically complied with the federal requirements. States should continue to invest in their database technology to improve functionality and integration of the various list maintenance programs and data-sources such as DMV records into the system. Related, states should take steps to protect their statewide databases from hackers and cyber-security threats.

7. Use of Bar Code Scanners with Electronic Poll Books

This issue is discussed more thoroughly below but one often overlooked problem is inaccurate voter history data and its impact on voter registration list maintenance activities. States should utilize bar code scanners with their electronic poll books to more accurately check in voters. This will ensure that voter history data, an important source of data for voter registration list maintenance, is more accurate.

C. Integration with Department of Motor Vehicles Registration Processes

RNLA strongly agrees with the PCEA recommendation that "[s]tates should seamlessly integrate voter data acquired through DMV with their statewide voter registration lists." Doing so, would allow a registration application completed at a DMV to be electronically transmitted to the appropriate registration official. The PCEA summarizes the various problems with lawful, eligible voters who properly submit registration applications at DMVs and who quite reasonably assume that their registration application will be processed by the appropriate registration official. However, as statistics and studies indicate, many of these applications never make it to the appropriate election official for processing. Various studies have been published analyzing the extent of the problem so an exhaustive recounting of many states' continued failures to comply with basic National Voter Registration Act (NVRA) requirements is unnecessary. It is worth noting, however, one egregious example to illustrate the extent of the problem. In 2011, the *Baltimore Sun* found that almost 25% of those applying to register to vote at Maryland's Motor Vehicle Administration staff offices were not registered.[24]

This disrupts the conduct of the election because these applicants then arrive at the polls on Election Day and are rightfully upset that their names do not appear as registered voters on the poll books. While some states have adopted safeguards to audit whether an individual did or did not submit a registration application at DMV, in many instances it is simply impossible to determine what went wrong. PCEA smartly holds out Delaware as an example for having voters complete an application electronically at DMV for wireless and near instant transmission to the appropriate election official for processing. Provided these processes follow Delaware's model of obtaining an applicant's digitized or electronic signature on a signature pad or tablet, RNLA strongly encourages states adopt this model. States should use technology and adopt business practices that ensures DMV obtains as high-quality and accurate digital signatures for voter registration as possible. While developing an electronic system to transmit this information requires an upfront investment in the IT infrastructure, these costs will be more than offset by the savings in mailing the paper applications and in potential litigation costs.

D. Best Practices for Online Voter Registration

Although the RNLA supports the concept of allowing an individual to complete and submit a voter registration application online, in light of the recent major examples of consumer fraud through hacked credit card information and rising number of cyber-attacks on state and federal government databases, there remains lingering concern regarding the susceptibility of an online registration system to fraud. Just as serious examples of consumer fraud lead to mistrust among the American public, electronic fraud in the voter registration process could similarly undermine confidence in the electoral system. While online voter registration can improve the quality of the voter rolls, save states money, make registration more convenient, and better prevent registration fraud, there are also risks.

Accordingly, while the RNLA Task Force supports online registration, the system used to undertake online registration must include certain safeguards to protect the integrity of the electoral system. It is imperative that states take steps to design a system that positively determines the identity of online applicants, ensures only eligible voters can utilize such a system, protects against cyber-attacks, leaves the registration determination in the hands of the proper registration official, and ensures the transmission of a valid signature.

1. No Automated or Automatic Online Registration

Any online voter registration option should leave the registration determination in the hands of the local election authority instead of allowing for instantaneous or automated registration. States should design their online registration system so an individual can submit an application online and an appropriate registration official can later review the application and determine eligibility before acceptance. In most states, local voter registrars or clerks are responsible for registration determinations and online voter registration should be designed such that the registration determination is left in the hands of local officials who know their voters and any potential idiosyncrasies in their election jurisdiction. In sum, online voter registration should not be synonymous with instantaneous or automated registration.

2. System Tethered to DMV or Other Official State Database

It is imperative that any online voter registration system be tied to an official state database such as the DMV to properly establish an applicant's identity prior to acceptance. States that have successfully implemented online registration have designed the system so that an individual applying online must provide information such as a Driver's License number, date of birth, social security number information, other unique personal identifying information that is matched and verified electronically against state's DMV records. The registration and DMV databases communicate with each other and ultimately inform the registration official that the applicant provided information on the application that matches information in the DMV database. Online applications should only be an option for those that can provide such matching information. It is possible other official state databases could provide such a credential, but DMV is most ideal due to its large and relatively accurate database that requires customers prove identity and provide evidence so DMV can determine lawful presence in the U.S. Voters without a DMV or other official state credential can utilize the traditional paper and mail process.

3. Necessity of a Signature

Third, the system should be set up to ensure a digitized signature is transmitted to the local registration official with the online application. Most states have set up a system where the DMV can electronically transmit the applicant's digitized signature in its file to the local registration official allowing that signature to serve as the voter's official signature for voting. It is important for local election officials to have a voter's digitized signature on file, especially in states that utilize signature matching in absentee voting, petition verification, and for other purposes. It is also important that a signature be on file in the event of any potential fraud. Finally, states should adopt the procedures outlined in the Uniform Electronic Transactions Act (UETA) for the completion of a signature during electronic transactions.

4. Adequate Safeguards to Prevent Cyber Attacks

Finally, states need to work to prevent piracy and hacking of the online voter registration portal. States need to consult with their appropriate information technology authority responsible for ensuring the integrity of state data and systems' processes and that monitors attacks on state

computer systems to develop these safeguards. Online registration systems must comply with industry standards for security. States need to maintain security measures for the transmission and storage of the information and actively monitor for cyber-attacks on the online registration system. States should leverage public-private partnerships when possible to obtain additional cyber-security expertise.

V. Improved Polling Place Management

The RNLA Task force generally agrees with the PCEA's recommendations to improve management of polling places, better train election officials, and place a higher priority on recruitment efforts for local poll workers to ensure access to the vote for all registered and qualified voters. This section of the PCEA Report provides straightforward concepts that local election jurisdictions can implement relatively easily, cheaply, non-controversially and without legislation.

For example, the recommendation that jurisdictions adopt best practices for polling place location and design is a common sense step for adoption throughout the country. Improved training and professionalism for poll workers and better traffic management in polling places are relatively simple solutions that will have immediate and dramatic results in many jurisdictions. RNLA also welcomes PCEA's suggestion for states to implement the use of electronic poll books as it speeds up the check-in of voters at the polling place thereby decreasing lines and increasing the security of the check-in process. RNLA also strongly recommends states pair bar code scanners with the electronic poll books. Finally, RNLA urges that authorities responsible for drawing precinct boundaries take appropriate action to ensure precincts do not grow to have too many registered voters and to avoid co-locating multiple precincts in one physical location when possible.

A. Polling Place Design and Election Day Preparations

Given the naturally transient existence of polling places that are set-up and torn down for use only a few days each year, there does not appear to be a uniform consistency of design to ensure logical line flow, signage, and poll worker locations. As the PCEA Report notes, many businesses—like theme parks—have mastered the art of moving large groups of people through lines in the most efficient manner. Election workers can mimic some of those techniques by evaluating space use and developing a floor plan that anticipates the flow of lines from check-in to ballot distribution to voting booth. Such an analysis naturally will also ensure proper ingress and egress for disabled voters and those voters requiring additional assistance.

Recognizing that different jurisdictions have varying facilities at their disposal for use as polling locations, it is not appropriate that policymakers mandate the use of any particular type of building. Rather, a consistent and uniform design formula should be provided that states and jurisdictions therein can adopt for polling places that may include township halls, schools, community centers, fire stations, etc.

B. Management of Voter Flow

1. Line Walkers and Greeters

The Commission's discussion regarding the efficacy of "line walkers" is a noteworthy commonsense improvement that would be relatively easy to implement in the short term. Particularly in larger voting locations that house multiple precincts, a continuous source of frustration and delay for voters is the failure to properly identify their correct precinct. A constant complaint from voters is that they waited an hour in line only to be told when they reach the check-in location that they are in line for the wrong precinct. Line walkers, coupled with adequate signage at the polling location, would alleviate such unnecessary delays by ensuring voters select the correct precinct upon arrival at the polls.

Line walkers or greeters can also expedite the process by determining in advance which voters may need to vote provisionally and, in certain jurisdictions, which voters may need to complete an affidavit due to some issue in the voter's record or in lieu of possessing a valid photo or other valid form of identification. To the extent line walkers can provide voters the affidavit to review before reaching the check-in table, valuable minutes can be saved by explaining the affidavit while the voter waits in line. The line walkers can also communicate the necessary information regarding what type of identification the voter is required to display when reaching the check-in table.

A technological component would be to provide line-walkers with electronic tablets with the roster of registered voters to help voters verify the correct polling location and precinct. Finally, greeters can also hand out official sample ballots and/or the text of ballot referendums, proposed constitutional amendments, and other more technical ballot items that may delay a voter in the voting booth and slow down the voting in the particular precinct. To make a line walker program work, individuals will need adequate training and oversight to ensure the integrity of the voting process. If line walkers (or any other election workers) appear partisan or biased, they could do more harm than good. That being said, line walkers also would serve as a first line of defense for those seeking to cause chaos, delay, or fraud on Election Day. They could help deter unlawful campaigning at polling locations and ensure voters receive accurate information.

2. Electronic Poll Books and Bar Code/Magnetic Stripe Scanners

RNLA strongly agrees with the PCEA's recommendations that states transition from paper to electronic poll books. Electronic poll books speed up the check-in process because election workers can search a field by typing in the voter's name rather than flipping through hundreds of paper pages. They also result in a more accurate roster of those who have checked in and voted at the polling place. The ability to, in real time, accurately identify those voters checking-in, including those who have already voted, will help to combat fraud and abuse.

The PCEA report outlined the many benefits of electronic poll books comprehensively but we feel it is important to specifically also recommend states use identification card bar code scanners to pair with their electronic poll books. Most state DMVs and some other government agencies already utilize bar codes or magnetic stripes on government issued identification.

Electronic poll books can be paired with bar code/magnetic stripe scanners to further expedite the check-in process by allowing poll workers to simply scan an identification card when a voter appears at the check-in table. Utilizing this relatively cheap technology to help automate the check-in process will simplify and speed the processing of voters and prevent errors in official voter history records. In addition, scannable bar codes can be included on paper identification cards that officials can provide to voters easily and free of charge. This scanning process would be similar to that used by the Transportation Security Administration for air travel.

The use of bar code scanners ensures nearly a 100% chance that the right individual gets marked off as having voted on the poll book. When manually checking in voters, poll workers frequently mark off the wrong voter on the poll book. For example, a poll worker may mistakenly mark off John Doe, Sr., when John Doe, Jr. comes to vote. These errors can then later lead to several problems, including delays and confusion when the voter who was earlier mistakenly marked as having voted appears to vote and the poll book shows the individual as having voted. Oftentimes these impacted voters will need to complete additional paperwork or even vote a provisional vote.

Additionally, these check-in errors can also result in more systemic problems in the voter registration process, particularly impacting list maintenance efforts. The data from the poll books become an individual's official voter history that serves multiple purposes, including its use in voter registration list maintenance processes mandated by federal law. The National Voter Registration Act (NVRA) requires officials to remove a voter after they have reliable information that the voter has moved outside of a registration jurisdiction, failed to a respond to a subsequent mailing, and then does not vote at least once over a period of two consecutive federal elections.[25] Consequently, errors in voter history data often result in voters mistakenly remaining on the rolls if a poll worker checked in another voter under their name. Conversely, election officials may erroneously remove a voter from the rolls if a voter was not marked as having voted because a poll worker failed to accurately mark the poll book. This is a relatively common problem, particularly for individuals who vote less frequently, and are more likely to be inaccurately identified as having moved residences. Similar problems result when voters who voted but are not given credit may remain on the rolls but with inactive status. Voters that may have been mistakenly moved to inactive status or removed will then create problems for poll workers if they show up to vote and are not on the pollbook or are listed with inactive status.

Inaccurate voter history data could make prosecution for potential voter fraud more difficult since the reliability of that record as evidence could be called into doubt, particularly when there is no other evidence that indicates the voter did actually vote. This is particularly applicable to instances of potential double-voting if a voter who has moved away from a state is mistakenly marked as having voted by a poll worker. In sum, pairing electronic poll books with bar code scanners can improve the speed and accuracy of the check-in process, prevent confusion, improve states' list maintenance processes, and aid in the prosecution of potential voter fraud.

Finally, one promising idea that some states have considered is enhancing electronic poll books by adding the display of photographs to the registered voter's record. This would be done through interfacing with state DMV databases so voters' state identification photos can be displayed along with their name and other identifying information.[26] This system would allow a

poll worker to display a voter's photograph on the poll book along with their other identifying information when checking in the voter, verifying that the voter is the same person in the image provided by DMV. This idea would be particularly helpful to states that do not have a Photo ID requirement. This technology should be piloted by states to gauge its effectiveness in accurately ensuring the identity of voters and providing for a more accurate check-in process.

3. Use of Online Tools

Another technology-based solution recommended by PCEA is the use of online tools to assist voters before getting to the polling place. Existing social media and other online resources can be used by election officials to inform voters regarding location and directions to proper polling places, estimated wait times at each precinct, and suggested return times for shorter waits. States can also take advantage of public-private partnerships such as Google's Voting Information Project (VIP) to leverage inexpensive or free offerings to implement these solutions. Much of this information can be anticipated in advance of Election Day—for example when a jurisdiction has a particularly lengthy ballot—and election officials can advise voters in advance regarding optimal voting times with regard to crowd levels.

In developing programs to equip local election officials to determine crowd levels and better allocate resources on Election Day, there are significant opportunities to learn from corporate America. Theme parks, hospital, grocery store and restaurant industries have worked for years to master the art of wait line optimization and would be great partners in translating those efficiencies to the polling place.

Providing sample ballots to voters that can easily be reviewed and printed on computers, tablets, and smartphones will help voters familiarize themselves with ballots before Election Day in order to expedite the voting process upon arrival at the polling locations

4. Better Recruitment and Training of Poll Workers

The RNLA Task Force agrees with the premise that effective polling place management requires well-trained personnel, with the recognition that such personnel will only undertake this job a few days each year. Election officials can also utilize technology to bolster training efforts. By their nature, election workers work a maximum of only a few days per year, so a refresher is helpful in reminding election workers regarding processes, procedures, and changes to the law. Online training sessions and video training can be used to compliment in-person training and mock voting demonstrations to ensure election workers are comfortable with their duties and the tools and technology in use on Election Day. Poll workers should be incentivized to receive extra training with additional compensation and official professional certifications for those who seek out and receive supplemental training.

Although recruiting from the private sector has significant advantages and should be pursued, recruiting high school and college students raises concerns regarding their reliability and less likelihood that they would work more than a few elections. College students are also less likely to be residents and registered to vote where they attend school. The Commission Report's concerns regarding the large number of retirees currently serving as poll workers is reasonable

and understandable; however, those individuals tend to be one of the most reliable groups in participating in long, stressful election days, most giving of their free time, and years of valuable experience administering elections. The RNLA Task Force urges prudence in evaluating whether to replace retiree volunteers with, teenagers and recommends that targeted recruitment efforts be done so with the aim of complementing or supplementing those most experienced in running elections at the precinct level.

To reach potential new poll workers, states and local election jurisdictions should engage in public-private partnerships and contact local major employers' community outreach liaisons for potential volunteers. Many corporations are receptive to public-private partnerships and are increasingly sensitive to their responsibilities as corporate citizens. Corporations and local election officials teaming together for a day of volunteerism for employees to work as poll workers is a natural fit. In addition, outreach efforts should be made to faith-based organizations, community groups like Rotary, and state and local employees who may be willing to serve on Election Day.

Another potential tool to ensure rapid voter flow without allowing voting fraud is to continue to allow properly credentialed poll monitors full access to the election process. A system must exist for poll monitors to observe the voting process and to raise issues of concern where they exist. Furthermore, such monitors must have a clear line of appeal in the event poorly trained or unknowledgeable election workers do not properly understand or apply election law. The rules for such poll monitors must be clear and uniformly applied for all political parties and, although election officials generally are partisan, every effort must be made to ensure no bias or partisanship shapes their decisions.

C. Addressing the Needs of Particular Communities of Voters

The RNLA Task Force agrees that establishing community advisory groups for voters with disabilities and those with limited English proficiency will help to ensure those voters are considered at all stages of the voting process. Advisory groups can serve as a conduit between those groups and election officials within the jurisdiction to help election officials better understand the needs of a particular group or issue.

As part of each jurisdiction's polling place identification and design, election officials must endeavor to provide physical access to each polling place, including not only the building, but parking lots and parking spaces and ensure compliance with state and federal accessibility laws. Additionally, as with training for other election-related functions, technology also should be utilized to train election officials and workers in assisting voters with disabilities. This is another area in which election officials may be able to partner with outside organizations—such as those representing voters with disabilities—to prepare online videos and other training mediums that help election workers understand how best to work with voters.

D. Additional Recommendations: Reduce Precinct Size and Avoid Co-Located Polling Places

A large contributor to many of the reported long lines on Election Day 2012 was that many precincts simply had too many registered voters. Too many voters in a precinct can be both a direct cause of lines and an aggravating factor when a polling place has other deeper-seeded issues such as an insufficient amount of voting equipment, not enough poll workers, mismanagement, or has an inaccurate voter list. Election jurisdictions need to pay careful attention to the size of their precincts to prevent them from reaching an unmanageable size. In addition, local election jurisdictions should be careful when housing multiple precincts in one geographic location since it has the same effect of confusing voters and drawing several thousand voters to vote in one particular place, thus increasing the chances for congestion.

The local decision-makers who determine precinct size, typically a local governing body such as city council or county board of commissioners or supervisors, need to work with their local election officials to closely monitor increases in the number of registered voters in precincts and population shifts within a county. Local officials need to make changes when precincts become too large or unbalanced across a jurisdiction. It is clear from the 2012 election that many local governments either failed to recognize this problem or just ignored the warning signs and refused to act. Notwithstanding the relief that purportedly accompanies early voting, there will still be problems in oversized precincts. Even with a substantial amount of early or absentee voting taking place before Election Day, a good percentage of the population will still choose to vote on Election Day so officials need to plan carefully.

Florida's Miami-Dade County is perhaps the best example where jumbo-sized precincts significantly contributed to long lines. Amazingly, Miami-Dade has not engaged in any significant re-precincting since 2002.[27] The lack of action resulted in approximately 25 polling places swelling to at least 4,803 registered voters by Election Day 2012 with one topping out at 8,745 voters.[28] Of the six polling places that had voters voting after midnight on Election Day 2012, all but one had over 5,000 registered voters. These six polling places averaged 6,199 voters per precinct, an extraordinarily high number of voters. While other problems contributing to the lines in these precincts, including insufficient staffing and voting equipment, the correlation between the large number of voters per polling place and lines is unmistakable. Miami-Dade's Election Department noted voter distribution among precincts several times in its After-Action Report as a contributing factor to problems. Even after the 2012 election debacle, Miami-Dade still refuses to enact meaningful re-precincting out of fear of voter's being confused by polling place changes. Miami-Dade's continued refusal to re-precinct and its negative impact on the county's elections spurred Ken Detzner, Florida's Secretary of State, to recently travel to Miami and plead with its County Commissioners to re-precinct at the earliest possible time.[29]

The same problem played itself out in different parts of the county, including in Northern Virginia outside of Washington, DC, where many of the precincts with the longest lines had too many voters. In Prince William and Fairfax Counties, many precincts had long lines, and like Miami-Dade, those counties had experienced growth and population shifts over the previous decade. In a bipartisan report issued by Prince William County analyzing the long wait times in many of its precincts, the commission found "there was a high correlation between large precincts and number of citizens voting after 7:00 p.m.," the time polls close in Virginia.[30] The Prince William County commission recommended subdividing precincts with more than 4,000 registered voters into smaller precincts in order to avoid the long lines/waits suffered by citizens

in 2012" and to work "to anticipate the opening of new housing developments and apartment complexes with the precinct[s]" which may result in precincts growing too large.[31] In Fairfax County, two precincts that had extremely long lines were near the statutory maximum for number of voters assigned to precinct.[32] Finally, a recent audit report in Virginia Beach analyzing lines in city precincts in the 2012 election made similar conclusions that large precinct size contributed to long lines in many of its precincts. In Virginia Beach, "[o]ut of the 25 larger precincts, 21 had closing times between 2 hours to 5 hours after poll close."[33]

A related contributor to polling place problems, particularly lines, is the co-location of multiple precincts at one polling place or facility. While this is a popular trend, RNLA cautions against stacking too many voters into one physical location which may have the practical effect of creating one giant, unmanageable precinct on Election Day. Many of the problem areas in Miami-Dade, Fairfax County, and other places that had the unfortunate distinction of showing up on national television with long-lines in 2012 were in co-located polling places. In response to problems at many of these co-located polling places, Fairfax County's after-action report recommended that "co-located precincts should be avoided" but recognizing that it is sometimes impractical or impossible to avoid them, recommended best practices to mitigate the risk of problems.

RNLA does not formally oppose co-location of precincts in all instances; however, we believe that they should be avoided whenever possible in favor of unique physical polling places for each precinct. This approach does divert somewhat from PCEA's recommendation that states establish vote centers to consolidate precincts into vote centers when possible. However, we believe that the lessons learned from those places with the very longest lines point to the need for smaller precincts, not larger, super-sized ones. When officials cannot avoid co-located or very large precincts, then RNLA adopts the Fairfax County recommendations that officials take the following steps to mitigate problems:

- Co-located precincts should be adequately staffed so that a person can be located outside voting rooms to direct voters to the correct room and/or correct line. Pages could be especially useful in co-located precincts, but if pages are not available, then a poll worker should be assigned to work outside if possible;
- Precinct maps must be posted outside each room so that voters can determine which room is their polling place;
- Signage should be improved to assist voters in finding the correct room; and
- Aggressive advertising for how voters can find or confirm their precinct and polling place after they are already inside the building, such as a "mobile app" that allows voters access to their voter information from their mobile devices.[34]

A common theme among precincts with long lines and other problems is their large number of registered voters and their co-location with other precincts. While not all precincts with lines are too large, nor do all precincts with a large number of voters have lines, there is a greater probability for problems and election officials have a smaller margin for error if other problems exist. States and local election districts need to closely monitor population shifts and growth within their counties, especially leading up to high-turnout elections and ensure that there is a proper balance of voters in their precincts. When precincts do grow too large and re-precincting

is not possible, then decision-makers need to devote extra resources, including experienced poll workers, more voting booths, and voting equipment to handle the larger volume of voters.

VI. Early Voting: An Expensive Non-Solution to Lines

In its final report, the PCEA came out strongly in favor of expanding opportunities for pre-Election Day voting (no excuse absentee voting, early voting, etc.). The Commission believes that early voting, in all its forms, is "here to stay." While that may be true, it is not a compelling policy reason why other states should adopt it. The RNLA Task Force disagrees that early voting will have a positive impact on our electoral system or make the voting experience better for voters, and we respectfully disagree with the PCEA's conclusions on early voting. If early voting actually accomplished the goals that its proponents so stridently claim, then perhaps RNLA could be persuaded to agree with PCEA's recommendations. However, we cannot recommend its further adoption when weighing its high costs against whatever convenience it may incur for voters. Instead, RNLA argues that states should focus on improving absentee voting for voters that require it for reasons other than convenience and devote resources that would go to early voting to adopt best practices for polling place and resource allocation management.

A. Not a Line Problem-Solver

Early voting is not a solution to long lines. There are states with early voting that had precincts with exceptionally long lines (Florida for example) and there are those without no-excuse or early voting that did not have lines (Alabama, Mississippi, others, particularly in the Northeast). Similarly, some areas with a high percentage of absentee voters still had long lines and some areas with low numbers of absentee voters regardless of the law, had few problems on Election Day. Supporters of early voting would argue that the more people voting before Election Day means fewer voters showing up on Election Day and consequently less people on site to cause lines. Perhaps in theory but observations from the 2012 General Election do not back that up. In Virginia, many of the precincts with long lines, particularly in Northern Virginia, had above average absentee voting rates, with over 20% of voters casting their ballots before Election Day. One precinct in Arlington County had over 30% of their votes cast by absentee ballot in advance of election day, one of the highest rates in the state, and yet still had voters waiting up to two hours in line.[35] In Miami-Dade County there were extraordinarily long lines even after several days of early voting. If early voting was so successful at preventing long lines then why do we still have problems in so many places that have adopted it or where such a high percentage of voters vote before Election Day?

In reality, most of the problems with lines can be attributed to systematic registration problems, failure to properly plan for Election Day, a lack of resources, and in many cases, too many voters assigned to a particular precinct. In addition to adopting the other best practices recommended by the PCEA, the most efficient way to ensure less gridlock is to reduce precinct sizes, thereby guaranteeing less people voting at a precinct on Election Day. As discussed above in the recommendation to reduce precinct size to a manageable level, many of the precincts with some of the worst lines in the country had far too many voters, particularly in Miami-Dade County.

If nothing else, the post-mortem of the 2012 General Election revealed the need to focus on the basics of Election Day administration. As the PCEA pointed out repeatedly, the long-lines were typically a result of management problems which can be solved with proper planning and resource allocation and upgrades to our voter registration system. Anything that distracts from the main focus of absentee voting for those who need it, the close of registration books, and the monumental task of preparing for Election Day is simply that, a distraction. Local election officials have finite resources and are already stressed to the breaking point with juggling poll worker training, press inquiries, programming and testing voting equipment, and the other planning that needs to take place on the eve of an election. Being required to administer a robust early voting program is simply going to draw resources and attention away from those preparations.

The fact is that many voters still want to or find it more convenient to vote on Election Day so crowds are not going away. Accordingly, election officials need to be ready for whatever turnout Election Day may bring. Relying on early voting to disguise what are typically management and resource allocation problems is unwise. Policymakers who implement the recommended early voting as a cure-all should not be surprised when the same Election Day problems continue to occur, resulting in lines and gridlock at the polling place. Instead states should invest their resources on Election Day and should closely review the recommendations by the PCEA, this report, and other best practices publications for resources on how to avoid lines.

B. Early Voting is Expensive

In the section of its report on early voting, the PCEA spends little time discussing the increased costs certain forms of early voting have on state and local governments. According to the PCEA Report, the average early voting state allows for 19 days of early voting before Election Day. While early voting states differ on how many hours and on what days to offer early voting, early voting is requiring election administrators to incur the costs of running multiple Election Days with officials at the local level typically bearing the brunt of the expenses.

We need only take a quick look around the country to see what early voting is doing to the budgets of state and local governments. In the deep blue state of Maryland, voters approved a constitutional amendment in 2008 to establish early voting, with implementation for the 2010 elections. For that first round of early voting in 2010, Maryland taxpayers paid an additional $2.6 million for their elections. The cost for 2012 was expected to be similar.[36] Miami-Dade County has estimated that each early voting site costs an estimated $20,000 per day.[37]

Another deep blue state, New York, has been another battleground between supporters and opponents of early voting, and most of the bipartisan opposition to early voting is focused on the additional costs county governments would incur if early voting were implemented by the state legislature. In one county alone, early voting was estimated to cost taxpayers an additional $1.5 million per election.[38] At a recent meeting of the Election Commissioners Association, a bipartisan group of county elections commissioners passed a resolution in opposition to Assembly Speaker Sheldon Silver's early voting bill.[39] This came after the state's nonpartisan Association of Counties came out against the same proposal because of the increased costs on

county governments.[40] Other states' nonpartisan Municipal Leagues and Associations of Counties have regularly opposed early voting legislation due to the high expenses incurred by local election jurisdictions.[41]

RNLA supports greater state and local funding for elections. Imagine the good these millions of dollars going to fund early voting could have on voter registration upgrades, purchases of new voting equipment, and other upgrades to the electoral system? Whatever policy decisions states make on early voting, RNLA agrees with the PCEA Report recommends that any expansion of early voting opportunities not take place at the expense of running the election on Election Day.

C. Does Not Increase Turnout

While it's easy to see the downsides to early voting, it's awfully difficult to see the benefits. Early voting advocates frequently claim that early voting makes voting easier and because voting is easier, more voters will turn out to vote. In 2008, a University of Wisconsin-Madison study found that early voting does not increase voter turnout. In fact, the study concluded that early voting actually decreases voter turnout.[42] Additionally, a 2003 study conducted by three professors from Reed College found that voter turnout increased at an insignificant level because of early voting.[43] With these effects on voter turnout, is early voting really worth the additional costs imposed on state governments, local governments, and most importantly, taxpayers?

D. Primary Beneficiaries: Campaign Consultants

There is another player in the political world that incurs additional expenses because of early voting – the campaigns. Without early voting, campaigns know exactly when the vast majority of voters will be casting their votes. This allows campaigns to spend their advertising and get out the vote resources in the most effective possible manner. If, however, voters can cast their ballots on any one of the, say, 19 days before Election Day, campaigns can only guess when a voter might vote. This leads to longer and costlier campaigns, more negative advertising, and more annoying phone calls to voters. Most Americans dread the onslaught of late-October political advertisements. Early voting will force Americans to see and hear more of these ads. While political consultants may savor the extra days of campaigning, American voters do not.

And early voting does not just increase campaigns' costs. It also makes it more difficult for smaller and underdog campaigns to obtain the volunteers necessary to do all the last minute campaign work that is traditionally done on or just before Election Day. When Election Day is every day for two weeks, it's not easy to find volunteers who will devote that much time to a campaign. The big, well-funded campaigns might not be adversely affected by early voting, but the ragtag, long-shot campaigns will suffer. Many Americans are cynical about the non-stop, expensive campaigns that make it exceptionally difficult for candidates that do not have the financial resources to compete in a month-long election. We should be wary about promoting a system of voting that gives better funded campaigns an additional leg up.

E. Convenience vs. Citizenship

Voting should be about more than convenience; voting is about citizenship. By turning Election Day into Election Month through early voting, we are cheapening the voting experience and cheapening citizenship. As George Will wrote, "it is not admirable to scatter to private spaces, and over many weeks, the supreme act of collective public choice. The coming of the public into public places for the peaceful allocation of public power should be an exhilarating episode in our civic liturgy."[44]

Part of the voting process requires a voter to educate himself or herself on the issues facing the community, state or country. When a voter in an early voting state casts his or her ballot weeks before Election Day, they're putting convenience over thoughtful deliberation. While this also happens with voters who vote on Election Day, we should not be encouraging it in our country.

There are few shared civic experiences left in America. Election Day – the act of casting a ballot alongside your family, friends, and neighbors after having taken a good look at all the candidates running for office is really one of the few common civic experiences left. Early voting destroys that civic experience and turns voting into just one more chore we all must do.

F. Focus on Those Who Need to Vote Absentee

To be clear: there is a difference between necessity and convenience. For many Americans, it is simply impossible to cast a ballot at their polling place on Election Day. Members of the Armed Forces, overseas voters, the disabled, college students, and those who travel for work frequently find it difficult or impossible to cast a ballot on Election Day. We need to accommodate the needs of these individuals through absentee voting. Instead of creating a complex and costly early voting system for voters just looking for convenience, election administrators and other policymakers need to work to make sure that the Americans who *need* to vote on Election Day are able to exercise their right to vote. While the data on early voting points to few positives, we do know that significant systematic problems exist in our absentee voting by mail procedures for those who actually need it. We should invest our energies in improving the system for these voters.

The Task Force applauds efforts like the MOVE Act, the SENTRI Act, and other recent steps taken to enable the members of the US military to cast votes while away from their homes, abroad, or in combat, and we strongly urge public officials at all levels of government to do anything possible to enable these brave Americans to exercise their rights.

In short, this Task Force strongly disagrees with the PCEA's determination that early voting is a positive change to the American electoral system. We strongly urge legislators and other policymakers to oppose any efforts to implement or expand early voting.

VII. Continued Need to Improve Military Voting Efforts

The RNLA Task Force appreciates PCEA addressing the continued obstacles to our military and overseas citizens (also known as "UOCAVA voters" after the federal Uniformed and Overseas Citizens Absentee Voting Act) to voting and generally agrees with PCEA's recommendations to better serve these voters. While the U.S. has made significant strides in recent years, helped in part by the enactment of the 2009 Move Act, more can be done. First, RNLA agrees with the PCEA's recommendations that states and election jurisdictions should "provide a targeted website" for UOCAVA voters and generally do a better job explaining the registration and absentee voting process and providing materials online. Related, states need to leverage the internet to allow UOCAVA voters to change their registration address electronically to maintain accurate and up to date registration records for our UOCAVA voters. DOJ needs to ensure compliance with our federal overseas and military voting laws, including by suing non-compliant jurisdictions when needed.

The PCEA report outlined statistics regarding states' shortfalls in providing quality online materials to UOCAVA voters. As the data shows many states are simply not providing adequate information and materials online. Accordingly, states and local election jurisdictions need to make this issue a higher priority. States need to display relevant overseas voting information prominently on their websites, explain the procedures in as simple terms as possible, and timely update information and dates when required.

The average overseas military voter may not know what a Federal Postcard Application (FPCA) and Federal Write-In Absentee Ballot (FWAB) are nor are they likely to have memorized the applicable deadlines for voter registration and absentee voting in their state. States need to convey this information online clearly and simply so that voters do not give up because they perceive the process to be too complex. States also need to make very clear that UOCAVA voters can request the delivery of their ballots via email. Moreover, state and local websites should also prominently display contact information for a staff member to provide assistance who is trained and knowledgeable on overseas voting. Many of our military and overseas voters have complex and unique scenarios that may require one-on-one problem solving from a state or local official. If states need assistance communicating this content effectively then they should work with the Federal Voting Assistance Program (FVAP), Military Voter Protection Project, state National Guards, and other organizations with expertise in communicating these issues and who are committed to improving overseas voting.

Related, UOCAVA voters would greatly benefit from the ability to update their registration information electronically. Virginia State Board of Elections Secretary Don Palmer in testifying before Congress on the proposed Safeguarding Elections for our Nation's Troops through Reforms and Improvements Act (SENTRI), noted, "[t]he members of the Department of Defense (DOD) are a highly mobile population of voters and because of this mobility, inaccurate addresses and information lead to significant delays in ballots reaching the military or result in undeliverable ballots where the ballots never reach the voter."[45] There are fewer more transient voters than those in our military and mailing in paper change of address requests is simply not feasible or efficient for those who may need to change their registration and/or mailing address on a regular basis and without much warning. Making registration changes easier for our UOCAVA voters will also mitigate a potential security risk. Absentee ballots are sent automatically for subsequent elections to certain voters who apply to vote absentee through an

FPCA. Some states will send ballots for all following elections over a certain period of time, often for an entire federal election cycle. If voters are unable to update their registration information then these ballots are more likely to be mailed to places where the voter no longer resides, thus creating the potential for mischief in addition to the more obvious problem of the voter not receiving his or her ballot.

Some of the good recommendations from the PCEA report and others are included in the proposed SENTRI Act, currently before Congress. The RNLA Task Force endorses some concepts included in SENTRI Act.[46] SENTRI proposes improvements to overseas and military voting, particularly for voter registration, an overlooked issue for our military and overseas voters. Among SENTRI's highlights is a repeal of the hardship waiver provided for in the 2009 MOVE Act which allows states to request an exemption from the Department of Defense (DOD) from the 45-day pre-election absentee ballot mailing deadline for federal elections. Currently, states granted a waiver get de facto permission to disenfranchise their UOCAVA voters since ballots mailed overseas after the 45th day run a high risk of not being returned in time to be counted. While some states enacted laws to require their local jurisdictions to count ballots mailed to voters late and returned after the deadline, the MOVE Act did not require it. SENTRI also requires states to send any ballots not mailed by the 45-day deadline via express delivery, something the MOVE Act recommended but did not require. SENTRI addresses some of the same issues outlined in the PCEA report for the need to improve registration and voting opportunities through online systems making it easier for our military voters to update their voting information electronically.

SENTRI begins to tackle some of the confusing components of the absentee voting process, particularly the lack of uniformity for the use of certain absentee and registration application forms. The PCEA points out voters and election officials' confusion resulting from different state standards for the use of FPCAs and FWABs. The PCEA highlights these specific problems and they do not need to be explained again in depth in this report, but we agree that confusion regarding issues is an impediment to overseas voting. For example, uncertainty regarding the effective duration of an FPCA and whether registration through an FPCA results in permanent or temporary registration creates an unnecessarily complex voting regimen for our UOCAVA voters, those who would benefit most from a straightforward and simple process. SENTRI takes aim at one of the areas of confusion by providing a uniform one federal election cycle timeframe for the duration of an FPCA. While different and confusing state standards in other areas remain, the uniform FPCA duration is an excellent start and will ensure that ballots will be mailed to UOCAVA voter applying via an FPCA for an entire federal election cycle.

Additionally, the Department of Justice needs to remain vigilant in enforcing federal laws pertaining to military voting. Even in 2013, four years after passage of the MOVE Act, some state and local election officials have still not come into compliance, evidenced by three enforcement actions DOJ took in 2013. When states fail to get their ballots sent by the 45th day before an election, DOJ needs to move swiftly to enforce compliance.

In sum, states' adoption of PCEA's recommendations, embracing some of the concepts included in the SENTRI Act, and vigorous Department of Justice enforcement of existing federal

military and overseas voting laws should help to build on the improvements made in recent years for our overseas and military voters.

VIII. Voting Equipment and Technology

A. Overview

As a fundamental principle, RNLA believes that there is no technology need, application or implementation which requires a federal role in the development, purchase or use of voting systems. RNLA believes that the attempted development by EAC of the HAVA Voluntary Voting System Guidelines Standards (VVSG Standards) and certification and testing standards failed, proving that top-down federal management of voting technology through attempted issuance of technology standards is not only contrary to our system of federalism and decentralized form of voting in America, but also counterproductive. Rather, RNLA believes voting technologies and all relevant standards should be developed and implemented like any other technology product in the competitive American economy. Necessary performance standards should be developed by using the voluntary consensus standards approach used throughout manufacturing. Congress should continue to fund and make available services of the National Institute of Standards and Technology (NIST) to assist election administrators and manufacturers as a convening and research organization. However, development of performance standards and related testing and certification procedures can best be achieved by experienced consensus standards organizations, such as American National Standards Institute (ANSI) and the Institute of Electrical and Electronic Engineers (IEEE), or by professional organizations such as the National Association of State Election Directors (NASED), National Association of Secretaries of State (NASS) and the International Association of Clerks, Recorders Election Officials and Treasurers (IACREOT). RNLA believes state and local jurisdictions should adopt testing and certification requirements based on voluntary consensus standards they prefer, and be left to finance and purchase voting systems of their choice based on their state laws without any federal regulation or intervention. Finally, RNLA believes the EAC, if continued as a federal agency, should no longer have authority or funding to engage in voting system development.

B. The EAC Obstructed Innovation

As a result of the 2000 *Bush v. Gore* recount, election authorities experienced a dramatic increase of interest on the part of voters and local oversight bodies in obtaining more usable and secure voting systems. If the federal government had simply left matters in the hands of local governments and election technology manufacturers, the market would have rationally responded to this demand with rapid development and availability of new, updated technologies. Unfortunately, certain requirements in HAVA in combination with the inability of EAC Commissioners to timely and competently perform their statutory duties severely deformed the marketplace – and obstructed the normal market incentives for private enterprise to innovate.

HAVA required the distribution of significant federal funding to local election authorities and required that it be used to purchase and deploy new voting systems by a date certain. The

product inventory of election technology manufacturers at that time was in most cases better than currently deployed systems. However, such immediately available products did not always include capabilities demanded in the post-recount environment. For instance, Direct Record Electronic (DRE) systems typically did not include the capability to print paper receipts to document individual votes. The intent of Congress in passing HAVA was to have the EAC develop new technical standards in time so that new voting systems purchased with the Federal funding would have cutting-edge security, auditability, and usability features.

C. HAVA Funds Were Spent on Obsolete Technology

That did not happen. The appointment of EAC Commissioners and employment of their staff members were delayed. Once appointed, rather than asking Congress for an extension, the EAC Commissioners insisted on distributing the federal funding to local election authorities even though the new technical standards had not yet been developed. This caused state and local authorities to purchase the then-best available late-1990s technology, which was often nearly out-of-date at the time it was acquired. So a principal technology development failure was that HAVA funds were effectively required to be spent *prior* to the development of new standards – the voting systems purchased only partly addressed technical problems identified during the *Bush v. Gore* recount. Election authorities are often under-funded, and only occasionally are able to obtain funding to update their voting systems. As a result, many voting systems acquired with HAVA funding were nearly-obsolete, and many are still in use today.

D. The EAC is Incapable of Developing Standards

Election technology manufacturers benefitted financially from the HAVA-funded explosion of equipment purchasing, and were consequently in a better financial position to develop their next generation of voting systems. But, the manufacturers were effectively prevented from doing so by a dysfunctional EAC – whose Commissioners were unable and unwilling to do the technical and policy work needed to issue technical standards.

The EAC's efforts to develop updated equipment standards went forward. NIST received funding from Congress, and its personnel convened principal manufacturing and user stakeholders. NIST also formed a Federal Advisory Committee known as the Technical Guidelines Development Committee (TGDC) comprised of private citizens of national-class expertise in the areas of security, usability, technical performance, and other relevant subjects. The TGDC members and professional technology and standards professionals from NIST developed a series of VVSG proposals (VVSG 2005, VVSG 2007) for consideration by the EAC Commissioners.[47] But instead of responding quickly to the proposed VVSG standards, EAC commissioners chose to over-emphasize other aspects of their duties, became mired in partisan and personal rivalries, and consequently slowed – and eventually halted – most aspects of research, standards development, and certification and testing. Attempted interference by individual EAC commissioners with the conduct and conclusions of NIST research, and their willingness to divert technology research funding to unrelated uses ultimately caused Congressional appropriators to provide the relevant research funding directly to NIST. The EAC

displayed bewilderment and incompetence in its attempted consideration and processing of NIST-developed and TGDC-recommended VVSG Standards. Despite some good showings by individual commissioners, the EAC was never able to establish what local election authorities and the manufacturing industry needed – a clear set of updated performance standards that could enable a manufacturer to confidently invest funds in the development of testable voting systems a local election authority would want to purchase.

E. The EAC Should Be Removed from the Standards Process

The attempt by the EAC to develop and mandate technology standards for voting systems is an example of when federal over-regulation and administrative agency dysfunction has nearly ruined an industry. Prior to enactment of HAVA, the election technology manufacturing industry in the United States was relatively healthy. Companies sold hardware and software products in a competitive marketplace. Major technology companies, such as financial industry technology titan Diebold, engaged in the business. Sales to election authorities were certainly challenging as a result of election authorities having either overly-conservative views toward new technologies, or lack of sufficient funding to purchase new systems. But, the industry was clearly positioned to provide necessary innovation and product in response to market demands.

The ability of manufacturers to raise capital funds to invest in research of new election technology innovations was consequently deformed, because there was no assurance that resulting innovations could be tested against updated standards. The EAC's standards were formally labeled "voluntary". This was a misnomer, because manufacturers and local election authorities regarded them as mandatory. No local authority was willing to purchase a system lacking certification to the updated standards mandated by HAVA and, as promised by the EAC. No manufacturer was willing to invest sufficient funds to develop entirely new product lines without the guidance of the promised standards. The PCEA gets this right: it truly was a regulatory "netherworld" created by a dysfunctional EAC.

Since this regulatory meltdown occurred, frustrated and disbelieving state and local authorities have had no choice other than to purchase what is available in this deformed market. Manufacturers have had to reverse-engineer their innovation activities by using some updated Federal Election Commission equipment standards (originally adopted in the 1980's), and the few VVSG Standards adopted by the EAC. An example of a typical enhancement is add-on paper receipt-printing devices. But generally, election equipment manufacturers have no choice other than to sell the outdated technology they have available, because the EAC failure has disrupted the normal innovation incentives.

RNLA agrees with PCEA observations that the standards development, testing and certification process is broken and needs to be fixed. However, we believe that there is no role for EAC, and Congress should terminate all of its related statutory responsibilities in this area. We recommend that the leaders of Congress take all necessary steps to prevent continued EAC activities in this area. Further, we believe that no federally-appointed political panel should again engage in a voting system standards setting process. The dysfunction of federal control of the process is likely to lead to continued partisanship and incompetence.

F. States Should Use Voluntary Consensus Standards

In sum, RNLA believes voting technologies and all relevant standards should be developed and implemented like any other technology product in the competitive American economy. Necessary performance standards should be developed by using the voluntary consensus standards approach used throughout manufacturing coupled with states' adopting their own certification standards to fit their particular needs. Congress should continue to fund and make available services of NIST to assist election administrators and manufacturers as a convening and research organization, consensus standards development organizations, and testing laboratories. However, development of performance standards and related testing and certification procedures can best be achieved by experienced consensus standards organizations, such as ANSI and IEEE, or by professional organizations such as NASED, NASS, and IACREOT.

IX. Conclusion

The RNLA is pleased that there appears to be in many areas a bipartisan consensus on how we can improve our nation's elections to ensure a pleasant voting experience for our voters while protecting the integrity of the ballot. The PCEA report and recommendations demonstrate the substantial amount of common ground on these issues. RNLA hopes that Democrats and their allies on the left can embrace some of the common-sense proposals, specifically enhanced voter registration list maintenance through interstate data sharing, as the bipartisan PCEA so heartily endorses. The goal by both political parties should be development of a system of voter registration and voting which assuages the competing concerns of access and integrity so each side of the political spectrum feels its respective concerns in that regard are met.

Moreover, we are wary about programs that essentially waive the white flag of surrender on efforts to improve the traditional approach of voter registration coupled with voting at the local polling place on Election Day. We believe that proposals like universal registration, election or same day voter registration, and the increased emphasis on early voting and vote by mail send the message that we should scrap rather than fix a system that has served our nation exceptionally well for most of our history. With a few exceptions, particularly regarding early voting, PCEA outlines the necessary steps that election officials and policymakers can take to reform and improve our electoral system. The additional recommendations in this report will further help election officials and decision-makers in this process.

Endnotes

[1] E.O. 13644 of May 21st, 2013; 78 FR 31813; available at: https://federalregister.gov/a/2013-12650.

[2] The 2001 report by The National Commission on Federal Election Reform, "To Assure Pride and Confidence in the Electoral Process" is available here: http://web1.millercenter.org/commissions/comm_2001.pdf; the 2005 report "Building Confidence in U.S. Elections" is available here: http://www1.american.edu/ia/cfer/

[3] To Assure Pride and Confidence in the Electoral Process, pg. 22.

[4] Ibid at pg. 23.

[5] Building Confidence in U.S. Elections, pg. 1

[6] "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration", Introduction. The PCEA report, released in January 2014, is available here: http://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

[7] *Arizona v. Intertribal Council of Arizona*; 133 S.Ct. 2247 (2013).

[8] *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997).

[9] Ibid.

[10] DOJ's failure to properly enforce HAVA is documented by author and former DOJ whistleblower J. Christian Adams in his 2011 expose, *Injustice: Exposing the Racial Agenda of the Obama Justice Department* Adams, Christian. Injustice: Exposing the Racial Agenda of the Obama Justice Department Washington, D.C.: Regnery Publishing.

[11] 42 USC § 15483(a), (d)(1)

[12] HAVA section 303(a), as mandated by HAVA section 401 (42 USC § 15511).

[13] NASS Position on Funding and Authorization of the U.S. Election Assistance Commission, Adopted on February 6, 2005; available at: http://www.nass.org/component/docman/?task=doc_download&gid=906&Itemid

[14] Interstate Voter Registration Crosscheck Program, Presentation by Kansas State Election Director Brad Bryant to Nastional Association of State Election Directors, January 26, 2013; available at: http://www.empowerthevotetx.org/uploads/KANSAS.pdf

[15] Not all states permit the sharing of social security number (SSN) information in the voter record, including last four SSN. Federal Privacy Act restrictions further limit states' use of SSN information for voter registration purposes.

[16] Annual Report on Voter Registration List Maintenance Activities, Report to the House and Senate Committees on Privileges and Elections, Virginia State Board of Elections, January 6, 2014; available at: http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD442014/$file/RD44.pdf

[17] Inaccurate, Costly, and Inefficient, Evidence That America's Voter Registration System Needs an Upgrade; Pew Center on the States, February, 2014; available at: http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Upgrading_Voter_Registration.pdf

[18] New York City Department of Investigation Report on the New York City Board of Elections' Employment Practices, Operations, and Election Administration, December, 2013; available at: http://www.nyc.gov/html/doi/downloads/pdf/2013/dec%2013/BOE%20Unit%20Report12-30-2013.pdf

[19] "Arizona makes example out of few caught voting twice," *USA Today*, Deceber 30, 2012, available at: http://www.usatoday.com/story/news/politics/2012/12/30/arizona-nabs-double-voters/1799581/

[20] "Congressional candidate charged with illegal voting," *The Baltimore Sun*, December 20, 2012, available at: http://articles.baltimoresun.com/2012-12-20/news/bs-md-wendy-rosen-charged-20121220_1_congressional-candidate-general-election-voter-fraud

[21] States are in varying degrees of compliance with federal Real ID requirements.

[22] Additional information regarding EVVE is available at the National Association for Public Health Statistics and Information Systems (NAPHSIS) website here: http://www.naphsis.org/Pages/EVVE.aspx; additional information regarding STEVE is also available at NAPHSIS here: http://www.naphsis.org/Pages/CooperativeAgreementforStateVitalStatisticsImprovement.aspx

[23] Orange County Registrar of Voters report on Voter Registration Accuracy and Voter List Maintenance; 2012, available at: http://www.ocvote.com/election-library/docs/2012%20Voter%20List%20Maintenance.pdf

[24] "Nearly 25 percent of MVA voter registrations fail," *The Baltimore Sun*, February 20, 2011, available at: http://articles.baltimoresun.com/2011-02-20/news/bs-md-voter-registration-20110220_1_voter-rolls-new-voters-motor-voter-act

[25] 42 U.S. Code § 1973gg–6; States typically use information from the United States Postal Service (USPS) National Change of Address database, election mail returned undeliverable from USPS to election officials, and other reliable sources of data to initiate the process described above.

[26] Photographs on electronic poll books have been proposed by both Democrats and Republicans. Democrat Secretaries of State in Minnesota and Nevada have advocated for the idea and Republican State Senator Mark Obenshain sponsored legislation that would have implemented the idea in Virginia. 2013 SB1072 (Obenshain).

[27] "Florida's chief elections official to Miami-Dade County: Draw new voting precincts now," *The Miami Herald Blog*, February 19, 2014, available at: http://miamiherald.typepad.com/nakedpolitics/2014/02/floridas-chief-elections-official-to-miami-dade-county-draw-new-voting-precincts-now.html

[28] Mayor's Election Advisory Group – Final Report, Miami-Dade County, February 15, 2013; available at: http://www.miamidade.gov/mayor-memo/Mayor's_Election_Advisory_Group%20-%20Final_Report.pdf; pg. 63.

[29] Florida's chief elections official to Miami-Dade County: Draw new voting precincts now," *The Miami Herald Blog*.

[30] Report of the Bi-Partisan Election Task Force to the Prince William County Board of Supervisors, adopted May 22, 2013; available at: http://www.pwcgov.org/government/bocs/Documents/Signed%20Final%20Recommendation%20Report.pdf; pg. 7.

[31] Ibid. pg. 8.

[32] On Election Day 2012, Fairfax County's Skyline Precinct had a total of approximately 5,370 registered voters. Fox Mill Precinct had 4,932 registered voters. Registration statistics are available at www.SBE.Virginia.gov. An Election Day report from *The Washington Post* noted that the addition of a fifth piece of voting equipment in the Skyline precinct "had little effect" on the long lines. Article available at: http://www.washingtonpost.com/local/dc-

politics/washington-area-polling-places-inundated-by-crush-of-voters/2012/11/06/a0110700-27d7-11e2-b2a0-ae18d6159439_story.html.

[33] Audit of Voter Registrar's Office, Office of the Virginia Beach City, February 27, 2014, available at: http://www.vbgov.com/government/departments/city-auditors-office/Documents/Audit%20of%20Voter%20Registrar%27s%20Office.pdf

[34] Final Report of the Bipartisan Election Process Improvement Commission, Presented to the Board of Supervisors on Tuesday, March 19, 2013; available at: http://www.fairfaxcounty.gov/electioncommission/election-commission-report.htm

[35] Wait time reported by *The Washington Post,* November, 6, 2014; available at: http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/06/interviews-with-swing-state-voters-a-virginia-polling-station-at-lunch-time/

[36] "Early voting costs counties $2.6M, but hasn't increased turnout yet," *MarylandReporter.com*, September 10, 2012; available at: http://marylandreporter.com/2012/09/10/early-voting-costs-counties-2-6m-but-hasnt-increased-turnout-yet/

[37] Mayor's Election Advisory Group – Final Report, web link above; pg. 47.

[38] "Day Opposes Costs of Early Voting," *Rockland Times*, April 25, 2013; available at: http://www.rocklandtimes.com/2013/04/25/day-opposes-expensive-costs-of-early-voting/

[39] "NYGOP Applauds Election Commissioners Association," available at: http://nygop.org/page/nygop-applauds-election-commissioners-association

[40] 2013 Legislative Conference Resolutions; NYSAC; available at: http://www.nysac.org/legislative-action/NYSAC-IntergovAffairs-Res3-Feb2013.php

[41] New Jersey League of Municipalities Legislative Update, March 27, 2013; available at: http://www.njslom.org/leg-bulletins/2013-0327-leg-update.html

[42] Burden, B. C., Canon, D. T., Mayer, K. R. and Moynihan, D. P. (2014), Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform. American Journal of Political Science, 58: 95–109. doi: 10.1111/ajps.12063; available at: http://www.pewtrusts.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/MVW/UWisconsin.PDF

[43] "Early Voting and Turnout," Paul Gronke, Eva Galanes-Rosenbaum, Peter A. Miller, October 2003; Journal: PS: Political Science & Politics; available at: http://www.apsanet.org/imgtest/PSOct07Gronke_etal.PDF

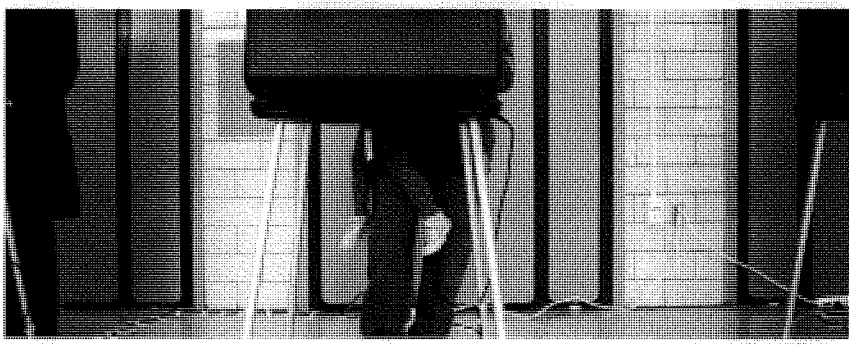
[44] "Farewell, Election Day," George F. Will, *Newsweek*, available at: http://www.newsweek.com/george-f-will-farewell-election-day-88705.

[45] "Improving the Registration, Absentee Request and Voting Process for the UOCAVA Voter." Testimony on the Record by Don Palmer, Secretary, State Board of Elections, U.S. Senate Committee on Rules and Administration January 29, 2014; available here: http://www.rules.senate.gov/public/?a=Files.Serve&File_id=bcc45672-7b96-4df0-a7b8-3c38c25c2f55

[46] A link to the SENTRI Act is available here: http://www.gpo.gov/fdsys/pkg/BILLS-113s1728is/pdf/BILLS-113s1728is.pdf

[47] 2005 Voluntary Voting System Guidelines and 2007 Voluntary Voting System Guidelines; available at http://www.eac.gov/testing_and_certification/.

A brief from THE PEW CHARITABLE TRUSTS April 2014



The Elections Performance Index 2012

The State of Election Administration and Prospects for the Future

Overview

In 2013, The Pew Charitable Trusts unveiled the Elections Performance Index, or EPI, the first comprehensive assessment of election administration in all 50 states and the District of Columbia. The release introduced the index's 17 indicators of performance and summarized 2008 and 2010 data, giving users a way to evaluate states' elections performance side by side.

Pew's new edition of the index adds analysis of the 2012 election and provides the first opportunity to compare a state's performance across similar elections—the 2008 and 2012 presidential contests—as well as with other states, regions, and the nation as a whole. This expanded analysis reveals key features of state elections and presents a rich picture of the U.S. democratic process that will be enhanced as new data are added each year.

Overall, states did better in 2012 than they did in 2008. Although voters turned out at a lower rate in 2012, fewer of those who did not vote said they were deterred from the polls by illness, disability, or problems with registration or absentee ballots. And more states offered voters the option to register online, which may have contributed to some of this improvement.

The 2012 analysis begins to clarify what it takes to be a leading state, which will help others improve in the coming years. These and other results are discussed in-depth in the pages that follow, but the key findings, briefly, are:

- **Elections performance improved overall.** Nationally, the overall average improved 4.4 percentage points in 2012 compared with 2008 the scores of 21 states and the district improved at a rate greater than the national

average; 19 states' averages improved but by less than the national average increase; and 10 states' averages declined.

- **High-performing states tended to remain high-performing and vice versa.** Most of the highest-performing states in 2012—those in the top 25 percent—were also among the highest performers in 2008 and 2010. The same was true for the lowest-performing states in all three years. In looking at these two groups, a picture begins to emerge of the distinctions between high and low performers.
- **Gains were seen in most indicators.** Of the 17 indicators, overall national performance improved on 12, including a decrease in the average wait times to vote and an increase in the number of states allowing online voter registration. In addition, the index revealed some stark regional differences across indicators. For example, the South had the lowest voter turnout and highest rate of nonvoting due to disability, as well as states with the highest average voting wait time.

These findings also reveal the steps that states can take to improve their scores and make elections more cost effective and efficient, including:

- Ensuring the collection of more and better elections data.
- Implementing online voter registration.
- Upgrading voter registration systems.
- Offering a complete set of online voting information lookup tools.
- Requiring postelection audits.

Nearly all of these steps were also recently recommended by the bipartisan Presidential Commission on Election Administration.[1]

What Is the Elections Performance Index?

The Elections Performance Index is intended to help policymakers, election administrators, and other citizens:

- Evaluate elections based on data, not anecdote.
- Compare the performance of elections across states and time.
- Identify potential problem areas that need to be addressed.
- Measure the impact of changes in policy or practice.
- Highlight trends that otherwise might not be identified.
- Use data to demonstrate to state and local policymakers the need for resources.
- Educate voters about election administration by providing context about how the process works.

Pew partnered with the Massachusetts Institute of Technology to bring together an advisory group of state and local election officials and academics from the country's top institutions to guide development of the index. The advisory group held a series of meetings beginning in July 2010 to select the best ideas from indices in other public policy areas, identify and validate existing data sources, and determine the most useful ways to group available data.

The EPI tracks 17 distinct indicators of elections performance, selected from more than 40 prospective measures, based on their completeness, consistency, reliability, and validity.[2] For more information on how the indicators were selected and computed, or additional analysis of their meaning, please see the online interactive report at www.pewstates.org/epi-interactive or the report's methodology at www.pewstates.org/epi-methodology. The 17 indicators are:

1. **Data completeness.** How many jurisdictions reported statistics on the 18 core survey items in the U.S. Election Assistance Commission's Election Administration and Voting Survey?
2. **Disability- or illness-related voting problems.** What percentage of voters did not cast a ballot due to an "illness or disability (own or family's)"?
3. **Mail ballots rejected.** What percentage of mail ballots were not counted out of all ballots cast?
4. **Mail ballots unreturned.** What percentage of mail ballots sent out by the state were not returned?
5. **Military and overseas ballots rejected.** What percentage of military and overseas ballots returned by voters were not counted?
6. **Military and overseas ballots unreturned.** What percentage of military and overseas ballots sent out by the state were not returned?
7. **Online registration availability.** Were voters allowed to submit new registration applications online?
8. **Postelection audit required.** Was a voting equipment performance check required after each election?
9. **Provisional ballots cast.** What percentage of all voters had to cast a provisional ballot on Election Day?
10. **Provisional ballots rejected.** What percentage of provisional ballots were not counted out of all ballots cast?
11. **Registration or absentee ballot problems.** How many people reported not casting a ballot because of "registration problems," including not receiving an absentee ballot or not being registered in the appropriate location?
12. **Registrations rejected.** What proportion of submitted registration applications were rejected for any reason?
13. **Residual vote rate.** What percentage of the ballots cast contained an undervote (i.e., no vote) or an overvote (i.e., more than one candidate marked in a single-winner race)—indicating either voting machine malfunction or voter confusion?
14. **Turnout.** What percentage of the voting-eligible population cast ballots?
15. **Voter registration rate.** What percentage of the voting-eligible population was registered to vote?
16. **Voting information lookup tools.** Did the state offer basic, easy-to-find, online tools so voters could look up their registration status, find their polling place, get specific ballot information, track absentee ballots, and check the status of provisional ballots?
17. **Voting wait time.** How long, on average, did voters wait to cast their ballots?

Overall elections performance improved

The addition of 2012 data to the Elections Performance Index makes it possible for the first time to compare a state's performance over time and against other states. In general, state election administration improved between 2008 and 2012. This was true for the performance of individual states compared with prior years and nationwide on many indicators.

Nationally, states' overall scores, which are calculated as an average of all 17 indicators, increased 4.4 percentage points on average in 2012, compared with 2008.

States

Forty states and the District of Columbia improved their overall scores, compared with 2008:

- 21 states and the district raised their performance more than the national average increase.
- 19 improved but less than the average increase nationally.

The 21 states and the district that improved more than the national average vary widely in size and region; they cover the political spectrum from deep blue to battleground to solid red.

The district's overall score improved the most—by 20 points—from 2008 to 2012. Although the city's EPI average is still below the national average, the district made major strides across multiple indicators. The district and Alabama were the only jurisdictions to improve more than 9 points above the mean increase since 2008. Both were in the bottom 25 percent in 2008 and remained among the lowest performers in 2012.

While the national trend was clearly upward, not all the news was good. Ten states' overall scores declined.

Georgia had the sharpest decrease, dropping 7 points from 2008 to 2012. The state's voter turnout fell by more than the national decrease, and it had one of the largest increases in nonvoting due to disability or illness. The state's rate of nonvoting due to registration and absentee ballot problems also increased, and Georgia did not add online voter registration or postelection audits, which many other states have implemented since 2008. The state did pass online voter registration legislation, but it has not been implemented. Lastly, it was one of only 10 to report less data to the federal Election Assistance Commission as measured by the index in 2012 than in 2008.

After Georgia, the states with the largest decreases in overall average since 2008 were Hawaii and Vermont.

High-performing states stay strong; low performers remain near the bottom

One of the most important facts emerging from the index is that certain states consistently perform at a high level on elections, and others are chronic underperformers. Over time, better data and a clearer understanding of the characteristics of these two groups will help all states identify the problems that most commonly hinder improvement and recognize truly effective election administration.

High performers continue to lead the way

At the state level, the highest-performing states in 2012—those in the top 25 percent—were Colorado, Connecticut, Delaware, Maryland, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Washington, and Wisconsin. Seven of these—Colorado, Delaware, Michigan, Minnesota, North Dakota, Washington, and Wisconsin—were also high performers in 2008 and 2010, and six states—Colorado,

Connecticut, Maryland, Montana, Nevada, and North Carolina—saw their overall scores rise more than the national average increase from 2008 to 2012.

North Dakota, Minnesota, and Wisconsin had the highest rankings for both presidential election years. This consistently strong performance could be due, in part, to their voter registration policies. Minnesota and Wisconsin allow Election Day registration, and North Dakota doesn't require voters to register. Previous research shows these policies can correlate with higher turnout, and in most cases it eliminates the need for provisional ballots.[3] Turnout was highest in Minnesota and Wisconsin in 2012; both exceeded 70 percent of the eligible population.[4]

Registration Policies Improve Elections Performance

States that offer more convenient and efficient ways for voters to register and update their registrations can avoid many common issues, such as registrations rejected, use of provisional ballots, and nonvoting due to registrations problems.

Seven of the 10 states with the lowest rates of registration or absentee ballot problems in 2012—Idaho, Iowa, Maine, Minnesota, New Hampshire, North Dakota, and Wisconsin—allowed Election Day registration or did not require voter registration. Maine, Minnesota, and Wisconsin had the lowest rates of these problems, 1 percent.

Additionally, states that adopt online voter registration can increase the accuracy of their rolls while also reducing costs to election officials and taxpayers.[5] States using the latest technology to conduct data matching of voter registration lists, such as those participating in the Electronic Registration Information Center, or ERIC, have reduced the number of provisional ballots cast and rejected, as well as the proportion of the population that fails to vote due to a registration problem.[6] The Presidential Commission on Election Administration recommends both online voter registration and participation in ERIC. For more information, visit ericstates.org.

Low performers still face challenges

Eleven states—Alabama, Arkansas, California, Hawaii, Idaho, Kansas, Mississippi, New York, Oklahoma, Texas, and West Virginia—and the District of Columbia were in the lowest 25 percent of the index in 2012. Six of these—Alabama, California, Mississippi, New York, Oklahoma, and West Virginia—were also ranked at the bottom in 2008 and 2010. Mississippi was the lowest performer in all three years. Of those at the bottom in 2012, only the overall averages of Hawaii, Oklahoma, and Texas decreased since 2008.

Importantly, because overall averages are calculated based on the performance of other states, sometimes even dramatic improvement or decline within a state will not be reflected in its ranking relative to other states. As noted earlier, this is evident in the case of the District of Columbia. The district improved the most in 2012 compared with its performance in 2008, but it still fell into the group of low performers because widespread improvement elsewhere also raised the national average significantly. This highlights the value of considering multiple points of comparison, made possible by the index: evaluating states against the national average; state against state; and a single state with itself year over year. The district gets high marks for improving on multiple indicators as compared with its 2008 performance; relative to the rest of the nation, however, it still has much room for improvement.

Whether a high performer, low performer, or somewhere in between, all states have the opportunity to do better in coming years. Learning more about those states that consistently outperform, and those that consistently struggle, can help all states improve.

Indicators

Individual indicators reveal critical information about what is driving better overall state performance, as well as what consistently holds states back.

The nationwide view

Nationally, 12 of the 17 indicators improved, with notable gains in six areas:

- **Wait times** decreased about 18 percent, or by about 3 minutes, on average, from 2008 to 2012.
- 13 states had **online voter registration** in 2012, compared with just two in 2008.
- 18 states and the district reported 100 percent **complete data** to the Election Assistance Commission in 2012, compared with only seven in 2008.
- Rates of **nonvoting due to disability or illness** declined nationally by nearly 0.5 percent; rates declined in 27 states and the district.
- Rates of **nonvoting due to registration or absentee ballot problems** decreased nationally by nearly 0.4 percent; rates declined in 28 states and the district.
- 30 states and the district required **postelection audits** in 2012, compared with 23 in 2008; audits allow states to ensure that voting equipment is functioning properly and delivering an accurate result.

Five indicators declined from 2008 to 2012. Of these, the most significant was voter turnout, which dropped by 3.4 percentage points. This was not surprising because voters in the 2012 election expressed less enthusiasm than in the 2008 presidential contest, which recorded the highest turnout since 1968.[7]

Additionally, the number of provisional ballots issued increased 25 percent in 2012, and the number of provisional ballots rejected increased 7 percent.

Performance varied by region

At least three indicators varied substantially by region:[8]

Nonvoting due to disability- or illness-related problems

The average rate for this indicator across both 2008 and 2012 in the Northeast was 17.7 percent and in the South was 19.0 percent, both significantly higher than rates in the Midwest, 14.4 percent, and the West, 12.4 percent.[9] Of the 10 jurisdictions with the highest rates in 2012, six—Alabama, the district, Mississippi, South Carolina, Virginia, and West Virginia—were in the South, and three—Massachusetts, New Jersey, and Rhode Island—were in the Northeast.

Turnout

Average turnout across both years was highest in the Midwest, 65.6 percent, and the Northeast, 64.5 percent, both significantly higher than the South's rate of 59.4 percent.[10] Two Midwestern states—Minnesota and

Wisconsin—had the highest turnout in both 2008 and 2012; but of the five states with the lowest turnout in 2012, four—Arkansas, Oklahoma, Texas, and West Virginia—were in the South.

Average voting wait times

Long lines at the polls in several states in 2012 made headlines, and as a result, wait times were understood by many voters to be a major problem nationwide. Data from the Survey of the Performance of American Elections, however, show that wait times actually decreased by about three minutes, on average, from 2008 to 2012.

Where longer wait times were recorded in both years, they generally were concentrated regionally. Of the 10 jurisdictions with the longest average waits to vote in 2012, eight were in the South—the District of Columbia, Florida, Georgia, Louisiana, Maryland, Oklahoma, South Carolina, and Virginia. And six of those also had some of the longest wait times in 2008, including:

- Florida, which had the longest wait in 2012 and one of the largest increases—16.1 minutes—from 2008 to 2012.
- South Carolina and Georgia had the two longest wait times in 2008. They also had the two largest decreases in wait times from 2008 to 2012—from 61.5 minutes to 25.2 minutes in South Carolina and from 37.6 to 17.8 minutes in Georgia. Both, however, still remained among the longest wait times in 2012.

Directions for future research

Evidence from the Elections Performance Index indicates that state policies on mail voting and provisional ballots may have cascading effects—affecting scores on other indicators of election administration. Unlike other election policies, such as those to upgrade voter registration practices where the benefits of reform have been documented, policies for mail voting and provisional ballots deserve more research and attention from policymakers as future elections provide additional years of data for analysis.

Mail ballots

Mail voting has been one of the most substantive policy shifts in elections over the past few decades. The index recognizes four classifications of mail-voting policies in states:

- **Limited.** Registered voters must provide a specific reason, often from a pre-established list (e.g., illness, disability, travel, etc.), when requesting an absentee ballot.
- **No excuse.** Any registered voter may request an absentee ballot without providing a reason.
- **Permanent.** No-excuse mail voting is permitted, and registered voters have the option of automatically receiving absentee ballots by mail for all future elections.
- **Full vote-by-mail.** Elections are conducted entirely by mail.

Research shows that voters like the convenience of casting their ballot by mail. This is especially true in states with fewer limitations on the use of mail ballots.[11] With respect to the index, only six states allowed individuals to cast a domestic ballot by mail without an excuse in 1988. By 2012, that number had grown to 27 states and the District of Columbia.[12] Mail-voting policies are related to performance on a number of indicators:

- On average, states with limited mail voting had higher rates of nonvoting due to disability or illness—18.6 percent in 2008 and 2012, compared with states offering no-excuse and permanent mail voting—14.3 percent and 14.7 percent, respectively.[13] This is reaffirmed in preliminary research, which suggests that, even though

disability is a valid reason for requesting a mail ballot in limited mail-voting states, more permissive regimes are associated with higher turnout among the disabled.[14]

- On average, mail ballot rejection rates in permanent mail-voting states were nearly double those of states with no-excuse mail voting and more than three times those of states with limited mail voting.[15]
- Permanent mail-voting states had much higher rates of mail ballots not being returned, on average: 14.3 percent in 2012, compared with 6.5 percent in limited states and 9.0 percent in no-excuse states.
- Permanent mail-voting states typically had higher rates of nonvoting due to registration or absentee ballot problems: 7.9 percent, compared with 5.9 percent in no-excuse and 5.8 percent in limited states.[16]

As there are apparent trade-offs with different types of mail-ballot regimes, additional research is needed to better understand the effects of mail-voting policies, particularly the high rates of unreturned and rejected absentee ballots in permanent and full vote-by-mail states, as well as the lower rates of nonvoting due to disability or illness in these states.

Provisional ballots

Provisional ballots are most often cast when there is a discrepancy between a voter's registration record and the information he or she presents at the polls. If the voter is deemed eligible in a later review, the ballot is counted. The EPI rewards states for low rates of provisional ballots cast and high rates of provisional ballots counted. This means that states that issue provisional ballots more frequently are penalized in the index, even if most are ultimately counted.

This judgment is based on recent research. Compared with standard ballots, provisional ballots are more costly, inefficient, and administratively burdensome. Large numbers of provisional ballots have also been cited as contributing to long lines at polling places. Testimony before the Presidential Commission on Election Administration indicated that laws resulting in large numbers of provisional ballots tended to slow the voting process at the polls.[17] These burdens can exacerbate controversy in close races, when provisional ballots often become the focal point for any challenged election or recount.[18] Consequently, provisional ballots—designed as a fail-safe to allow a voter, otherwise disenfranchised, to cast a ballot that could be counted after eligibility was confirmed—have been compared to canaries in the coal mine, because in large numbers they can indicate that an election system is not working efficiently.[19]

The use of provisional ballots varies dramatically. Future research should include systematic evaluation of state laws regarding the use and counting of provisional ballots. Policy choices by states can inform our understanding of provisional ballot use, and research on the cost and administrative burden of provisional ballots will help states weigh their options.

Recommendations

From 2008 to 2012, states' elections performance improved overall. For all states, but especially those with low scores or that were near the bottom in both years, strategies are available to spur improvement. These recommendations are not Pew's alone. Most were also included in the Presidential Commission on Election Administration's 2014 report.

- **Ensure that more and better elections data are collected.** Data completeness, specifically as reported to the federal Election Assistance Commission, is an indicator that offers a clear path toward improvement. Some

states have systems designed to effectively and accurately collect source data from local election jurisdictions, but many do not. Not only will the best use of technology improve data collection by and from local election jurisdictions, it will also lead to higher completeness rates and help provide necessary tools to states to more finely assess how well elections are run and how to improve the voting experience. As the Presidential Commission on Election Administration notes, "If the experience of individual voters is to improve, the availability and use of data by local jurisdictions must increase substantially."[20]

- **Implement online voter registration.** Offering voters the opportunity to register and update their information online provides measurable benefits to states and helps improve overall election administration. In particular, online voter registration saves taxpayer dollars, increases the accuracy of voter rolls, and provides convenience to voters.[21] And by giving voters a simple way to keep their records up-to-date after a move or name change, online registration may reduce voter registration problems and the need for provisional ballots.
- **Upgrade voter registration.** There are several ways to do this, including online voter registration. Additionally, eight states and the District of Columbia have joined the Electronic Registration Information Center, a data-sharing partnership that helps participating states to keep better track of voters who have moved or died and to encourage those who are eligible to vote but have not yet registered. This keeps voter information more up-to-date while helping eliminate some of the registration problems that may result in provisional ballots on Election Day.[22]
- **Offer a complete set of online voting information lookup tools.** More states offered a wider range of online voter information tools in 2012 than in 2008. In 2008, 11 states had none of these tools. In 2012, only two states, California and Vermont, did not furnish any of these tools. The more states provide such tools, the more access voters will have to election information where they look for it most—online—and the more problems, such as being at the wrong polling place and thus voting by provisional ballot, can be avoided.[23]
- **Require postelection audits.** Mandating a postelection audit allows states to ensure that voting equipment is functioning properly, correct procedures are being followed, and problems are identified quickly.

Conclusion

The Elections Performance Index provides the first opportunity for policymakers, election administrators, and the public to see how states performed in 2012 and to evaluate changes since the 2008 presidential election. Future iterations of the index will offer still more opportunities to compare similar elections—such as the 2010 and 2014 midterms—and to see the state of elections over a much longer time frame, from 2008 to 2016 and beyond.

As data improve, there will be additional uses for the index. When states change policy or administration, the index will be able to track the effect of those actions. Additionally, as we learn more about how elections run and how best to measure them, we expect to refine the index by adding, changing, or subtracting indicators to better reflect the characteristics of effective, efficient election administration.

"Future iterations of the index will offer still more opportunities to compare similar elections—such as the 2010 and 2014 midterms—and to see the state of elections over a much longer time frame, from 2008 to 2016 and beyond."

Endnotes

1 Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* (January 2014), https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

2 A state's overall EPI average is calculated from its performance on all 17 indicators, relative to all states. A state with an average of 100 percent would have the best value of any state on every indicator across both 2008 and 2012, and a state with an average of zero would have the worst value on every indicator across both years. Because these averages are based on the performance of all states in those years, even a state with a 100 percent average has room for improvement in future elections.

3 Stephen Knack, "Election Day Registration: The Second Wave" (1998), http://mpra.ub.uni-muenchen.de/25011/1/MPRA_paper_25011.pdf.

4 Although these Election Day registration states do well on the indicators we measure, high performance is not a universal feature of states with this policy. Idaho and Montana have Election Day registration and do not have higher overall averages in any of the years. Further, as discussed in the methodology (www.pewstates.org/epi-methodology), the index is not able to capture certain empirical evidence of the performance or implementation of Election Day registration that occurs in the polling place. Some have questioned how to measure the quality or integrity of the implementation of an Election Day-registration system, but the lack of comprehensively good data means that scores for this indicator may be inflated.

5 The Pew Charitable Trusts, "Understanding Online Voter Registration" (January 2014), http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/Understanding_Online_Voter_Registration.pdf.

6 Gary Bland and Barry C. Burden, "Electronic Registration Information Center (ERIC): Stage 1 Evaluation," report to The Pew Charitable Trusts by RTI International (Dec. 10, 2013), http://www.rti.org/pubs/eric_stage1report_pewfinal_12-3-13.pdf.

7 The drop in interest and enthusiasm among adults nationally was demonstrated in a number of polls before and after the 2012 election. Gallup found that the proportion of adults who were "more enthusiastic than usual about voting" decreased from 62 percent in 2008 to 47 percent in 2012. See http://www.gallup.com/poll/153038/gop-slightly-ahead-voting-enthusiasm.aspx.

8 The index uses the U.S. Census Bureau regional designations of Northeast, Midwest, South, and West. The Northeast includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The Midwest is made up of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. The South includes Alabama, Arkansas, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. The West is composed of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

9 In nonvoting due to disability or illness, the difference between the South and the Northeast, compared with the Midwest and the West, is statistically significant, $p<0.01$.

10 The difference in turnout between the Midwest and the Northeast, compared with the South, is statistically significant, $p<0.05$.

11 John Fortier, *Absentee and Early Voting: Trends, Promises, and Perils* (Washington: AEI Press, October 2006). The proportion of voters casting ballots by mail in 2012 almost tripled, to 20 percent, compared with 1980.

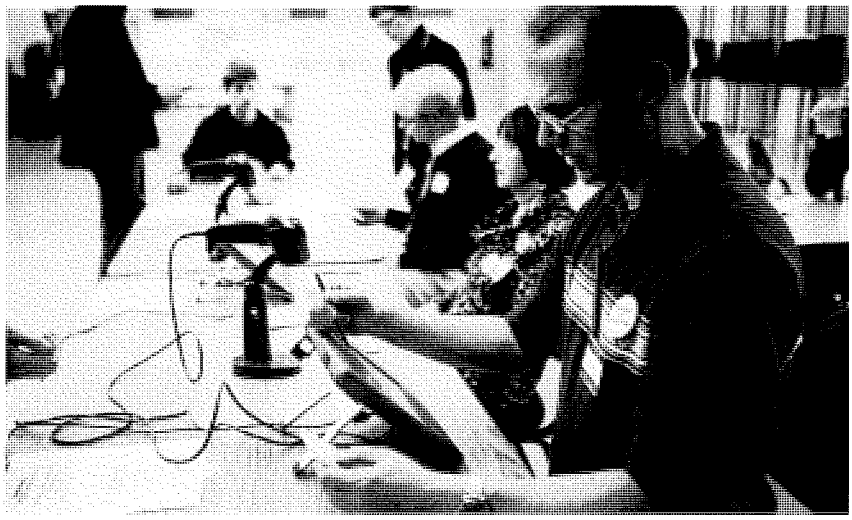
12 "Absentee and Early Voting," the National Conference of State Legislatures, http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

13 The difference between the average rate of nonvoting due to disability or illness for permanent states and for limited states and the difference between the average rate of nonvoting due to disability or illness for limited states and for no-excuse states is statistically significant at $p<0.01$.

14 Lisa Schur and Douglas Kruse, "Disability and Election Policies and Practices," in *The Measure of American Elections*, eds. Barry C. Burden and Charles Stewart III, forthcoming.

15 The difference between the average rejection rate for permanent states and for limited states and the difference between the average rejection rate for permanent states and for no-excuse states is statistically significant, $p<0.01$. It is unclear whether there is a difference between the rejection rates for limited and no-excuse states.

16 The difference between the average rate of nonvoting due to registration or absentee ballot problems for permanent states and for limited states and the difference between the average rate of nonvoting due to registration or absentee ballot problems for permanent states and for no-excuse states is statistically significant, $p<0.01$.



Election Day, Nov. 5, 2013, Tuckahoe Elementary School, Arlington, VA.

17 States that rely on provisional ballots as a mechanism for updating voter registration rolls may be less likely to seek out more cost-effective and efficient solutions to their administrative procedures. See Daron Shaw and Vincent Hutchings, "Report on Provisional Ballots and American Elections," submitted to the Presidential Commission on Election Administration (June 21, 2013), https://www.supportthevoter.gov/files/2013/08/Daron-Shaw-Provisional-Ballots-Shaw-and-Hutchings.pdf; Presidential Commission on Election Administration, *The American Voting Experience*; "Provisional Ballots General 2012," Maricopa County, AZ, Elections Department (Jan. 30, 2013), http://recorder.maricopa.gov/voteroutreach/pdf/english/1-2013%20General%202012%20Provisionals.pdf; Gregory J. Diaz, "Voting and Registering to Vote: The 2013 Report of the Nevada County Elections Office" (March 28, 2013), http://www.mynevadacounty.com/nc/elections/docs/The%202013%20Report%20of%20the%20Nevada%20County%20Elections%20Office.pdf; and "After-Action Report on the November 6, 2012, General and Special Elections," District of Columbia Board of Elections (Feb. 4, 2013), http://www.dcboee.org/popup.asp?url=/pdf_files/nr_1108.pdf.

18 States that issue large numbers of provisional ballots risk having an election outcome hinge on these ballots. See David C. Kimball and Edward B. Foley, "Unsuccessful Provisional Voting in the 2008 General Election" (http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/ProvBallots_Kimball_Foley_essay%281%29.pdf), in Martha Kropf and David C. Kimball, *Helping America Vote: The Limits of Election Reform* (New York, London: Routledge, 2012).

19 Heather Gerken and J. Skelly Wright, "Provisional Ballots: The Miner's Canary for Election Administration," research for The Pew Charitable Trusts (July 2009), http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/ProvBallots_Gerken_essay(1).pdf.

20 Presidential Commission on Election Administration, *The American Voting Experience*.

21 Matt Barreto, Bonnie Glaser, and Karin MacDonald, "Online Voter Registration (OLVR) Systems in Arizona and Washington: Evaluating Public Usage, Public Confidence, and Implementation Processes," a report for The Pew Charitable Trusts' center on the states (2010), http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/online_voter_reg.pdf; and Christopher Ponoroff, "Voter Registration in a Digital Age," Brennan Center for Justice (2010), http://brennan.3cdn.net/806ab5ea23fde7c261_n1m6b1s4z.pdf.

22 Bland and Burden, "Electronic Registration Information Center."

23 A September 2013 survey by Public Opinion Strategies and the Mellman Group on behalf of The Pew Charitable Trusts found that 58 percent of registered voters look for election information online. http://www.pewstates.org/research/analysis/polling-summary-updating-voter-registration-85899538627.

The Pew Charitable Trusts

Susan K. Urahn, executive vice president
Alexis Schuler, senior director

Election initiatives team

David Becker
Heather Creek
Maria Ho
Zachary Markovits
Sean Greene

Acknowledgments

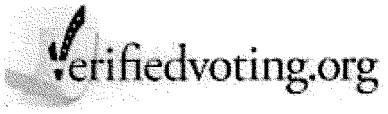
We would like to thank our advisory board of more than 20 election officials and academics who provided invaluable insight and feedback in developing the Elections Performance Index. Charles Stewart III, the Kenan Sahin distinguished professor of political science at the Massachusetts Institute of Technology, and his research assistant, Stephen Pettigrew, contributed unmatched guidance and research support for the project. Additional thanks go to Jennifer Carlson, Joshua Hart, Emily Lando, Melissa Maynard, Benjamin Navarro, Mary Tanner Noel, Kao Phetchareun, and Jacintha Wadlington for their review of this report and the online interactive. Throughout the editorial process, Jennifer V. Doctors provided critical advice and feedback. The team at Pitch Interactive Inc. designed the online interactive for this report, while printable graphics and design for this research were created by Kristin Centrella with assistance from Dan Benderly and Jennifer Peltak. Frederick Schecker and Natalia Pelayo contributed Web support. Stephanie Bosh and Tammie Smith provided strategic advice and production and media assistance on this product.

External reviewers

The project also benefited from the feedback and guidance offered by external reviewers David T. Canon, professor of political science at the University of Wisconsin, Madison; and David W. Nickerson, professor of political science at the University of Notre Dame. Although they provided constructive suggestions on the content, neither they nor their organizations necessarily endorse Pew's findings or conclusions.

Contact: Stephanie Bosh, officer, communications **Email:** sbosh@pewtrusts.org **Project website:** pewtrusts.org/elections

The Pew Charitable Trusts is driven by the power of knowledge to solve today's most challenging problems. Pew applies a rigorous, analytical approach to improve public policy, inform the public, and stimulate civic life.



The Honorable Charles Schumer, Chairman
United States Senate
Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510-6325

The Honorable Pat Roberts, Ranking Member
United States Senate
Committee on Rules and Administration
481 Russell Senate Office Building
Washington, DC 20510-6325

Re: Statement for the Record: Senate Rules Committee hearing, "Collection, Analysis, and Use of Data: A Measured Approach to Implementing Election Administration," May 14, 2014

Dear Chairman Schumer and Ranking Member Roberts,

I am Pamela Smith, the President of Verified Voting. Verified Voting is a non-partisan, non-profit organization founded and governed by leading technologists in the U.S. As the nation's foremost promoter of secure, reliable and accessible voting systems and election administration practices, Verified Voting strives to safeguard elections in the digital age. Among other achievements, Verified Voting co-authored the seminal study: *Counting Votes 2012: A State by State Look at Voting Technology Preparedness.*

We strongly support the collection of relevant data to improve election administration in the US and appreciate the inquiry of this Committee into this important subject matter. We request that this letter be included in the hearing record for the Senate Committee on Rules hearing, "Collection, Analysis, and Use of Data: A Measured Approach to Implementing Election Administration," that was held May 14, 2014.

I write to you today concerning potential solutions to long lines in the voting process in the U.S. The use of Direct Recording Electronic (DREs) voting machines as the primary voting system in a polling place often contributes to long lines in elections.

The Use of DREs Contributed to Long Lines in 2012

For background, the U.S. voting public now largely uses one of two basic kinds of voting systems in the polling place. The most widely used is voter-marked paper ballots counted by scanner-tabulators (often called "optical scan"). The other system (DREs) involves a machine on which one marks one's choices, and which also tabulates those choices in the same device (known as direct recording electronic voting machines, or DREs). For additional details on these systems in use nationwide, see http://verifiedvoting.org/verifier .

If you divide problems that arose in the 2012 election into "easy to solve" and "hard to solve", the "easy to solve" problems tended to be in polling places that used optical scan [paper ballots], and the "hard to solve" problems occurred in places using DREs.

Long lines were pronounced in locations with DREs where there was no alternative for a working machine and little or no access to a sufficient supply of emergency paper ballots. In many instances,

2777 Jefferson St. Carlsbad, CA 92008; pam@verifiedvoting.org; (760) 434-8683

DREs broke down, failed to boot up or "flipped" votes during the voting process. Due to the fact that DREs force voters to use the machine interface for marking their ballot, voters had to wait until a machine was available. If even one machine breaks down during the voting day, that means fewer voting stations, which contributes to long waits.

Further, even in DRE polling stations that had emergency paper ballots on hand, in some instances, poll workers had not been trained to use paper ballots in the event of machine failures or long lines. Difficult to solve problems reported to the Election Protection 1-866-OUR-VOTE hotline included: Machines that don't boot, or crash; ballot display and ballot set up problems; poll worker error in assisting voters when equipment problems occurred.

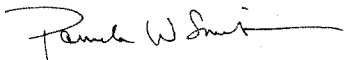
Optical Scan Problems Can be Prevented in the Future

The long lines seemed to be caused primarily by voters waiting for DRE machines, though not exclusively. There were lines in a number of jurisdictions using optical scan systems too. These could be divided into two categories of causes: first, the excessive ballot length of a jurisdiction like Miami-Dade County, Florida (some seven pages), which would have caused delays no matter what type of voting system were involved; and second, the incorrect response of pollworkers who had not been sufficiently trained when problems with scanners arose. For example, the Hotline received reports of pollworkers experiencing jams when inserting ballots into the scanner. Instead of accepting the ballots into a locked container to be scanned later when the jam could be cleared, in some instances they asked voters to "try again" with a new ballot, or to wait until the jam was fixed. These were incorrect reactions, and are easily solved by advising the pollworkers of how to handle the situation until the scanner could be fixed.

It is most important to note that when optical scan systems are in place, there is no need for to bring in additional "emergency DRE" machines to address lines and wait times if the scanner should happen to break down. However, when DRE systems are the voting system in place, it is **essential** to have "emergency paper ballots" to address lines and wait times if the DREs should happen to break down, as we witnessed in the elections in 2012.

Again, we strongly support the collection of relevant data to improve election administration in the US and appreciate the inquiry of this Committee into this important subject matter. We urge the consideration of the type of voting system as a relevant data point for this Committee as demonstrated by reports in the 2012 and previous elections to the Election Protection hotline at 1-866-OUR-VOTE.

Sincerely,



Pamela Smith
President

2777 Jefferson St. Carlsbad, CA 92008; pam@verifiedvoting.org; (760) 434-8683

HEARING—ELECTION ADMINISTRATION: EXAMINING HOW EARLY AND ABSENTEE VOTING CAN BENEFIT CITIZENS AND ADMINISTRATORS

WEDNESDAY, JUNE 25, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 2:00 p.m., in Room SR–301, Russell Senate Office Building, Hon. John Walsh, presiding.

Present: Senator Walsh.

Staff Present: Kelly Fado, Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Julia Richardson, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Jeffrey Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Paul Vinovich, Republican Chief Counsel; and Rachel Creviston, Republican Senior Professional Staff.

OPENING STATEMENT OF SENATOR WALSH

Senator WALSH. The Rules Committee will come to order. I want to wish everyone a very good afternoon and thank you for being here.

We have had a series of votes scheduled to start at 2:30, so in order to hear from all of our witnesses, we are going to stick to the time limits and I will keep my statement brief for the sake of time.

This hearing is the committee's fifth in a series on improving the administration of elections. Today's hearing focuses on how early and absentee voting can benefit citizens and administrators. Chairman Schumer wanted to be here today, but was unable to attend.

Today, we will discuss how common sense reforms, like early voting and absentee voting can help more Americans, especially those in rural areas or in Indian Country, participate in our democracy.

Tuesday has been our official Election Day since 1845, but it is not always possible for voters to make time to vote on the second Tuesday in November. This is especially true for voters in rural areas, Indian Country, farmers, ranchers, the disabled, our veterans, and working parents. Many Americans face significant time and distance-related barriers to voting on time.

My home State of Montana is also known as Big Sky Country, and for good reason. If you have ever driven around Montana, you have seen that there is a lot of open space. We have counties that would swallow Rhode Island. This means many Montanans do not live close to their polling place or election office. If you live in Indian Country or in many of our rural counties, you could face several hours' drive to the voting ballot.

The pressures of time and space mean Tuesday just does not work for a wide range of folks, whether they are working, a working parent that wants to get home to see their kids, or a Tribal

voter that faces a hundred-mile journey to vote. Expanding early and absentee voting will provide more Americans with an opportunity to vote. That is why this hearing is so needed.

These reforms are not about favoring one party over another or any particular group of Americans. They are simply matters of good governance that benefit all Americans and that will strengthen our democracy.

The committee is fortunate to have an excellent panel of witnesses. Today, we have with us the Oregon Secretary of State, Kate Brown. Kate oversees elections that are entirely run by mail, helping voters exercise their right on their schedule.

Larry Lomax, who served as the Registrar in Clark County, Nevada, implemented what is certainly one of the best examples in the country of citizen-focused early voting.

I am particularly pleased to have my fellow Montanan, Rhonda Whiting from Western Native Voice, here today to discuss how election administration reforms can help ease some of the difficulties Americans face in getting to the ballot box. Rhonda, thank you for being here. If we can implement reforms that help overcome the barriers of time and space that Rhonda routinely sees in Montana's Indian Country, I am confident that we can expand voting access to voters across the country.

With that, I would like to thank all of our witnesses and I look forward to our testimony.

At this time, we will now hear from our panel of witnesses in alphabetical order. First, we will hear from Secretary of State Kate Brown, who, again, serves as Oregon's Secretary of State. Kate.

STATEMENT OF KATE BROWN, SECRETARY OF STATE, STATE OF OREGON, SALEM, OREGON

Ms. BROWN. Good afternoon and thank you, Mr. Chair and committee members. I am Kate Brown. I am currently serving as Oregon's Secretary of State, and I am honored to be here with you today. I applaud your efforts to provide American voters with choices on how and when to vote.

In Oregon, we believe that your vote is your voice and that every single voice matters, and vote by mail is a great way to put a ballot in the hands of every eligible voter. Our 30-year experience with vote by mail has been a smashing success. Vote by mail enhances turnout, is cost effective, and is secure.

Oregonians love vote by mail because it is convenient and accessible to cast an informed ballot. Voters with disabilities can vote independently in their own homes. And, rural Oregonians who live miles from an elections office can simply drop a ballot in the mailbox.

Oregon has been at the top ten of States in voter turnout amongst registered voters in the last two Presidential cycles. It is the only State in the top ten that does not have same-day voter registration.

But where I think vote by mail shines is in turnout in primary and special elections. In May of 2014, 35.9 percent of registered Oregon voters voted in our primary. As the Chief Elections Officer, I normally would not brag about this figure, but so far, excluding yesterday's primaries, it is greater than any of the other 20 States

have held primaries so far this year. For example, Kentucky had 27 percent turnout and Georgia had 19 percent turnout.

And then in special elections, we shine, as well. In 2011, both California and Oregon had special elections to fill Congressional vacancies. Oregon's turnout in our special election for that particular Congressional race was 51 percent and California's was 25 percent, a huge difference.

Also, in these financially strapped times, the savings from vote by mail are critical. We estimate the savings are 20 to 30 percent over polling place elections.

Vote by mail is also secure. To combat fraud, we have a number of security measures in place. To ensure the integrity of every single ballot, we check every single signature. We track ballots with bar codes, and voters can now confirm that their ballot has arrived at the elections office.

In the over 30 years of vote by mail, we have absolutely no evidence of coercion, either, and the penalties for both fraud and coercion are very, very severe.

Some folks are critical about vote by mail because they say we no longer share the ritual of waiting in very long lines to vote. Well, I would argue that it has been replaced by a much richer version of civic engagement. Voters' pamphlets come three weeks before the election and our ballots arrive about two-and-a-half weeks prior to the election. Families sit down at the dinner table and talk about who is on the ballot and what is on the ballot. And, I know, at neighborhood associations, they meet to discuss both candidates and the issues that are on the ballot. This gives voters ample opportunity to consider all of the issues on their ballot.

Across the West, voters are embracing vote by mail. Colorado and Washington have also joined us in only serving their voters via the mail, and not only through the mail, but primarily mail ballot. And, many voters in States like Arizona and California and Hawaii have made their choice. Secretary of State Wyman from Washington is submitting a letter in support today, as well, so it has broad bipartisan support.

I urge you to support efforts across the States to put ballots in the hands of every eligible voter using our Postal Service. Thank you so much.

[The prepared statement of Ms. Brown was submitted for the record:]

Senator WALSH. Thank you, Ms. Brown.

Next, we will have John Fortier, the Director of the Democracy Project at the Bipartisan Policy Center. John.

STATEMENT OF JOHN C. FORTIER, DIRECTOR, DEMOCRACY PROJECT, BIPARTISAN POLICY CENTER, WASHINGTON, D.C.

Dr. FORTIER. Great. Thank you, Senator Walsh, and thank you for inviting me to testify today.

I am the author of a book, Absentee and Early Voting, of several years ago and I wanted to give a little bit of background of the rise of two types of convenience voting, one, vote by mail, and also in-person early voting, and then lay out some of the pluses and minuses.

If I could first start by noting two commissions, one which you will hear from, Larry Lomax, the President's Commission on Election Administration, which I have some connection with in that we are going to be working closely with the Commission on their recommendations, and also a commission that put out a report yesterday, the Commission on Political Reform out of the Bipartisan Policy Center. Both have recommendations regarding early and absentee voting.

Quickly stated, the PCAA calls for the States to expand opportunities to vote before Election Day, but notes that they do not want the expansion of pre-Election Day voting to come at the expense of facilities and resources dedicated to Election Day.

And then the other, the Commission on Political Reform, has a recommendation for a seven- to ten-day intense period of early voting, which includes at least voting on one day of the week before Election Day.

What I will note is both of these methods of voting have risen dramatically. If you went back 35 years ago, you would have found only about five percent of America voting before Election Day, mostly by mail, for a reason, for a specific reason, being away from the polls or being infirm or overseas. That number has risen to about a third today, and both types have significant participation, with about 17 percent or so—a little bit more—voting by mail, and another 14 percent of the electorate voting early in person.

But, I will note that there is very great variation among the States. Many of the Western States are much more vote by mail. Many of the Eastern States, Northeastern States, have a very traditional single Election Day polling place-focused election without much of either type of voting. And, then, States like Texas and Tennessee and now Georgia and North Carolina have a lot of in-person early voting. So, there really is a great variety of practices across the country.

I want to address quickly the issue of turnout in these methods of voting. I guess my big message is, I do not think moving to either in-person early voting or voting by mail, the primary reason you should do so is to dramatically increase turnout. When I used to testify, I would say I think that, really, the research showed that there was not much at all increase in voter turnout. I think there is some more recent evidence or studies in the vote by mail which show a small increase in voter turnout. But, really, I think, these changes are not dramatic, but the reasons for adopting them are more convenience or to help election officials spread out the vote across elections.

I will note two exceptions to this, and I think Secretary Brown pointed to one. On very low turnout elections—local elections or ballot initiatives or perhaps primaries—there is a significant increase based on vote by mail, not so much when you see the larger general elections.

And then on the early voting side, we do see some increase in turnout based on vote centers, the ability to choose among different locations within your county on a pre-Election Day or sometimes even on Election Day itself basis, where you are not limited to one local place, that you can actually go to a place closer to work or

on your commuting pattern. So, I think those are two important exceptions.

What are my concerns? I am actually much more of a fan of early voting in person than voting by mail, and my concerns about vote by mail are some which Secretary Brown addressed. One is privacy and the secret ballot. It may not be the experience of most people that they have someone who might coerce their vote, but there certainly are people who are pressured or in a position where they are not casting their vote freely. And, the secret ballot, of being able to go into a polling place and put the curtain behind you, allows you to escape those pressures.

Secondly, there are some problems in transmission of the ballot. If we see vote fraud—people argue whether there is a lot or not a lot, but I think most people would agree that most of the cases we have are in the absentee or vote by mail realm.

And then, finally, there is some question of error checking, whether the ballot that you cast by mail does not have the error checking that you would have at the polling place, and more ballots are lost, either because they do not have the signature requirements or the ballots themselves have some errors that would have been caught.

I will say that on early voting, the simple point is that there is no single formula. I would not impose a formula for across the country because we have rural and urban. We have places that do lots of vote by mail, lots of early voting, some who do not do a lot. But, my preference would be for a short, intense period of early voting, one that has significant hours, good locations, but that it is not a Federal matter where you prescribe one type for all the States. The States have to weigh their particular circumstances to figure out whether the early voting that they might adopt in their State is proper for their State.

So, I will conclude my testimony with that.

[The prepared statement of Dr. Fortier was submitted for the record:]

Senator WALSH. Thank you, Dr. Fortier.

Mr. Lomax, please proceed.

STATEMENT OF HARVARD "LARRY" LOMAX, REGISTRAR OF VOTERS (RETIRED), CLARK COUNTY ELECTION DEPARTMENT, LAS VEGAS, NEVADA

Mr. LOMAX. Good afternoon. I was asked here today to talk about Clark County's early voting program, which my personal belief is it is one of the most successful in the country.

Many States claim they conduct early voting, but what they mean varies widely from State to State. In some States, early voting simply means anyone can request an absentee ballot and vote by mail. In others, it means voters can vote in person prior to Election Day, but only at the Clerk's Office.

In Clark County, early voting means that during a two-week period prior to Election Day, any registered voter can vote in person at a time and place convenient for them. Rather than requiring the voter to come to a government office, which is invariably an inconvenient experience for the voter, we take the opposite approach.

We look to see where voters go during their normal day-to-day routines and then we take our voting machines into their neighborhoods to them. Most voters, in fact, will pass by one of our early voting locations during the two-week early voting period during their normal course of business. We provide early voting sites in supermarkets, all the major malls, in libraries, in recreation centers and other facilities that attract the local population whether or not an election is in process.

So the voters will know when we will be in their neighborhood prior to the beginning of early voting, every voter in Nevada is mailed a sample ballot, which includes the complete early voting schedule.

Sites that are located in the malls, in major shopping locations, and in a few minority areas where there are no major shopping locations, are open early day during the two-week period. In major elections, if the facility is open for business, so are we. Thus, in our mall sites, people can cast their ballot from ten in the morning until nine at night.

We also have mobile voting teams that rotate through neighborhood locations, primarily supermarkets, recreation centers, and libraries, and conduct voting for two or three days in those locations. If they are in a library or recreation center, they are available to the voter as long as the facility is open. Since most supermarkets in Las Vegas Valley are open 24/7, our supermarket teams are typically open from eight in the morning until seven at night.

To serve areas in the county where there are no suitable facilities in which to conduct voting, often minority areas, we have four generator-powered self-sustaining voter trailers which we can position anywhere in the county. With these trailers, we can ensure all voters in Clark County have easy access to an early voting location, and their popularity is reflected by the fact that more than 60,000 voters have voted in these trailers in the last two Presidential elections.

So, how have the voters in Clark County taken to early voting? The great majority of them love it and the turnout numbers show it. While the number of Election Day voters over the last five Presidential elections—and this is Election Day voters—has remained relatively constant at about 200,000 voters per Presidential election, during the same time period, early voting turnout has exploded.

In the 1996 Presidential election, the first year of early voting, 17 percent of the voters, or 46,000 people, voted early. Sixteen years later, in the last Presidential election, 437,000 people voted early. That was 63 percent of everybody who voted in the election.

And, let me point out, in 2012, it only took us 450 voting machines to support the 437,000 voters who voted in those two weeks. On Election Day, it took us 4,000 voting machines to support the 200,000 people because they had to go to specific polling places to cast their ballot. I point this out because one of the arguments against early voting is the alleged increase in the cost of an election. Certainly, there is a cost to early voting, but it also significantly reduces the amount of voting equipment that a jurisdiction requires, in our case, by 50 percent.

In addition to allowing voters the opportunity to vote at a time and place convenient for them, there are additional benefits to early voting. Post-election audits show fewer mistakes are made each election because early voting workers, working 14 consecutive days, are much more experienced and, therefore, make less mistakes than the thousands of workers recruited to train and work only on Election Day, what we call our One Day Wonders.

And, finally, as the popularity of early voting has increased, our voter turnout has also increased. In the 1996 and 2000 Presidential elections, when early voting was just starting and on the rise, the percentage of registered voters who voted overall in the election was in the 60 percent range. In the last three Presidential elections, where early voting turnout has always been 50 percent or more of the turnout, our voter turnout has been 80 percent or more.

In summary, Clark County's two-week early voting program has been an enormous success. The voters love it. Elections run smoothly, and Election Day lines are a thing of the past. Thank you.

[The prepared statement of Mr. Lomax was submitted for the record:]

Senator WALSH. Thank you, Mr. Lomax.

Ms. Whiting, please proceed.

STATEMENT OF RHONDA WHITING, CHAIRMAN OF THE BOARD, WESTERN NATIVE VOICE, MISSOULA, MONTANA

Ms. WHITING. Yes. Thank you, Senator Walsh. I am here as the Chairman of the Western Native Voice Board of Directors for the Tribes in Montana.

The history of Native American voting is the story of a group of U.S. citizens who were compelled to be incorporated into the nation and then given the rights of citizens in a disjointed manner, in many cases, over many decades. It is the story of a group of U.S. citizens who were unlawfully denied the right to vote through illegal means, at times. Even though Native American citizens have served in the military, pay taxes, and are a major part of the United States, they were not able to vote until they became citizens in 1924, with the Indian Citizenship Act. Then, the Tribes were sent to reservations through the New Deal times with the Reorganization Act.

Many of these reservations are isolated, and what happens on the reservations is that we are not able to use the—we are not able to use doing voting or doing anything without our computers and network systems, and that is not the norm for most reservations at this point in time. We talk about bridging the digital divide. We are making progress, but we do have—we are isolated in lots of ways. In fact, in reservations like Fort Peck, a lot of times, you cannot even use your cell phone. So, we really do need to continue to work on that.

I would like to propose some practical solutions that will alleviate some of the problems to keep Native Americans from exercising their right to vote.

First of all, expansion of access to registration modes will enable and facilitate voting. Intake of voting registration forms by govern-

ment offices and educational facilities. For example, in Montana, the Indian Health Service and Tribally controlled community colleges, which we have on each reservation—not all Tribes have that—it would be a practical method of capturing voter registration forms. This would help increase the voting tremendously.

In 2014, electronic registration options that are secure, safe, and verifiable are desirable, particularly for younger people who are used to conducting business online. Creating a Federal standard for electronic voting is critical to modernizing the Federal process.

Another issue that we face is the distance involved for Native Americans and other rural voters to travel to vote. In Montana, with election services based in county seats, there is considerable distance for most Native American communities. Some Indians have to travel in excess of 100 miles to vote. It is hard to overstate the burden that is imposed upon Native American citizens by traveling long distances to cast their vote. The remote locations for many people and the economic problems that they face make it very difficult to get to the polling places.

Placing satellite early voting locations in Native American communities would alleviate these barriers. One of the complaints that we hear, that it is a greater cost to the Secretary of State, we are hoping that we can overcome that and be able to have the satellite offices. It is important to emphasize the economic burdens, and that is why these remote communities really need the satellite offices.

And the experience is in Montana that the same-day registration expands access to the polls for many citizens with busy lives and demanding careers. The same-day registration by college students, working mothers, busy professionals, and service people indicates that it is a basic part of the election administration to provide the ability to vote.

Native Americans have benefitted in that same way. Same-day registration in Montana has helped lessen the negative effects of the electoral system for Natives, who overwhelmingly support it. Sadly, same-day registration is under attack in Montana with some ballot initiatives that were rolled out. They do not look at the Native Americans and what we need to do to enable us to vote.

I believe that if we were able to do these practical solutions, which would include satellite voting and same-day registration, that the voting for Native Americans would increase. We have, at times, with a lot of work—and I have been working on this for a long time, formally since 1988—and when we had a lot of people helping us, we were able to get in some polling places 90 percent turnout. That is not always the case, and it would certainly be much more efficient if we could do satellite voting.

Thank you.

[The prepared statement of Ms. Whiting was submitted for the record:]

Senator WALSH. Thank you, Ms. Whiting, for your comments.

We now have time for a few questions. I have asked each Senator to limit their questions to five minutes, and I think I will go first.

[Laughter.]

Senator WALSH. With that, Ms. Whiting, thank you for traveling all the way from Big Sky Country to visit us today. It is great to

have more Montanans in the District. You mentioned the economic barriers many Tribal members and rural residents face while exercising their right to vote. Could you elaborate on how these barriers affect their ability to cast a vote.

Ms. WHITING. I know for a fact that the Superintendent of Schools, Margaret Campbell, had talked to me about the people on the Fort Belknap Reservation and those that live in Hays/Lodge Pole. She said that with 30 percent of the people not being employed, and higher numbers than that, that she could go vote, but to drive into Harlem, which is a round-trip 100 miles, but a lot of people do not have the ability to do that. So, economically, we have the highest poverty rate in the State, and in many States across the United States. So, financially, it is very, very difficult for some people.

Senator WALSH. Okay. Thank you.

Mr. Lomax, you have raised turnout and increased voting access by making early voting sites more accessible for your voters. Clark County, Nevada, however, has about twice the population that Montana has. Do you think that your early voting reforms, particularly innovations like mobile voting sites, could be applied in more rural areas that do not have the technology that you may have throughout your State?

Mr. LOMAX. Yes, I certainly do. Yes, sir. There is a variety of ways by which you can provide the voters with ballots, and we have a lot of very rural counties in Nevada. In fact, 75 percent of the population is in Clark County. About 20 percent is in Washoe County. And, all the other 14 counties share the rest, and so there are lots of counties up there that have several thousand registered voters in total and they are spread out throughout the county.

They depend—they do not use technology nearly as much up there. They just—they use the—they have to move the voting machines to where the voters are. It is still the same concept. And, usually, the voters are going to be concentrated in some areas around the counties. But, I see no reason it would not work.

Senator WALSH. Okay. Thank you.

Secretary Brown, Dr. Fortier mentioned some potential concerns with vote by mail, such as secrecy of the ballot, transmission issues, and potential voter errors that are unable to be corrected. Given your experience overseeing elections in Oregon, do you share these concerns, and can you describe any efforts that have solved some of the problems that you have faced.

Ms. BROWN. Thank you, Senator Walsh. As the Chief Elections Officer, my primary concern is to ensure the integrity of the ballot. We have a number of methods in place to ensure the integrity of Oregon's ballot. We have a centralized voter registration database. As I mentioned in my testimony, we check every single signature to verify it against our voter registration rolls. And, we have a bar code on the ballot to track every single ballot. So, these measures ensure the integrity of Oregon's ballot. These are some of the measures that we have.

I will share, vote by mail was adopted by Oregon voters in 1998. Since 2000, we have been regularly voting by mail, roughly 17 million ballots. We have had 13 convictions for voter fraud during that time period. So, the incident of fraud is extremely small.

In terms of privacy of the ballot and coercion, as I mentioned, we have had absolutely no evidence of coercion in voting in Oregon since we implemented vote by mail. I reached out to one of the women that represents our Oregon Coalition Against Domestic and Sexual Violence to verify this information. They have reviewed restraining orders in the past. My predecessor, Secretary Bill Bradbury, also worked with the domestic violence community. We have just heard of no evidence of coercion in the vote by mail ballots in Oregon.

Senator WALSH. Okay. Thank you, Secretary Brown.

So, that completes my questions, so on behalf of the Rules Committee, I would like to take this time to thank all of our witnesses for being here today and for your important testimony. We will make this available to all of our members of the committee and we will take a look at it, and if they have any questions, they may reach out to you. But, again, I appreciate you taking the time out of your busy schedules to be here with us today.

So, this concludes the panel for today's hearing. Without hearing any objection, the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing for our witnesses to answer.

Again, I apologize for none of my colleagues being able to be here today. They have busy schedules, a lot going on. But, this is very important. We want to make sure that all of our citizens have the ability to vote and that they can participate in our democracy, and I think this hearing today will help us move forward with that respect. So, thank you very much.

This hearing is now adjourned.

[Whereupon, at 2:29 p.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Written Testimony of Oregon Secretary of State Kate Brown
Before the U.S. Senate Committee on Rules and Administration
June 24, 2014

Chairman Schumer and distinguished members of the Committee: Thank you for the opportunity to address the Senate Rules Committee today about Oregon's vote-by-mail system.

I want to start by commending you all on your efforts to explore early voting. Opportunities for early voting strengthen the legitimacy of government in the eyes of its citizens. Elections are the foundation of our Democracy. It's the way the public grants the government power to make important decisions that affect our daily lives. If the public loses confidence in the elections process because they face unnecessary obstacles to voting, the legitimacy of the government itself becomes questioned.

There are several ways to ensure that voters have ample opportunity to cast ballots without standing in long lines. Vote-by-mail is one way, and it has been so successful in Oregon that it is now part of Oregonianssepolitical DNA.

Oregon began experimenting with vote-by-mail in local elections in the early 1980's. In 1998, 70 percent of Oregon voters approved a citizen initiative that required all elections to be conducted by mail.

Since then, Oregon has unequivocally benefitted from our vote-by-mail system. I would like to highlight a few of the ways that vote-by-mail has improved the elections experience for voters and elections officials in Oregon.

First, we have found that vote-by-mail increases voter turnout. The average turnout of registered voters in the first three elections conducted exclusively by mail in Oregon was 6% higher than the average turnout in the final three polling place elections. We saw an even bigger impact in the primaries. At the time I prepared this testimony last week, 26 states had conducted primaries, and Oregon's 35% turnout so far leads the nation. As an elections official I will never be satisfied with less than 50% percent of registered voters casting ballots. But it is clear that

vote-by-mail increases turnout by making it more convenient for busy voters to cast ballots. That is especially true in primaries.

The second way Oregon has dramatically benefited from vote-by-mail is that it has cut costs. Our 1998 General Election — the last polling place election — cost $1.81 per voter. By comparison, the cost of a Special Election a few years ago cost $1.05. According to a recent study, Colorado — the third state after Oregon and Washington to adopt vote-by-mail — would have saved $4 million if it had conducted the 2010 general election exclusively by mail.

The third primary benefit to Oregon of the vote-by-mail system is that it's secure. The security of our democratic process has always been and must remain of the utmost importance. Vote-by-mail increases accessibility without sacrificing security. Elections staff compare every signature on every ballot envelope with the signature on the voter's registration card before the ballot is counted. Each specialist checking signatures first goes through an intensive training by the company that trains the Oregon State Police on signature identification.

If the signature doesn't match, the ballot is set aside. The voter is contacted and given an opportunity to correct the signature. I know first-hand that the system works. Several years ago, I was contacted by elections officials and informed that my signature didn't match. I had to go down to the elections office to verify it.

The security of Oregon's vote-by-mail system is further supported by harsh penalties for voter fraud. Before sending a ballot in the mail, potential voters must swear that the information they provide is true. Forging a signature or lying about age, residency or citizenship during voter registration is a class C felony with a maximum fine of $125,000 and up to 5 years in prison.

We have hard evidence that Oregon's vote-by-mail system is secure. Since the year 2000, my agency has received hundreds of fraud complaints. Yet, upon investigation, we have found the need to prosecute less than 20 people out of more than 20 million ballots cast. Currently, there are a handful of cases regarding voter fraud that are pending at the Oregon Department of Justice.

Oregonians are proud of our vote-by-mail system and I am encouraged by Congress' willingness to consider its merits. However, I would caution against all-or-nothing thinking for

other states. If given the choice between the current polling-place system and all-mail elections, states are unlikely to abruptly throw out a system that has been in use for a long time.

In my experience, a gradual approach is best. Oregon adopted vote-by-mail in 1981 for local elections where turnout was exceedingly weak. In the 1970's, a rural school measure passed by 2-0; a husband and wife both voted yes.

Oregon gradually expanded its vote-by-mail system, allowing voters to become permanent, absentee voters. By the time the vote-by-mail initiative appeared on the ballot in 1998, a large majority of Oregon voters had already chosen vote-by-mail as their preferred system of voting by signing up to be permanent absentee voters. It is hardly surprising that Oregonians overwhelmingly passed the vote-by-mail initiative.

Washington and Colorado also took a gradual approach.

Arguments against vote-by-mail often revolve around collective voter experience. Opponents argue that voters miss out on the shared experience of voting alongside their neighbors in the local gymnasium, community center or firehouse. And it's true; in Oregon we no longer take part in this ritual. But we have created a new one. Families sit down at the dining table, open up the Voters' Pamphlet, and discuss the candidates and measures on the ballot. This system gives voters more time to research issues and learn about lesser-known government entities like soil and water conservation districts. And voters don't have to stand in line. There is nothing like standing in a long line that causes one to make a rush decision, or worse, not vote at all.

In closing, I urge states to give vote-by-mail a try. I also urge Congress to do what it can to support states' efforts to use vote-by-mail. States should start gradually. States can test run it in a single election in one county. Don't force it. See if it saves money. Take a close look at the security measures. One thing I can guarantee: voters will love vote-by-mail. Thank you.

Kate Brown, Oregon's 24th Secretary of State.

Elected in 2008 and re-elected in 2012, Secretary Brown's objective is to make state government effective, efficient and accountable to taxpayers. That's why during her two terms in office, Kate has:

- Removed barriers to voter registration and voting, including using tablet technology to help voters with disabilities, as well as overseas and military voters. She has also proposed a total modernization of our voter registration system.
- Expanded online services for businesses.
- Created the Office of Small Business Assistance.
- Fought for Benefit Company Legislation in Oregon to harness the power of the private sector to change the world.
- Focused audits on government efficiency and made recommendations that have saved the state millions of dollars.

Kate was appointed to the state House of Representatives in 1991 and, after winning two more House terms, was elected to the Oregon Senate. In 1998, Kate was chosen Senate Democratic leader. Significantly, in 2004 she became the first woman in Oregon to serve as Senate Majority Leader.

In her legislative career, Kate led efforts to create a searchable online database for campaign contributions and expenditures, and reformed Oregon's initiative process to reduce fraud and protect the citizen's right to petition their government. She was also instrumental in passing comprehensive civil rights and domestic partnership laws.

Kate practiced family and juvenile law and has taught at Portland State University. She earned her law degree at Lewis and Clark Law School after receiving a Bachelor of Arts in environmental conservation with a certificate in women's studies from the University of Colorado at Boulder. Kate grew up in Minnesota.

Testimony of Dr. John C. Fortier
Director, Democracy Project
Bipartisan Policy Center
Submitted to the United States Senate Committee on Rules and Administration
June 25, 2014

Chairman Schumer, Ranking Member Roberts, and Members of the Senate Rules and Administration Committee. Thank you for inviting me to speak today on the subject of vote-by-mail and early in-person voting.

A generation ago, Americans voted almost exclusively on Election Day at local, neighborhood polling places. Early during the twentieth century, states adopted laws and procedures that allowed citizens to cast an absentee ballot by mail but restricted such ballots' use to specific reasons, such as absence from the jurisdiction on Election Day, sickness or infirmity, or military service overseas. States also required procedures aimed at protecting the integrity of the absentee ballot, such as the signatures of witnesses or of a notary public. These tight restrictions on absentee vote-by-mail ballots kept the percentage of voters that cast such ballots small at about five percent.

The revolution in casting ballots prior to Election Day started in the late 1970s when several western states, starting with California, introduced no-excuse absentee balloting. This new way of looking at absentee voting—more as a convenience option than an option of last resort—opened the way for increased voting by mail. Not long after California expanded absentee voting did we see the first trials of in-person early voting. This form of voting started in the late 1980s when Texas, and a few years later Tennessee, opened up polling locations for several weeks prior to Election Day where voters could cast ballots with the security of the polling place.

These early seeds planted three decades ago have today yielded tremendous growth in the number of people who cast ballots prior to Election Day. Nearly a third of voters in 2012 cast their ballots prior to Election Day; over 17 percent of voters cast absentee ballots by mail and over 14 percent of voters cast their ballots at an early in-person polling location.[1]

Even four decades into the convenience voting experiment, the rise of vote-by-mail and early in-person voting varies significantly among states both in the magnitude of votes cast and in the modes available to voters. Oregon and Washington State, for example, vote 100 percent by mail. States such as Texas, Georgia, and Tennessee regularly see over 40 percent of voters choosing to cast their ballots early in-person. Some states like Nevada and New Mexico see large numbers of vote-by-mail and early in-person ballots. And other states, mainly in the Northeast but also in the South and Midwest, experience very low levels of vote-by-mail and early in-person voting.

Does voting by mail and early voting increase turnout?

The evidence is mixed about whether voting by mail and/or early voting increase turnout. The main finding of most earlier studies of vote-by-mail and early in-person voting show that there is no significant increase in voter turnout for either convenience option. There have, however, been several

[1] "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration." *Presidential Commission on Election Administration.* January 2014. www.supportthevoter.gov. Pg. 54

recent studies that have shown a small, but statistically significant increase in voter turnout in some types of vote-by-mail elections.

The more robust turnout effects occur in two cases. First, in very low turnout local elections, vote-by-mail can show a substantial increase in turnout, as regular voters who normally vote in statewide and federal elections cast ballots in a purely local election that they otherwise may have ignored. Second, research on vote centers, which are locations at which any registered voter in a jurisdiction is given the opportunity to cast his or her ballot, has shown an increase in turnout at these locations. Vote centers can be employed on Election Day *in lieu* of or in addition to neighborhood polling places or during early voting. The vote center model has shown some positive effects on turnout, possibly caused by added voter choice and the ease of access to vote centers strategically sited along commuting paths or at sites such as big box stores.

Voters tend to like absentee and early voting. Several studies of public opinion show that both vote–by-mail and early in-person voting, when implemented in a given jurisdiction, garner popular support. And election administrators are, broadly speaking, in favor of adopting some form of pre-Election Day voting, though, their support depends on the details. Administrators' strongest argument in favor of adoption is often to take the pressure off of Election Day voting by processing voters over the course of a pre-Election Day period of voting. However, there are significant issues that administrators raise: Should urban, suburban, and rural areas employ early voting? Should there be one early voting site or several throughout the jurisdiction? How should resources be allocated between Election Day voting, vote-by-mail and early voting? The answers to these policy questions affect how administrators view vote-by-mail and early voting options.

Concerns about vote-by-mail

Vote-by-mail allows many Americans who could not or would not have cast a ballot to participate in elections. But the option is not a panacea and comes with significant drawbacks that states should consider before greatly expanding the use of this option.

Privacy of the vote and coercion

In *Absentee and Early Voting: Promises, Perils and Trends*, I examined the early adoption of vote-by-mail as well as the adoption of another significant voting reform—the secret ballot. In the late nineteenth century, there were significant concerns about the operation of elections and the coercion that some voters faced from city political machines that often controlled the livelihood of many voters or that issued rewards and punishments based on an individual's vote. The caricature of the era is one in which voters march to the ballot box with a clearly color-coded ballot that indicates to everybody the voter's selection of candidates and party.

To combat this kind of coercion, reformers pushed for and succeeded in enacting secret ballot legislation in many states. With these protections in place, the government would produce the ballots, not the parties or candidates. And the voter would cast the ballot behind the privacy of a curtain.

Reformers during the early twentieth century believed that a vote-by-mail ballot was necessary for certain people who were away from their polling places on Election Day. But these reformers also struggled to reconcile the desire for a vote-by-mail ballot with their belief in the benefits of a secret

ballot. Once a ballot exists outside the polling place, a voter can be subject to the same types of pressures that voters experienced during the era of city machine politics.

For this reason, reformers adopted vote-by-mail ballots with witness and notary public requirements. They insisted that voters provide a reason for casting an absentee ballot. Nearly all of these witness and notary requirements have been repealed.

I do not believe that most voters will have their votes coerced if they choose to cast a vote-by-mail ballot. But unfortunately, there are still people who feel the coercion of a spouse, employer, union, religious institution, or other cause. A secret ballot cast at a polling place allows the voter to go into a private, secure space behind a curtain and mark a ballot that no one else will see. Vote-by-mail is necessary for those voters who cannot attend the polling place on Election Day. However, it should be recognized that the option does not protect the secret ballot like casting a ballot in person does.

Transmission of the ballot

While voter fraud is not widespread in America, a large proportion of our voter fraud activities occur around vote-by-mail. We have seen prosecutions of individuals applying for multiple absentee ballots in others' names, taking advantage of unsuspecting voters, or otherwise interfering with the transmission of ballots back to election administrators.

Lost votes because of a lack of error checking mechanisms

The Help America Vote Act requires that there be ballot error checking mechanisms on voting equipment at polling places. The error checker must give the voter an opportunity to correct any mistake, such as marking too many selections for a given contest or by skipping a contest entirely. Recent studies have shown that these mechanisms have reduced the number of ballots that are rejected because they contain two or more selections for president. A recent study by Professor Charles Stewart at MIT shows that more errors are made on absentee or vote-by-mail ballots than on ballots cast within a polling place

Concerns about early voting

Early in-person voting is not without its detractors as well. While offering a more Election Day polling experience for a voter with similar protections as compared to vote-by-mail, it can be costly and difficult to administer.

There is no formula for number of days, hours, etc to administer early voting

Controversies over early voting often arise over the number of days of early in-person voting. But in truth, there are many factors that improve the efficacy of early in-person voting. For example, a short period of a few days of early in-person voting period with long hours for voting might give voters more opportunity to vote. Other states are experimenting with vote center-like characteristics that allow an early voter to choose among several locations to cast his or her ballot.

It would be very difficult to propose a national standard for early voting. Again, some states choose not to offer early voting in more rural locations because the need is not great. The location of early voting locations might also affect the usefulness of early voting. Early voting sites placed far from voters might not best serve voters even if they work for election administrators. Or small early in-person voting locations without the ability to process large number of voters might also push against the notion of early voting by resulting in long lines and voter frustration.

Recommendations for Early In-Person Voting

Two bipartisan commissions have recently made recommendations about early in-person voting that show support for this option of pre-Election Day voting:

1. The Presidential Commission on Election Administration makes the recommendation that "states should expand opportunities to vote before Election Day." Further, they warned that "the expansion of pre-Election Day voting should not come at the expense of adequate facilities and resources dedicated to Election Day."

2. The Bipartisan Policy Center's Commission on Political Reform yesterday released a broad set of recommendations on the political system. The full report can be accessed at bipartisanpolicy.org/CPRreport. Among the commission's consensus recommendations are that "states should enact a seven- to ten-day period of early voting prior to Election Day that includes at least one day of voting on each day of the week."

Conclusion

Based on my scholarship, I recommend that states should adopt a short, seven- to ten-day early in-person voting period with longer hours, larger satellite facilities, and some weekend voting. Americans like convenience voting options as survey after survey has shown. While the impact of early in-person voting on turnout can be debated, I believe that we should continue trying to broaden participation in our elections in any way possible; early in-person voting is the best available option to do just that. This option makes it easier for Americans who may not be able to wait in line on Election Day to cast a ballot and often offers voting locations more conveniently located than traditional neighborhood polling places.

But I also strongly support balancing increased access to the polls with securing the integrity of the ballot. To reach that balance, I think we should focus efforts on perfecting early in-person voting in the states instead of turning to vote-by-mail systems because the security and error checking capacity afforded during in-person voting cannot be guaranteed for vote-by-mail. Finally, given the differences among states, it would be hard to prescribe a federal mandate for a one-size-fits-all approach. States must retain the flexibility to prescribe for themselves the best mix of voting options for their voters and resources.

Thank you and I look forward to your questions.

John C. Fortier, Ph.D.

Director, Democracy Project

Bipartisan Policy Center

www.bipartisanpolicy.org/ projects/democracy-project

John C. Fortier joined the Bipartisan Policy Center (BPC) in April 2011. He is a political scientist who focuses on governmental and electoral institutions.

Prior to coming to BPC, he was a research fellow at the American Enterprise Institute, where he also served as the principal contributor to the AEI-Brookings Election Reform Project, the executive director of the Continuity of Government Commission, and the project manager of the Transition to Governing Project. He was also a regular contributor to AEI's Election Watch series. He also served as the director of the Center for the Study of American Democracy at Kenyon College.

He has a Ph.D. in political science from Boston College and a B.A. from Georgetown University.

He is the author of *Absentee and Early Voting: Trends, Promises and Perils* (AEI Press: 2006), author and editor of *After the People Vote: A Guide to the Electoral College*, and author and co-editor with Norman Ornstein of *Second Term Blues: How George W. Bush Has Governed* (Brookings Press: 2007), and numerous academic articles in political science and law journals.

He has been a regular columnist for *The Hill* and *Politico*. Fortier is a frequent commentator on elections and government institutions and has appeared on ABC's Nightline, CNN, Fox News, PBS's News Hour, CBS News, NBC's Today Show, C-SPAN, NPR, Bloomberg, and BBC.

He has taught at Kenyon College, University of Pennsylvania, University of Delaware, Harvard University and Boston College.

Testimony Before the United States Senate
Committee on Rules and Administration

Harvard "Larry" Lomax

June 25, 2014

Good afternoon. My name is Larry Lomax and from 1999 through last year, when I retired, I was the Registrar in Clark County, Nevada. Subsequently, I served on the Presidential Commission on Election Administration. I was asked here today to talk about Clark County's Early Voting program, which I believe is one of the most successful in the country and its success has made me a strong proponent of early voting conducted in the manner in which we do it in Nevada.

While many states claim to conduct "Early Voting", what they mean varies widely from state to state. In some states, early voting simply means anyone can opt to request an absentee ballot and vote by mail. In others, it means voters can vote in-person prior to Election Day, but only at the Clerk's office

In Clark County, early voting means that during a two-week period prior to Election Day, any registered voter can vote at a time and place convenient for them. Rather than requiring the voter to come to a government office, which is invariably an inconvenient experience for the voter, we take the opposite approach. We look to see where voters go during their normal day-to-day routines and we take our voting machines into their neighborhoods to them. Most voters, in fact, will pass one of our early voting locations during the two-week early voting period during their normal course of business.

We provide early voting sites in supermarkets, all the major malls, in libraries, in recreation centers and other facilities that attract the local population whether or not an election is in process. Prior to the beginning of early voting, every voter in Nevada is mailed a sample ballot which includes an early voting schedule that lists the locations and hours of every early voting location throughout the two-week period.

Sites located in the malls and other major shopping locations, as well as a few located in minority areas where there are no major shopping areas, are open every day during the two-week period. In major elections, if the facility is open for business, so are we. Thus, our mall sites are open mall hours, and voters can cast their ballot from 10:00 in the morning to 9:00 at night. We also have what we call "mobile" voting teams rotate through neighborhood locations, primarily supermarkets, recreation centers and libraries, conducting voting for two to three days at each location. If they are in a library or recreation center, they are available to the voter as long as the facility is open. Since most supermarkets in the Las Vegas Valley are open 24 hours every day, our supermarket teams are typically open from 8:00 in the morning until 7:00 at night.

To serve areas in the County where there are high concentrations of residents but no suitable facilities in which to conduct voting, often minority areas, we have four generator-powered self sustaining voting trailers which can be positioned anywhere as long as we have wireless

connectivity. In Clark County this means almost anywhere. These trailers ensure all voters in Clark County have access to an early voting site and their popularity is reflected by the fact that more than 60,000 people have voted in our trailers in each of the last two presidential elections.

So how have the voters in Clark County taken to early voting. The majority of them love it and have become inveterate early voters. As the chart below shows, over the last five presidential elections, the percentage of those who vote early in-person has increased from 17% of those who voted in 1996, when early voting was first introduced throughout the county, to 63% in 2012.

Presidential Election Yr	Of Those Who Voted, the Percent of Voters Who: Voted Early	Voted by Mail	Voted Election Day	Total Election Turnout
1996	17%	10%	73%	61%
2000	43%	13%	44%	69%
2004	50%	10%	40%	80%
2008	60%	8%	32%	80%
2012	63%	7%	30%	81%

As the chart below shows, while the number of Election Day voters increased by less than 12,000 from 1996 to 2012 (194,023 to 205,693), the number of early voters increased by more than 390,000 (46,136 to 436,568).

Presidential Election Yr	The Number of Voters Who: Voted Early	Voted by Mail	Voted Election Day	Total Election Turnout
1996	46,136	24,927	194,023	265,086
2000	167,522	49,933	167,317	384,772
2004	271,465	53,357	222,036	546,858
2008	391,805	50,718	210,264	652,787
2012	436,568	50,001	205,693	692,262

Election Day turnout is what drives the amount of voting equipment a jurisdiction requires (In Clark County, in a presidential election we use approximately 4,000 voting machines on Election Day to support over 300 polling places. Only 400 machines are required to support early voting, and the voting machines used during early voting can be used again on Election Day). Therefore, even though Clark County's population and number of registered voters nearly doubled between 1996 and 2012, we did not require additional voting equipment because almost

the entire increase total turnout was absorbed during the two-week early voting period, while the number of Election Day voters remained essentially constant.

I point this out because one of the arguments against early voting is the alleged increase in the cost of an election. While there is certainly a cost to conducting two-weeks of early voting, there is also a significant savings in that a jurisdiction such as Clark County only requires half the voting machines, supporting equipment and poll workers that would be required if everyone were to vote on Election Day.

In addition to allowing voters the opportunity to vote at a time and place convenient for them, there are additional benefits to an early voting program. One that is not so obvious is that the Election results are more accurate. Because early voting workers process voters for 14 consecutive days, they are much more experienced than the thousands of workers recruited and trained to work only on Election Day. Post-election auditing shows that even though twice as many people in Clark County now vote early as on Election Day, the vast majority of mistakes that occur processing voters at polling locations occur on Election Day.

And a finally, at least in Clark County, as more and more voters have chosen to vote early, overall voter turnout has increased. In fact, (with the exception of Oregon and Washington (two all mail ballot states) Clark County and Nevada went from the worst voter turnout among the western states in 1996, measured as the percent of registered voters who voted, to the highest voter turnout in the western states in both 2008 and 2012).

In summary, Clark County's two-week early voting program has been an enormous success. The voters love it, Election Day lines are a thing of the past, and voter turnout has increased.

I would be happy to answer any questions.

Executive Summary: Early Voting in Clark County, Nevada

While the meaning of "early voting," varies widely from state to state, in Clark County it means that for a two-week period prior to Election Day, voters can vote at a time and place convenient for them. Rather than requiring a voter to come to a specific location, we look to see where voters go during their normal daily routines and take our voting machines into their neighborhoods to them.

We provide early voting sites in supermarkets, all the major malls, in libraries, in recreation centers and other facilities that attract the local population when an election is not in process. Every voter is mailed the early voting schedule (locations and hours) prior to the election.

"Permanent" sites are open every day during the two-week period and are located in major shopping locations, as well as in some minority areas where there are no major shopping areas. If the facility is open for business, so are we. Thus, mall sites are open mall hours (10am–9pm).

Our "mobile" voting teams rotate through the neighborhoods, primarily in supermarkets, recreation centers and libraries, conducting voting for two to three days at each location. Except in supermarkets, voters can vote as long as the facility is open. Since most supermarkets in the Las Vegas Valley are open 24/7, supermarket teams are typically open from 8am to 7pm.

To serve highly populated areas where no suitable facilities exist in which to conduct voting, we have four generator-powered self sustaining voting trailers which can be positioned virtually anywhere. Over 60,000 people voted in the trailers in each of the last two presidential elections.

Early voting is now immensely popular with the County's voters. When it was introduced county-wide in the 1996 presidential election, 17% of the voters voted early. Since then, the percent of early voters has increased each election, with 63% voting early in the 2012 presidential election.

In the last five presidential elections, the number of early voters has increased from 46k in 1996 to 436k in 2012 (+390k) while the number of Election Day voters only increased from 194k to 205k (+11k) over the same period. Although total election turnout more than doubled (265k to 692k), almost the entire increase has been absorbed by the early voting program.

Since Election Day turnout is what drives the amount of voting equipment a jurisdiction requires, even though Clark County's turnout has more than doubled from 1996 to 2012, we did not require additional voting equipment because Election Day turnout was essentially constant. This is significant because an argument against early voting is it increases the cost of an election.

While there is certainly a cost to conducting two-weeks of early voting, there is also a significant savings in that a jurisdiction such as Clark County requires half the voting machines, supporting equipment and poll workers that would be required if everyone were to vote on Election Day.

An additional and unexpected benefit of the early voting program is that post election audits show early voting workers, due to their 14-days of experience, make far fewer mistakes processing voters than Election Day workers who work only one day.

And a final benefit, at least in Clark County, is that as the percentage of early voters has increased, voter turnout has increased.

Biography

Harvard "Larry" Lomax

Harvard "Larry" Lomax held the position of Clark County Registrar in Nevada from 1999 through 2013. Mr. Lomax served as Nevada's representative to the Election Assistance Commission's Standards Board, was elected by the board's members to the Standards Board Executive Board, and served on a Pew Foundation Committee focused on modernizing our nation's system of registering voters. In 2013, Mr. Lomax was appointed as a member of the Presidential Commission on Election Administration. Prior to working in Clark County, Mr. Lomax was a Professor of Leadership and Ethics at the Air War College. As a former Air Force pilot, he accumulated over 4,000 hours of flying time in a 30-year career. He commanded the 9th Bomb Squadron and the 319th Bomb Wing. He served two tours on the Joint Staff in Washington D.C. and was chosen to serve as the Air Force Colonel on the staff group supporting the Chairman of the Joint Chiefs of Staff. Mr. Lomax received a B.A. from Stanford University and an M.B.A. from the University of North Dakota. He is a Distinguished Graduate from the U.S. Air Force Officer Training School.

Statement: Rhonda Whiting, Chair, Western Native Voice Board of Directors, to the U.S. Senate Rules Committee

The history of Native American voting is the story of a group of U.S. citizens who were compelled to be incorporated into the nation and then given the rights of citizens in a haphazard, disjointed manner over many decades. It is the story of a group of U.S. citizens who were then unlawfully denied the right to vote through illegal means. It is a history of civil rights denied even as the country demanded military service and levied taxes on Native American citizens. And the story of the right to vote being denied to Indian people is a story still unfolding in 2014.

The Indian Citizenship Act of 1924 granted citizenship at the federal level to Native Americans. In many states, however, the civil rights, including voting, of the new citizens were often abridged or even denied. The New Deal brought the Indian Reorganization Act (1934), which recognized the legitimacy of tribal governments and permitted limited self-rule. Yet it did not solve the issue of access to the polls. The landmark Voting Rights Act of 1965 created a solid legal platform to expand minority voting rights and is the legal basis for securing access to the polls for Native American citizens. However, as subsequent amendments to the Act as well as the series of lawsuits based upon the Act needed to compel elected officials and election administrators to grant voting rights to Natives demonstrate, it is evident that achieving full and unfettered access to the polls for all citizens has a long way to go.

I speak to the Committee today with the purpose of proposing practical solutions that will alleviate some of the problems that keep Native Americans from exercising their right to vote.

First of all, expansion of access to registration modes will enable and facilitate voting. In-take of voting registration forms by government offices and educational facilities, for example, at Indian Health Service clinics and tribal colleges, will be a practical method for capturing voter registration forms. Plainly the federal government has a wide range of options in directing government offices to facilitate voter registration in the course of conducting other business.

In 2014, electronic registration options that are secure, safe, and verifiable are desirable, particularly for younger voters who are use to conducting business on-line. Creating a federal standard for electronic voting is critical for modernizing the voting process.

Another issue of access is the distance involved for some Natives, and other rural voters, to travel to vote. In Montana, with election services based in county seats that are considerable distances from Native communities, some Indians have to travel in excess of 100 miles to vote. It is hard to overstate the burden imposed on Native American citizens by having to travel long distances to cast their vote. The remote location of many Indian communities, coupled with the way elections are conducted, limit the ability of the Native American citizen to partake in their own government. Placing satellite early voting locations in Native communities will alleviate this barrier.

It is important to emphasize the significant economic burden that falls on some Native American citizens in these remote communities. Many members of these communities have limited

economic resources and the costs imposed on them by travel to the polling place functionally prevent them from voting. It is salient that these travel costs are not borne by the average voter in the United States, most of whom vote near their place of residence. The creation of a federal satellite early voting standard will rectify this problem.

The experience in Montana is that same-day registration expands access to the polls for many citizens with busy lives and demanding careers. The use of same-day registration by college students, working mothers, busy professionals, and U.S. service members strongly indicates that it should be a basic part of election administration. Native Americans have also benefited from same-day registration.

Same-day registration in Montana has also helped to lessen the deleterious effects of other aspects of the electoral system for Natives, who overwhelming support it. Sadly, same day registration is under attack in Montana in the guise of a 2014 ballot measure that will roll back Montana's common-sense approach to election management. Recognizing the value and utility of same-day registration on the federal level will be invaluable to expanding Native access to the polls.

Finally, simplifying the voting process and providing federal resources and authority to educate citizens on their rights and responsibilities will be invaluable in engaging Native American citizens in the civic process. Many Native Americans are, I am sad to say, skeptical about the motivations of the federal government given past history and current conditions. A sincere, robust program for citizen education and engagement has the potential to transform the relationship between the government and historically dis-enfranchised Indian communities.

Members of the Senate Rules Committee, you have the power to create laws that will secure and protect voting rights for Native American citizens and all citizens. I ask that you do so. Pass legislation that expands access to voting before Election Day. Make laws that evenly allocate resources, modernize elections and allow electronic registration options. Give the full force and power of federal law to same-day registration, vote-by-mail, and early voting.

These are all practical, proven solutions to problems in voting. I respectfully ask the Committee to create legislation that will make them a reality.

In closing, I need to emphasize that the right to cast a vote is the most fundamental right for a citizen in a democracy. For this right to be abridged or limited in any way harms both the substance and the spirit of our great democracy. And no words ever spoken could more true than "injustice anywhere is a threat to justice everywhere." So I ask you all that, when you consider making the law just for Native American citizens, think also of the rights of your own children and of the kind of nation you want to see them inherit.

Thank you.

Rhonda Whiting
Chair, Western Native Voice Board of Directors

June 20, 2014

Testimony of Wendy Weiser
Brennan Center for Justice at NYU School of Law
Before the Senate Committee on Rules & Administration Hearing on "Election Administration: Examining How Early and Absentee Voting Can Benefit Citizens and Administrators"

June 25, 2014

On behalf of the Brennan Center for Justice at NYU School of Law,[1] I thank the Senate Committee on Rules & Administration for the opportunity to submit testimony in connection with this important hearing, "Election Administration: Examining How Early and Absentee Voting Can Benefit Citizens and Administrators." The Brennan Center is a nonpartisan law and policy institute that focuses on issues of democracy and justice. Among other things, our Democracy Program works to ensure fair and accurate voting procedures and systems, and that every eligible American can participate in our elections.

The last presidential election brought to life memorable scenes of voters waiting hours in long lines to cast their ballots. Hours after polls were supposed to have closed, President Obama referenced those who remained in line and noted that "we have to fix that." These long lines, found in states across the country, were visible evidence of a range of longstanding flaws in the way we register and vote both before and on Election Day.

Despite the attention they received, the long lines in 2012 were nothing new. We have seen similar lines in past elections; they are the results of recurring election administration problems that go back decades. The President took an important first step by forming the bipartisan Presidential Commission on Election Administration (PCEA). The Commission included veteran campaign lawyers from both sides of the aisle, customer service industry leaders from the private sector, and election officials from jurisdictions across the country. For six months the Commission thoroughly studied this issue through public meetings, and extensive expert and public comments. Earlier this year, the Commission released a thoughtful report that identified key flaws in election administration and recommended best practices that state and local jurisdictions should implement immediately.[2]

Notwithstanding the importance of its PCEA's findings, the Commission is powerless to implement these reforms. But Congress is not. Congress can legislate reforms that are long past due and provide the resources states need to comply with new federal requirements. In fact,

---

[1] The Brennan Center has done extensive work on a range of issues relating to election administration, including work to modernize our voter registration system; remove unnecessary barriers to voter participation; make voting machines more secure and accessible; support and defend federal protections of the right to vote; and expand access to the franchise. Our work on these topics has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, litigation to compel states to comply with their obligations under federal and state law. This testimony is submitted on behalf of a Center affiliated with New York University School of Law, but does not purport to represent the school's institutional views on this or any topic.

[2] Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* (2014), *available at* https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf ("PCEA Report").

federal action is appropriate because, as the noted by the PCEA, "most jurisdictions that administer elections confront a similar set of challenges." The PCEA expressly rejected the view that there could be no "one size fits all" solution.[3]

Last year, the Brennan Center published a report, *How to Fix the Voting System* (Appendix A), based on testimony submitted to the PCEA,[4] that recommended best practices in four key areas of election reform. That report discusses these proposed reforms in further detail. The following sections describe the ways in which Congress could effectively act to improve our election administration.

I. Modernizing Voter Registration

Voter registration is the single biggest election administration problem in the United States. One in eight registrations nationwide contains serious errors, and one in four eligible Americans are not registered to vote at all.[5] As we reported to the PCEA, the continued use of inefficient and error-prone paper-based registrations is the primary cause of this problem. A modernized registration system would put more eligible Americans on the voter rolls, save resources, and make our voter lists more clean and accurate, thus reducing fraud. The Brennan Center reports *How to Fix the Voting System* and *Voter Registration in a Digital Age* (Appendix B) discuss these reforms in more detail.[6]

Congress has meaningful modernization proposals before it. The Voter Empowerment Act, sponsored by Rep. Lewis and Sen. Gillibrand, provides for electronic transfer of the registration information of consenting voters from government agencies to election officials, online registration, making a voter's registration move with a voter as long as she remains in-state and eligible, and the ability to update registrations up to and on Election Day.[7] Senator Gillibrand also recently announced plans to introduce a bill, the Voter Registration Modernization Act, mandating online voter registration.[8]

Congress should draw upon these efforts and pass legislation that would mandate electronic and online registration, provide for registration portability, and allow voters to register and update their information through Election Day.

---

[3] *Id.* at 9-10.
[4] Testimony of the Brennan Center for Justice at NYU School of Law Before the Presidential Commission on Election Administration (Sept. 4, 2013), *available at* http://www.brennancenter.org/sites/default/files/analysis/PCEA_Testimony_090413.pdf ("Brennan Center PCEA Testimony").
[5] Pew Center on the States, *Inaccurate, Costly, and Inefficient* 2-3 (2012), *available at* http://www.pewtrusts.org/~/media/Imported-and-Legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf.
[6] *Id.* at 2-15.
[7] H.R. 12/S. 123, 113th Cong. (2013).
[8] Press Release, Office of U.S. Senator Kirsten Gillibrand, "Gillibrand Calls For Modernizing Nation's Voter Registration System By Allowing All Eligible Voters To Register Online – Currently Only Half The Nation Can Register Online –Would Expand Access To Millions Of Voters," (June 22, 2014) *available at* http://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-calls-for-modernizing-nations-voter-registration-system-by-allowing-all-eligible-voters-to-register-online_currently-only-half-the-nation-can-register-online-would-expand-access-to-millions-of-voters.

II. Expanding Early In-Person Voting

The antiquated notion that all ballots cast in-person must be voted on a single day, in an 8 or 12 hour period, fails to reflect the realities faced by Americans with complex lives. It also burdens poll workers who must serve waves of voters. In a recent Brennan Center study, we found that sufficient opportunities for voters to cast their ballot early and in-person can improve election administration by, among other things, reducing this burden on poll workers and providing greater access to voting to the general public.

The PCEA took an important step forward by endorsing early in person voting (EIPV) and recommending that states expand opportunities to vote before Election Day.[9] Congress can do even more by establishing national standards for EIPV which would include: establishing EIPV a full two weeks before Election Day, extending hours in which voters can cast their ballot early, and including the last weekend before Election Day. The Brennan Center report *Early Voting: What Works* (Appendix C) provides further detail.

Congressional action would be timely. Thirty-two states plus the District of Columbia already use some form of EIPV,[10] and at least twenty-three considered introducing or expanding EIPV in just the most recent legislative session.[11] However, early voting standards and usage vary greatly. Congressional standards will ensure that the benefits of EIPV reach as much of the voting public as possible.

III. Adopt Minimum Standards for Managing Polling Place Resources

National standards should also reach the management of polling places themselves as a method of improving the voter experience on Election Day. Long lines reduce voter turnout and satisfaction; a recent analysis estimated that in Florida alone, more than 200,000 voters may have been discouraged from participating because of long lines.[12] Voters in urban areas experienced

---

[9] *See* PCEA Report, *supra* note 2, at 56-58.

[10] Alaska, Arizona, Arkansas, California, Colorado, D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming. The two exclusively vote by mail states, Oregon and Washington, are not counted among the states with early in person voting since virtually no voting — including Election Day — takes place in person in those states. *See* U.S. Election Assistance Comm'n, 2012 Statutory Overview 28-30 (Feb. 2013), *available at* http://www.eac.gov/assets/1/Documents/EAC_StatutoryOverviewReport_FINAL-rev.pdf

[11] Brennan Center for Justice, *Voting Laws Roundup 2014*, *available at* http://www.brennancenter.org/analysis/state-voting-2014.

[12] Scott Powers and David Damron, *Analysis: 201,000 in Florida Didn't Vote Because of Long Lines*, Orlando Sentinel, Jan. 23, 2013, *available at* http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner. Professor Theodore Allen found that long lines in Florida caused an estimated 49,000 people in central Florida not to vote. He previously found that long lines in Franklin County, Ohio discouraged approximately 20,000 people from voting. Voters who experience longer lines have less positive evaluations of their voting experience. Scott Powers and David Damron, *Researcher: Long Lines at Polls Caused 49,000 not to vote,* Dec. 29, 2012, *available at* http://articles.orlandosentinel.com/2012-12-29/news/os-discouraged-voters-20121229_1_long-lines-higher-turnout-election-day (citing analysis of Theodore Allen).

longer lines,[13] and there were significant racial disparities in wait times as well: African-American voters waited an average of 24 minutes, Hispanics waited 19 minutes, and whites waited only 12.[14]

Based on this research and our own findings from a forthcoming report, we recommended that the PCEA urge states to improve the management of polling place resources by examining the number of machines and poll workers at voting sites and by setting maximum acceptable wait times. The Brennan Center's reports *How to Fix the Voting System* and *How to Fix Long Lines* (Appendix D) provide additional detail. The PCEA agreed that long lines to vote were problematic and concluded that voters should not generally have to wait in excess of half an hour to vote under normal circumstances.[15]

Congress can make the PCEA recommendation a reality by passing legislation which would ensure our country's polling stations are sufficiently resourced. Congress can look as a starting place to the LINE Act, sponsored by Sen. Boxer, which would require states to provide a minimum number of poll workers and voting machines at each Election Day and early voting site.[16]

IV. Improving the Simplicity and Usability of Election Forms and Publishing Data on Machine Performance

In many elections, poorly worded instructions, confusing design and machine failures cause hundreds of thousands of lost and miscounted votes.[17] These errors undermine the fundamental promise of our voting system: that every vote is counted. Additionally, the PCEA warned of an "impending crisis in voting technology" precipitated by aging machines, a broken process for setting standards for such technology, and the lack of new voting machines on the market to meet current needs.[18]

We recommended to the PCEA that states adopt ballot design guidelines and usability testing for ballots; and implement policies to generate and disclose data on voting machine performance. The Brennan Center's reports *Better Design, Better Elections* (Appendix E) and *Voting System Failures: A Database Solution* (Appendix F) detail more about our ballot design and voting machine recommendations, respectively.

---

[13] Charles Stewart III and Stephen Ansolabehere, *Waiting in Line to Vote* 11 (July 28, 2013) (Submitted to the Presidential Commission on Election Administration), *available at* https://www.supportthevoter.gov/files/2013/08/Waiting-in-Line-to-Vote-White-Paper-Stewart-Ansolabehere.pdf.
[14] *Id.*
[15] PCEA Report, *supra* note 2, at 14.
[16] S. 58, 113th Cong. (2013).
[17] *See* Lawrence Norden et al., Brennan Center for Justice, *Better Design, Better Elections* 3 (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Better_Design_Better_Elections.pdf. Lawrence Norden & Sundeep Iyer, Brennan Center for Justice, *Design Deficiencies and Lost Votes* (2011), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/Design_Deficiencies_Lost_Votes.pdf. *See* Lawrence Norden, Brennan Center for Justice, *Voting System Failures: A Database Solution* (2010), *available at* http:// www.brennancenter.org/sites/default/files/legacy/Democracy/Voting_Machine_Failures_Online.pdf.
[18] PCEA Report, *supra* note 2, at 62.

Because the situation could deteriorate further still, Congress should require states to follow ballot usability and machine performance guidelines. However, the most immediate step it can take would be to revitalize the Election Assistance Commission. The federal agency has been without Commissioners since 2011. Right now, it cannot fully carry its responsibilities, which include testing and certifying voting machines and other election equipment and distributing funds to the states to implement changes in voting technology. Many of the problems with voting machine performance could be addressed by simply allowing this agency to function as intended.

***

Events in recent years have rightly forced Congress to consider how good a job that we, as a nation, are doing at the business of running elections. While some states are making progress, too many are stuck in neutral or moving in the wrong direction. There should be no controversy about implementing reforms to modernize our voter registration system and make our elections more reliable. We urge Congress to set national standards to improve election administration and safeguard the right to vote.

PEOPLE LOVE IT: Experience with Early Voting in Selected U.S. Counties

A Report by Common Cause/NY and Common Cause Election Protection Project

Written by

Susan Lerner, Elizabeth Steele, Jenny Flanagan and Prachi Vidwans

Introduction

According to the National Conference of State Legislatures, "In 32 states and the District of Columbia, any qualified voter may cast a ballot in person during a designated period prior to Election Day. No excuse or justification is required." This procedure is known as "Early Voting." As in other aspects of election administration, there are many versions of Early Voting across the country with different levels of utility and efficiency.

Early Voting is adopted in all of the states west of the Mississippi, except for Washington State and Oregon where all elections are conducted solely by mail. In the 2012 presidential election, more than 30 million voters cast their ballots before Election Day.

In the eastern part of the country, in contrast, there is no region where states have uniformly adopted Early Voting. In the mid-Atlantic region, Maryland has recently instituted Early Voting and Connecticut's voters will decide in 2014 whether to authorize Early Voting through a constitutional amendment.

In New York, serious public consideration of Early Voting began as a result of Superstorm Sandy's extreme disruption of the 2012 election in New York's 8 most populous counties. In his State of the State address this past January, Governor Cuomo identified Early Voting as a reform priority.[1] Later that same month, the New York State Bar Association's Special Committee on Voter Participation endorsed Early Voting in its report which was adopted by the State Bar Association's Conference of Delegates.[2] A bill to institute Early Voting has passed the State Assembly, but failed to move forward in the State Senate. Election Administrators around the state are examining the issue.

In New York, as elsewhere, the concept of Early Voting is popular with the public. More than two-thirds of New Yorkers surveyed by Siena Research earlier this year support Early Voting.[3] Yet we have found that misconceptions abound, with few voters and even some election administrators unfamiliar with the Early Voting experience in other states. We strongly believe that any state's decision whether to adopt Early Voting should be made on the basis of facts and not ideology. Our strong support for Early Voting is based on the experience of Common Cause voters and staff in states that have Early Voting. Common Cause/NY and Common Cause nationally is dedicated to assisting the public and states in learning about best practices in election administration, so that the public, election administrators and legislators can work together to continue to improve their state's voting administration to insure efficient, secure, transparent, reliable, and accessible elections for all Americans.

This report is not a survey, comparison or discussion of Early Voting in all 36 states that provide their citizens with some means of voting in advance of election day. Rather, our goal in preparing this report was to examine selected counties across the country whose experience with Early Voting provides what we hope will be helpful and relevant information for those considering whether to adopt Early Voting in New York and other Atlantic region states.

Methodology

Early Voting, as is the case with all aspects of election law and administration in the United States, is handled differently in each state that allows it, and, in some states, differently in each county within the state. We began with a review of the laws pertaining to Early and Absentee Voting in all 50 states to identify the various ways in which Early Voting is conducted across the country, as well as a limited review of the academic literature pertaining to Early Voting. The first part of this report is devoted to a discussion of the results of that review.

We then reviewed the laws pertaining to Early Voting in states in which Common Cause has a presence to identify those states whose election administration had some aspect we subjectively deemed relevant to New York's election administration. Based on our analysis of the laws pertaining to Early Voting and our discussions with colleagues, we selected 6 states for examination: Florida, Illinois, Maryland, New Mexico, North Carolina and Ohio.

Our next step was to query Common Cause staff, consultants and activists in those states to identify counties with particularly strong election administrations. Our purpose was to learn from the practical experience of other states in order to make recommendations to devise an Early Voting system that serves the voters, while remaining manageable for its administrators.

The counties profiled were selected based on the recommendations of state-level elections administrators. local nonprofit organizations, as well as recommendations from Common Cause staff. The counties are: Orange County, FL; Cook County, IL; Montgomery County, MD; Bernalillo County, NM; and Charlotte-Mecklenburg County, NC. These counties have efficient Early Voting systems that have met with exceptional success. Also, all of these counties are urban or are among the most populous counties in their states, which means that their Early Voting systems must be robust, efficient, and cost-effective to serve such large populations. Additionally, all use a combination of DRE, Optical Scan, and Paper ballot systems, as New York does, which means that their experiences managing and securing ballots will be more relevant and useful to NY legislators. Additionally, though some of these states, like Florida and North Carolina, have more established Early Voting systems, others, like Maryland and New Mexico, have established these systems more recently. This report, then, contains advice from those who have been through the trial-and-error process, and those who are currently experiencing the transition into Early Voting.

We looked specifically at five aspects of early in-person voting systems, seeking answers to the following questions:

1. System: What has the experience been with implementing Early Voting in the states we surveyed? Can their experiences provide guidance regarding what should be required by statute, and what should be left up to counties and municipalities to decide? How much flexibility should be built into Early Voting systems?

2. Dates and Times: Can the experience of other states help determine a preferred length of time to offer Early Voting or identify appropriate hours to reach the most voters? Can we discern a pattern identifying the days or times of day that elections administrators experience the heaviest voter traffic?

3. Voting Locations: Is there a clearly preferable system for determining how many voting locations a county should have? What has experience been with systems that determine Early Voting locations according to population? Geography? Demographics? Further, what locations are most useful? Elections offices? Government buildings like libraries and schools, or unconventional locations like grocery stores or shopping malls?

4. Ballot Security: What practices have been put in place to secure ballots during the Early Voting period and prevent voter fraud? What technology has been used to aid in these efforts?

5. Budgeting: How have states and counties budgeted for Early Voting? Who is responsible for bearing the costs of Early Voting? How does it affect election day costs? Are there any savings associated with Early Voting?

With these questions in mind, Common Cause interviewed state and county-level elections officials that have first hand experience with administering Early Voting (both early in-person and in-person absentee systems). The second section of this report details the Early Voting experiences of those counties and the advice of their administrators.

The final section of the report summarizes Common Cause/NY's recommendations for states looking to implement Early Voting, based on the experiential knowledge of county and state elections administrators who have already been through that process.

I. EARLY VOTING OVERVIEW

Defining Early Voting

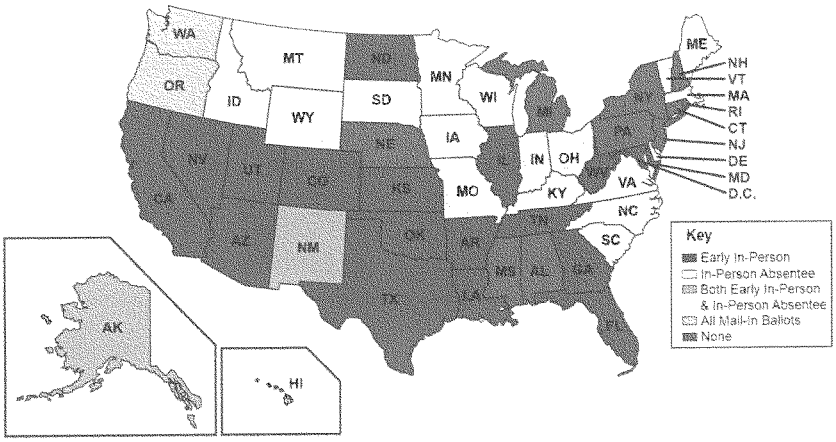
Broadly speaking, Early Voting refers to mechanisms that allow voters to cast a ballot before election day. States, journalists, and academics use the term loosely to refer to many different voting practices, so it is, therefore, useful to outline a working terminology for discussing Early Voting systems.

Today, the term "Early Voting" is used separately from mail-in systems. Following this trend, this report does not consider mail-in absentee ballot systems a type of "Early Voting." Additionally, Washington and Oregon, which have both adopted all-mail voting systems, are treated as special cases. Though both states allow voters to hand-deliver their ballots to elections officials in a way that could be construed as "Early Voting," the overall system in these states is so different that its data provides little that is applicable for the implementation of Early Voting in other states.

The two broad categories of Early Voting that remain are *in-person absentee* and *early in-person*. This report examines the latter. Accordingly, we use early in-person to refer to systems that do not use the word "absentee" to describe its Early Voting system. Though this differentiation seems only semantic, it does reflects the shared characteristics of these systems: that they do not require voters to fill out voting applications before casting their ballots, do not require an excuse for Early Voting, *and* use the same technology and process for Early Voting as they do on election day. The first distinction is especially important because, in some states, "any voter who chooses to vote absentee is perforce allowing a multitude of factors to intrude on the likelihood that his or her ballot will count."[4] Because an absentee ballot is verified after the vote has been cast, a ballot could be invalidated for a number of reasons, such as mismatching signatures. With Early Voting a voter's eligibility to vote is verified before the ballot is cast, obviating this potential problem.

By these definitions, 38 states across the nation have implemented either in-person absentee systems (19 states) or early-in person systems (18 states and D.C.), not including Alaska, which offers both options. Two states (Oregon and Washington) have switched to all mail-in balloting, and the remaining 10 states (AL, CT, MA, MS, NE, NJ, NH, NY, PA, and RI) have no in-person voting options other than allowing voters to deliver their applied-for absentee-by-mail ballots straight to their county office.

The in-person absentee category covers a diverse array of Early Voting systems. Some of these states have extra barriers for absentee voters. Massachusetts, for example, allows in-person absentee voting, but requires registered voters to make individual arrangements to vote early with election officials 2-3 weeks before the election. Also, many in-person absentee systems (DE, KY, MA, MN, MO, MT, SC, VA) require voters to have a valid excuse in order to vote early.



Map of Early Voting Systems across the U.S. (May 2013)

At the same time, some Early Voting systems blur the line between in-person absentee and early in-person voting. Some, like North Carolina and Wisconsin, have "one-stop absentee" systems where a voter can apply for an absentee ballot and cast it in-person during the same visit. This seems very similar to early in-person voting, except that voters do not use the same ballots or voting equipment that they would use on election day. Another mixed case is Kentucky's system, which it calls "absentee voting" even though it allows citizens to cast their votes directly into the same voting machines used on election day. However, Kentucky is regarded as an in-person absentee system because it requires its voters to have an excuse in order to vote early.

Some states also allow for a great deal of flexibility in their statues or constitutions when it comes to Early Voting. Many allow their counties to independently determine important aspects of election administration such as the type of election equipment, security, and budgeting, so that there is constant revision and innovation of Early Voting procedures at the county level that is difficult to track from a state or national perspective.

The great diversity in in-person absentee reflects the lack of national consensus on what Early Voting looks like and how to talk about it. However, this gives New York and other late arrivers the opportunity to learn from the experiences of other states to fashion the most effective and efficient Early Voting systems.

Specifically, this report considers the following characteristics of Early Voting systems: the length and hours of the Early Voting period, methods for determining the number and location of

Early Voting sites, methods for ensuring ballot security and preventing voter fraud, and preferred budgeting practices.

The New York Bill

New York is falling behind when it comes to modernization of its elections laws and administration. It is one of only 10 states that have yet to implement some form of Early Voting option. New York's voter turnout is one of the lowest in the nation, while New York City's turnout is the lowest among major metropolitan centers.[5] 2012 Election Day coverage featured long lines winding outside of the state's polling centers and election administrators' frantic efforts to expand voting opportunities in the wake of Hurricane Sandy. An Emergency Executive Order allowed New Yorkers to cast provisional ballots at any location convenient to them, but the last minute adoption of the provision created a monstrous workload for elections administrators in affected areas.

In the past legislative session, Early Voting legislation that might address these concerns, among others, by making voting more convenient for voters across the state was introduced. The bill, sponsored by New York State Assembly Speaker, Sheldon Silver, passed the State Assembly but languished in the State Senate. While no public hearings were conducted by either house on Early Voting or the specific bill, the issue of Early Voting was discussed by various County Boards of Election.

The bill (A689 same as S01461) attempts to raise turnout and to alleviate several challenges for administration of in-person voting on Election Day and ease the burden on election day polling sites. The bill states that, "All New Yorkers, regardless of work schedules or personal and professional commitments should have the ability to vote in each and every election," which the bill aims to achieve by increasing accessibility, convenience, and ease.

Specifically, the bill calls for Early Voting from 14 days before a general election and 7 days before a primary election, right up to Election Day. It requires specific hours (8:00 am – 7:00 pm) each day, including weekends. In terms of Early Voting locations, the legislation requires each county to set up at least five Early Voting polling places that are "geographically located to provide all voters in each county an equal opportunity to cast a ballot." It specifies that election day protocol must be observed during the Early Voting period, and that ballots be handled in the same way that election day ballots are. It also allows counties the flexibility to use ballot scanner technology and voting machines, and requires up-to-date poll books to prevent voter fraud. The bill also includes other provisions, such as mailing voters information about Early Voting options in advance.

While New York State's suggested Early Voting length is near standard (15 days before election day is the most common start date), and though it allows flexibility with election technology and location selection, we believe that less restrictive provisions are preferable. The case studies that

follow in the second section of this report provide insight into the relative strengths and weaknesses of this Early Voting bill and where it might be improved.

The Big Question: Does Early Voting affect voter turnout?

Much of academic research has focused solely on the question of how Early Voting practices affect voter turnout.[6] For the most part, however, studies have found that Early Voting has only a marginal impact on total voter turnout.

Barry Burden's frequently cited report on Wisconsin's 2008 general election finds that though Early Voting sites were heavily used (more than 30% of votes were cast before election day), total turnout actually decreased by 3% in Wisconsin as a whole.[7] However, Burden's report stands alone in reporting a decrease in turnout. Most of his colleagues find that Early Voting either has no impact on turnout, or that turnout modestly increases.

The percent of voters that take advantage of Early Voting in its first years is highly correlated with campaign efforts.[8] Campaigns can increase voters' awareness that new Early Voting systems are in place, and can, in major part, mitigate the potential effects of Early Voting reductions.[9] Some note that the boost in turnout that campaigns effect is "short-lived," but this may be because campaigns have not yet found an efficient way to factor Early Voting into their strategy year to year.[10]

But regardless of campaign strategy, the impact of Early Voting rules on turnout is also highly dependent on how long the system has been in place. Since voting is habit-forming,[11] a more established system will experience an increase in turnout over time. Many counties experience yearly increases in Early Voting traffic for a number of election cycles. Others note, however, that these increases tend to level off after the system is more established.[12]

As a result, when state legislators have made moves to cut back on Early Voting, they have had a negative impact on the efficacy of Early Voting and turnout. In the 2012 General Election, a number of states shortened their in-person absentee and early in-person voting periods. Significantly, Florida's move to decrease their Early Voting period from 14 to 8 days had a significant impact on certain demographics, especially black voters and Democrats.[13] This was precisely what concerned the Obama 2012 campaign when elections administrators in Ohio attempted to prevent non-military voters from voting on the weekend before election day. The Obama campaign stated that this was a form of voter suppression. Eventually, the U.S. Supreme Court rejected the administrators' effort to curtail Early Voter on that week-end, and 105,000 voters cast their votes in those three days alone.[14]

However, even when Early Voting does increase turnout, it is by a small margin. Though many Republicans were reportedly concerned that Early Voting would advantage the Democratic Party, a Gallup poll released one week before the 2012 General Election actually found that a slightly higher percentage of Republicans than Democrats had taken advantage of Early Voting

(19% Republicans versus 15% Democrats). This is likely due to their finding that senior citizens, who are generally more conservative, were more likely to vote early than their younger counterparts.[15]

That being said, election administrators should welcome any opportunity to make voting more convenient. Voting should not be subject to an onerous cost-benefit analysis; on election day, voters should not be required to give up shifts at work or set aside time in the middle of the day to sit in line for hours in front of polls. Voting is not a privilege, it is a right, and it is the responsibility of lawmakers and administrators to lessen the burden for citizens to take part in their democracy.

Devising Smart Early Voting Systems

But the benefits of Early Voting go beyond increases in turnout. In the last presidential election, New York voters faced Hurricane Sandy just days before the election, which left destruction in its wake. It destroyed some precincts in downstate counties including Long Island and Westchester, as well as throughout New York City, and required a flurry of provisional ballots and special measures to ensure that voters could still have the opportunity to cast ballots. There is no doubt that the flexibility of an Early Voting system would have lessened the impact of the hurricane on elections.

Additionally, long lines at precincts on election day 2012 caused outrage, and Early Voting would decrease those lines. Early Voting has the potential to decrease the election day burden on administrators and voters alike.

But there are certainly some Early Voting protocols that work better than others, and some states and counties have devised smart and effective Early Voting programs that could inform New York's own voting system. Review of the academic literature helps understand some of the dimensions of Early Voting that this report examines: the system, dates and times, voting locations, ballot security, and budgeting.

Many academic reports relay the nervousness elections administrators feel on implementing Early Voting regarding ballot and equipment security, costs, staffing, etc., but these same reports do little to help evaluate the validity of these concerns.[16] Many simply point to these fears and take them at face value, rather than evaluating the ways existing Early Voting systems have addressed these issues. Of course, elections administrators have a right to be nervous in the face of change, but that does not mean that the benefits of the change itself should be discounted.

Some reports have addressed the effect differing days and times have on Early Voting success. A Government Accountability Office report[17] surveyed 17 jurisdictions across 9 states and D.C., and found that 13/17 jurisdictions were concerned about the planning Early Voting would require, especially when it came to finding staff and ensuring the security of voting equipment over the weekend. Indeed, Herron and Smith's report on Florida found that traffic at polls

increases over the weekend, and especially on the last weekend during the Early Voting period. In the 2012 election, for example, so many voters turned up on the last Saturday before election day that three counties had to stay open until early Sunday morning to accommodate all of the voters in line. The report notes that black voters were overrepresented in the Saturday rush when compared to the registered number of black voters in these counties. But knowing this sort of information would allow counties to allocate their resources wisely. Those concerned jurisdictions can examine where their staff are needed the most, and assign them to weekend shifts.

There also should be room for flexibility in Early Voting systems. After Hurricane Sandy in October 2012, Watauga County in North Carolina attempted to vote to extend Early Voting hours. Though this motion was not ultimately adopted, it reflects that Early Voting systems have the flexibility to respond to emergency situations.[18] One of the Florida counties in Herron and Smith's report was also able to extend its hours after a bomb threat shut the polling place down for several hours on Saturday, November 3. Spreading voting over a couple of weeks, rather than dealing with all voters at once on election day, allows elections officials time to work out problems like these, and also decreases the chaos of election day in general.[19]

Other reports analyze the way that the choice of Early Voting locations can increase or decrease early turnout. For example, one study[20] found that Early Voting can have a "mobilizing effect" in the following situations:

- If voters stumble upon Early Voting locations in non-traditional sites (grocery stores, libraries, shopping malls, etc.)
- If voters run across others who voted early and are reminded to vote themselves
- If voters encounter news coverage of Early Voting
- If voters are subject to candidate or party campaigns encouraging Early Voting

Making Early Voting present in the daily life of a potential voter seems to increase the likelihood that a person will take advantage of Early Voting opportunities. Elections administrators have the power to increase the likelihood of the first scenario: that voters will run into Early Voting locations during their usual routines. Indeed, other reports have found that placing voting centers in "nontraditional locations" or "socially familiar sites" increases early turnout.[21] The same report also finds that those nearest to their Early Voting site were 13% more likely to vote than those farther away from voting locations. Distance also has a greater impact in rural counties than in urban counties, and in locations where residents have long commutes to work, the Early Voting rate drops 22%. Taking this into consideration, it may be more useful to put more Early Voting sites in office and industry-heavy parts of counties rather than in residential areas, so that commuters can factor voting into their workday.

Statistics and data about Early Voting security and budgeting are much harder to find. Though there are many people discussing the possibility of voter fraud with respect to Early Voting, counties and states have not published reports about incidents of voter fraud or about how they secure Early Voting locations overnight. Voting technology seems to both greatly ease the Early Voting process and greatly increase rampant fears about its misuse or malfunctioning.

There is similar concern about budgeting for Early Voting. Information about how counties fund Early Voting is not typically made public, though concerns about costs and staffing are also common. This report will shed some light on how elections administrators in successful counties secure voting locations overnight, and how counties find savings in implementing Early Voting, but hopefully future academic studies will address these gaps in data and knowledge.

II.

CASE STUDIES

FLORIDA

Source

Telephone interviews with:

- Carolyn Thompson, a Florida Voter Protection Advocate at the Advancement Project
- Bill Cowles, Supervisor of Elections, Orange County

State Overview

Florida has a no fault early in-person system that underwent significant changes in the recent past. Originally, the Early Voting system provided for two weeks of Early Voting, but this was cut to just 8 days in time for the 2012 general election, which Carolyn Thompson at the Advancement Project called a "painful" experience. Reports show that turnout—and especially the turnout of black voters and Democrats—decreased as a result of this change.[22] Legislative efforts are under way to allow counties more flexibility in determining their Early Voting policies in terms of days, hours, and locations.

Florida has some unique state-level measures that increase the system's effectiveness. For example, the state puts information about wait times online, so that voters can go to the Early Voting centers that have the shortest wait times. This is highly convenient for voters, and allows them to better structure their days around voting.

Florida State Early Voting Requirements

System	Early In-Person, No Fault
Dates	E-10 to E-3[1]
Times	Centers must be open for 8-12 hours per day, including Saturday and Sunday.
Locations	Early voters can cast ballots in the main or branch office of the Supervisor of Elections, though the Supervisor may also designate any city hall or public library as an Early Voting site. All locations must be geographically convenient to voters so that "all voters in the county [...] have an equal opportunity to vote." Early voters can use any voting location in the county.
Voting Technology	Optical Scan, DRE, Ballot-On-Demand statewide
Ballots and Security	Early voters use the same type of voting equipment as election day voters. Voters must present ID and fill out an "Early Voting voter certificate" in which they swear and affirm that they will not commit voter fraud, and that they will bear the consequences if they do.
Budgeting	Managed on the county level

[1] I.e., "election day minus 10 days to election day minus 3 days," or that Early Voting runs from ten days before election day to the third day before election day. During a November election, this would mean that voters could cast early ballot two Saturdays before the Tuesday election, until the Saturday before the Tuesday election. In this report, we use the "E-#" format as shorthand.

Orange County, FL: Demographic Facts[23]

- Geography: Central Florida, includes Orlando and a dozen other municipalities.
- Population: 1,157,372
- Urban/Rural: 90% urban and 10% rural
- Race: 46.0% White, 26.9% Hispanic or Latino, 19.5% Black or African American, 4.9% Asian
- Major Industries: Tourism (Arts, Entertainment, Lodging, and Food Services account for 18% of industry)
- Administration: Elected County Supervisor of Elections supported by professional staff

Orange County, FL: Experience with Early Voting

At the time we spoke to Bill Cowles, the Supervisor of Elections in Orange County, Florida was in the middle of legislative sessions where Early Voting policies were up for debate. Though Cowles had changes that he would recommend for Early Voting in Florida, for the most part, he said that the system just made sense for his county. According to Cowles, the number one reason Early Voting is appropriate for Orange County is that tourism employs many of the county's residents and shapes daily life. Because most residents of Orange County do not have a typical workday, the traditional election day vote is simply inconvenient, and Early Voting gives voters "the flexibility to vote within their own convenience."

Orange County's experience is illuminating when it comes to the impact of Florida's recent legislative changes in Early Voting policy. When Florida decreased the Early Voting period from 14 days to 8 days, Orange County made up for the shortage by offering the maximum number of Early Voting hours possible—but the increasing the number of *hours* in the day that Early Voting polling places were open did not compensate for the fewer number of *days* of Early Voting. These statutory changes actually allowed for the same overall number of hours, but restricted the overall Early Voting period. Orange County offered the maximum possible hours, 12 hours on each of the 8 days, but Cowles reports that this didn't make up for the 6 lost days. He explains, "It was the same number of hours, but we didn't get as many people through the process. People were frustrated." Planning for an election cycle is not unlike opening a business, he says, because you must plan for a soft opening and build to a big weekend. Cowles explains, "When you start on Saturday, which is normally a big turnout day, you get a weak opening."

Squeezing two weeks of voters into eight days also put a lot of pressure on poll workers, who had to work 12 hour days, not including setting up and closing down the polls or accommodating for voters who are still waiting in line when the polls closed for the day. Cowles explains, "I'm

not sure if we'd have workers that could survive 16 hour days for 8 days." But while this time might not be sufficient for Orange County, Cowles recognizes that 8 days might be enough for smaller, rural counties. Proposed legislation would require 8 days, but allow bigger counties to opt for running Early Voting from 15 days before election day to the Sunday before. In Orange County, Cowles says, they'll definitely go back to a 14-day schedule.

According to Bill Cowles, the most important thing for an Early Voting system is that it be flexible. "Not every county is the same," he says, "The elections office [of a county] knows their community better and would know how to pick good locations and times."

In particular, Cowles would like to have more flexibility in picking Early Voting locations. Currently, Florida only allows supervisors to set up voting sites in their main or branch offices, public libraries, and city halls. Some libraries and city halls are located in shopping centers and other places that are highly convenient for voters—but not every county has an office in such locations. Also, some of these locations, like libraries, do not have enough available free space to accommodate Early Voting. Cowles says that these restrictive limits are directly responsible for Florida's long lines in the 2012 general election. If he had more flexibility, he feels he would be able to use his community knowledge to pick the best possible voting locations, use his resources in the most effective way possible, and further strengthen Orange County's Early Voting system.

When talking about the system Orange County already has in place, Bill Cowles' thoughts are consistent with administrators in other states. He explains that Early Voting decreases the chaos of election day. In Orange County's experience, Early Voting ends up being budget neutral over time because it ultimately reduces election day costs (fewer polling places, staff, telephone lines, etc.). Savings are also realized by using the statewide Ballot-On-Demand system. Ballot-On-Demand is a system that prints the appropriate ballot for voters when they appear at the election site. This is much more effective than the "pick-and-pull" system where counties print all of the ballots from every precinct ahead of time, and pull out the appropriate ballot for each voter when they arrive at the Early Voting center. Ballot-On-Demand drastically reduces printing costs and reduces the amount of prep work for in-person absentee or Early Voting staff, while increasing convenience for voters. Since two parts of the ballot are the same statewide, Cowles and his staff print those ahead of time, and only print the precinct-specific ballots on site, saving both time and money. Cowles also uses electronic poll books, which saves time in compiling election day poll books, and also strengthens Early Voting security against fraud—though, as he believes, "Voter fraud has become a campaign tool more than a real situation."

IILLINOIS

Source

Telephone interviews with:

- Gail Weisberg, Manager of Early Voting
- Gail Siegel, Communications and Policy Director

State Overview

Illinois has a no fault, early in-person system that was first implemented in 2006, and has evolved over time, driven in part by the demands of voters for the system. Illinois has both permanent and temporary Early Voting locations that are subject to different rules concerning location, hours, and ID requirements. The advent of Early Voting has also allowed for grace period registration.[ii]

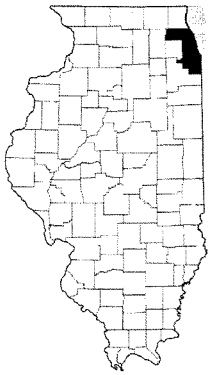
Illinois State Early Voting Requirements[24]

System	Early In-Person, No Fault
Dates	E-15 to E-3
Times	Permanent locations are open from 8:30 am-4:30 pm OR 9:00 am-5:00 pm weekdays, and 9:00 am-12:00 pm on weekends and holidays. Permanent Early Voting locations must be open 8 hours on any holiday during the Early Voting period and 14 hours during the final weekend before the general election. The hours and days for temporary Early Voting locations are subject to the election authority's discretion.
Locations	Each election authority in a county where: • Population > 250,000 = at least 1 location within each of the three largest municipalities, and if any such municipality is >80,00, then at least two locations in that municipality • Population > 100,000 = at least 2 locations Also allows for temporary Early Voting locations at the discretion of the election authorities. Locations must be accessible in accordance with ADA and HAVA.
Voting Technology	Optical Scan, DRE, Networked Voter Database

[ii] Illinois law allows voters who miss the traditional voter registration cut-off of 28 days prior to the election to register in person at the office of their election authority during a grace period of the 27th to the 3rd day prior to the election.

Ballots and Security	Clerks are required to verify the signature of all early voters. Photo ID is required to vote early. Anyone who is voting early who also received an absentee ballot can surrender the absentee ballot and vote early. Clerks must maintain and submit to the state a list of all voters who voted early. The names on the list will then be delivered to the appropriate precinct before the opening of polls on election day. Voting sites must also comply with all applicable voting machine security provisions. All early vote ballots must be counted at the election authority's central ballot counting facility, and cannot be counted until after the polls are closed on election day.
Budgeting	Managed on the county level

Cook County, IL: Facts[25]



- Geography: Northeastern Illinois, includes Chicago and 30 townships
- Population: 5,294,664, the 2nd most populated county in the U.S., and contains 43.3% of Illinois' residents
- Urban/Suburban: approx. 54% urban
- Race: 43.9% White, 24.4% Black or African American, 24.0% Hispanic or Latino, 6.1% Asian
- Election Administration: Elected County Clerk

Cook County, IL: Experience with Early Votin

Gail Weisberg, Manager of Early Voting, Cook County, and Gail Siegel, Communications and Policy Director, Cook County, were eager to endorse the benefits of Early Voting. Early Voting has increased in popularity since its introduction. In Cook County, all voters received a postcard prior to the November 2012 election notifying the voter of the closest early vote location and encouraging them to take advantage of the Early Voting option. "We encourage Early Voting. It provides so much access for voters. We all think those benefits outweigh any of the issues and costs of setting it up," said Gail Weisberg.

When Illinois first established Early Voting, the state brought in an election demography expert who looked at their maps and population distribution and came up with a suggested plan for the location of Early Voting centers. Cook County includes the City of Chicago and 120 other villages and towns, and is served by 43 Early Voting sites. They tried to distribute the locations in sync with the population's needs and voting habits. Most of the Early Voting locations are in local municipal halls, libraries, and other public buildings. The permanent Early Voting locations are generally in county offices. There has not been a need to make too many changes in locations, though a few sites were moved because the original location became too small as Early Voting popularity grew.

In order to effectively implement Early Voting, Cook County developed software that would allow it to serve every voter in the County at every Early Voting location. This includes a voter database that can be accessed remotely, so that election staff can check a voter's registration, deploy the correct ballot style, and be sure that voters are not trying to vote twice in a single election. This software also enabled Early Voting judges to retrieve voter signatures on file to enable the signature verification required by statute. In smaller counties, there was concern that this remote checking of signatures would not be possible and there would not be resources to develop the capability as in Cook County, which is why the legislature added a photo ID requirement for Early Voting. They would advise any state undertaking Early Voting for the first time to be certain the technology to check in voters will be successful.

It was also important for Cook County to create some uniformity in voting equipment. When Early Voting was first implemented, the early vote locations in downtown Chicago used touch screens, while the suburban areas of Cook County did not. This meant that not all voters could vote in every Early Voting center. Now Cook County has touch screens at all locations, and any voter in Cook County can now vote at any location in the County. The machines are capable of generating any required ballot style.

In determining locations and hours, Cook County's experience is similar to that in other states. Elections administrators noted that the popularity of Early Voting is dependent on the convenience of Early Voting locations. It is also their experience that early vote increases in popularity the closer it comes to election day. They have seen wait times expand during Early Voting from 20 minutes in the first days to an hour or more closer to election day. However, this has meant that lines on election day are shorter. As Gail Siegel says, "There are real benefits. I don't disagree that there is expense and work, but we have been able to reduce the number of precincts and consolidate them. Election day lines are shorter, and we need fewer election judges. It's not free, but people love it. It allows them access."

MARYLAND

Source

Telephone interviews with:

- Ross Goldstein, State Deputy Administrator of Elections*
- Margaret Jurgensen, Election Director in Montgomery County
- Alison McGlaklin, Deputy Election Director in Montgomery County
- Chris Resesits, Operations Manager in Montgomery County

State Overview

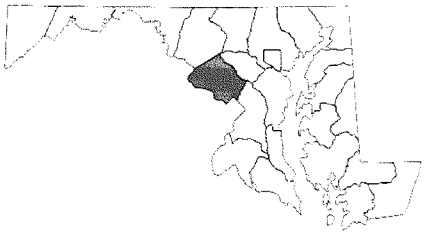
Maryland has an early in-person voting system. Maryland's first Early Voting bill was passed in 2006, but after a legal challenge, it was determined that in order to implement Early Voting, the state would have to vote to amend the state's constitution. Voters approved the amendment during the 2008 general election, and Early Voting was finally implemented in time for the 2010 general election. The laws guiding Early Voting in Maryland are relatively inflexible compared to other states. It sets the days and hours for the Early Voting period, and determines how many locations a county should have according to its population.

MARYLAND STATE REQUIREMENTS

System	Early In-Person, No Fault
Dates	E-10 to E-5, but not on Sunday (E9)
Times	10:00 am-8:00 pm each day
Locations	Early voters can vote at any voting center in their county. The number of voting centers is determined by the registered voter population: • Population < 150,000 = 1 voting centers • 150,000 < Population < 300,000 = 3 voting centers • Population > 300,000 = 5 voting centers
Voting Technology	Touch screen voting equipment (transitioning to Optical Scan by 2016), Electronic poll books statewide (ESNS, Express Poll)
Ballots and Security	Early voters check in before voting, and vote on the same touch screen voting system used on election day. Maryland uses electronic ballots, and all voting equipment and election supplies are secured at the Early Voting center, in accordance with a plan filed by the local board of elections. After the last day of Early Voting, they are secured at the local board of elections. In response to concerns about voter fraud, the governor at the time of the implementation pledged money for the state to get electronic poll books.
Budgeting	The cost is shared by the state and the county. In general, the county pays for election costs, but the state pays for institutional changes, like improving voting technology.

*Participated in Early Voting Panel in New York City on May 20; video online at http://bit.ly/1d2Pop7

Montgomery County, MD: Facts[26]



- Geography: Bordering Washington, D.C. on the west
- Population: 971,777
- Urban/Rural: largely suburban
- Race: 49.3% White, 17.0% Hispanic or Latino, 16.6% Black or African American, 13.9% Asian
- Election Administration: County Board of Elections made up of five regular members and two substitute members appointed by the governor from candidates recommended by the appropriate county political leaders with three regular members and one substitute member of the majority party, and two regular members and one substitute member of the principal minority party, supported by a single appointed professional Election Director and a single appointed Counsel and a staff specifically barred from political activity.
- Other: 91.1% of residents age 25+ have a Bachelor's degree or higher and 56.8% of residents age 25+ have a Bachelor's degree or higher

Montgomery County, MD: Experience with Early Voting

The election administrators in Montgomery were more than eager to discuss their experiences with Early Voting. Because it is located next to Washington, D.C., and is the most populous county in Maryland, Early Voting is a substantial operation in Montgomery Country.

The most restrictive aspect of Maryland's laws are its requirements delineating the number of voting locations in very populous counties, where any county with more than 300,000 registered voters must have exactly five voting centers. This means that county with 1,000,000 voters must have the same amount of voting centers as one with 300,001 voters. This makes it difficult for larger counties like Montgomery County to tailor their early Voting program to the specific needs of their county. This might account for Ross Goldstein's observation that despite arguments that Early Voting was a type of "unfunded mandate," once it was implemented, "the counties were the ones asking for more locations." Restricting the ability of counties to prepare for early voter traffic creates long lines at polls. Maryland's legislators addressed this problem earlier this year, passing a new statute allowing for increased number of sites depending on the size of the jurisdiction a d extended the length to one full week, including a week-end, with the possibility of adding second week-end hours depending on study.

It takes quite a bit of planning—almost a year—to set up these Early Voting locations, the Montgomery County administrators note. Administrators are sensitive to regulations that set the criteria for Early Voting locations, including access to public transportation and the availability of utilities. At least 80% of the population must be within 15 minutes of Early Voting sites, according to the state law, so that they can be maximally accessible. Goldstein also noted, however, that resident population may not be the most important things to consider. He has found that the most useful sites are on major roads, are accessible, have sufficient space for voting machines, and space for parking. Maryland does allow for flexibility in the types of locations administrators can pick. Locations can be in public or private buildings, and the state elections board approves the locations six months ahead of time.

Another key part of Early Voting planning for Montgomery County involves training staff to handle the large amount of work on long, 10 am-8 pm days. The state requires that counties hire regular election judges for the Early Voting period, but Montgomery County chose to use these elections judges to compliment the specially hired temp staff. These judges work from 6:30 or 7:00 am until 9:00 or 10:00 pm, overseeing the set up and shut down of the Early Voting sites each day. Montgomery County hires two elections judges per location—one Republican and one Democrat—to "provide political coverage."

Montgomery takes great care to make sure their staff is very well trained. Temps undergo at least 8 hours of training going over the instruction manual, management of election forms, and equipment training, and also have at least 2 hours of on-site training before the election. Judges train for additional hours, including 9 hours of classroom instruction. Because many have already been trained to handle voting at precincts on election day, elections administrators can "cherry pick" the best of their judges to work through the Early Voting period. Additionally, the training staff is also available on-site during the Early Voting period to help manage any problems that might arise. Montgomery "supports a high level" of staffing, which increases costs, but also increases the efficiency, security, and professionalism of Early Voting.

Also, Montgomery County and Maryland State are fully digitized, and have been using electronic poll books and DRE since 2002. In particular, the electronic poll books make Early Voting more secure. The state's poll books are all networked together to prevent voters from voting twice in one election. Maryland ends its Early Voting period on the Thursday before the election, and uses the next four days to update all of the early voter information into finalized poll books for election day, which are delivered to polling places on Monday.

Finally, Maryland's Early Voting cycle was impacted by Hurricane Sandy in October 2012, just before the general election. These elections administrators recall that their Early Voting period started the Saturday right before Hurricane Sandy, and they were surprised to see very heavy traffic throughout the day, with lines almost two blocks long. When Margaret Jurgensen asked voters why they all decided to vote that day specifically, she said that 90% of voters responded that they came early because of Hurricane Sandy. "They were afraid of power outages that would

affect Election Day and wanted to get voting out of the way before the storm," Jurgensen explained. In fact, when Sandy forced them to cancel Early Voting on the following Monday, the County then had to expand hours to allow for Early Voting for an extra day. This process was "very hard," which was not helped by the 90-minute line on that extra day.

However, although Jurgensen emphasized the hard work these changes required, it is remarkable that the Early Voting system was flexible enough to adapt to the Hurricane. Should the hurricane have fallen on Election Day without any type of Early Voting system to accommodate these sorts of unexpected emergencies, thousands of voters would have been disenfranchised. The long lines are not ideal, but they are a testament to the fact that Early Voting makes it easier for administrators to adapt elections to emergencies, and that voters are eager to take advantage of Early Voting during these types of situations.

NEW MEXICO

Source

Telephone interviews with:

- Maggie Toulouse Oliver, County Clerk*

State Overview

New Mexico offers both in-person absentee voting and early in-person voting. New Mexico's statutes have rules setting specific dates, hours, and locations for each voting option. The Early Voting provisions also set a minimum number of Early Voting locations depending on population, and require numerous checks and records of Early Voting to provide for ballot security.

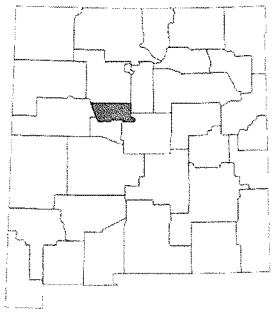
New Mexico State Early Voting/In-Person Absentee Requirements[27]

System	Early In-Person AND In-Person Absentee, No Fault
Dates	Early In-Person: E-17 to E-3 In-Person Absentee: E-28 to E-4
Times	Early In-Person: Must be offered 12:00 pm-8:00 pm on Tuesday-Friday and 10:00 am-6:00 pm on Saturday. Additional hours at the discretion of county administration. In-Person Absentee: Must be offered during regular business hours (M-F, 8:00 am-5:00 pm) and 10:00 am-6:00 pm on Saturdays.
Locations	Early In-Person: Early in-person locations are established at "alternate sites." Voters can vote in-person at any of these sites, and the number of sites is determined by total voting population: • Population > 10,000 = at least 1 location • Population > 50,000 = at least 4 locations • Population > 250,000: at least 14 locations Provisions also allow for mobile alternate voting locations in rural counties. Voting centers must be in centralized locations, close to major intersections/public transportation, at least 2,000 sq. ft., and should be based on voter registration/turnout projections. They must also follow a Least Change Scenario, meaning that once an alternative site is established for one election, it should be available in future elections. Sites must be accessible in accordance with ADA and HAVA. In-Person Absentee: County Clerk's offices
Voting Technology	Paper ballots, Optical Scan, Ballot-On-Demand, electronic pollbooks, and a county-specific app, "My Voter Information"

* Participated in Early Voting Panel in New York City on May 20; video online at http://bit.ly/1d2Pop7

Ballots and Security	Early In-Person: Clerks must make sure that voters cannot vote twice. Voters must present the required voter identification upon arrival, and fill out an application to vote. The clerk then makes an appropriate mark on the signature roster or register noting that the voter has voted early. All voting locations must have a secure storage area for ballots and printing systems. All locations must have broadband internet connections.
Budgeting	Managed on the county level

Bernalillo County, NM: Facts



- Geography: Central New Mexico, includes Albuquerque
- Population: 662,564 (~430,000 registered voters)
- Urban/Rural: 96% urban in the Albuquerque Metropolitan Area, with 4% rural areas in the East Mountains/S. Valley
- Race: 47.9% Hispanic or Latino, 41.5% White, 4.0% American Indian and Alaska Native, 2.5% Black or African American, 2.2% Asian
- Other: Includes two Native American tribes (To'hajilee and Isleta Pueblo)
- Election Administration: Elected County Clerk

Bernalillo County, NM: Experience with Early Voting

Maggie Toulouse Oliver, County Clerk of Bernalillo County, is eager to speak well of the Early Voting system in her county. Under her leadership, the county has made some innovations to increase the efficiency of the system and neutralize costs. She reports that Early Voting comprises 70% of the county's overall turnout, serving 125,000 voters in the 2012 general election.

Bernalillo County uses the same ballot across all types of voting options—absentee by mail, in-person absentee, early in-person and election day voting. As was explained earlier, using different absentee ballots can mean that a voters' ballot may be invalidated on Election Day when it is counted, disenfranchising voters without their knowledge, weeks after they cast their votes. Bernalillo also goes beyond the state's minimum requirements to offer Early Voting Monday-Saturday from 8:00 am-8:00 pm and uses 17 sites (two more than is required).

Additionally, the state requires that any voter be allowed to vote at any precinct during the early in-person period. This increases the convenience factor for voters, who do not have to worry

about the "wrong church problem," which disenfranchises voters simply because they go to an incorrect voting center. Bernalillo has also improved this process by publishing wait times during the Early Voting period online and on its "My Voter Information" app. Also, rather than printing all possible ballots at all precincts ahead of time—which can be quite expensive and wasteful—Bernalillo updated to a Ballot-On-Demand technology, which allows the staff at voting locations to print the ballot the voter needs when they arrive at the polls.

Bernalillo County has also modernized its voting system by digitizing its poll books. When early in-person voting was first implemented in 2010, voters were only allowed to vote at their own precinct, and printed rosters were used. Learning from the chaos of this experience, elections officials digitized their systems for the 2012 general election. This included setting up an electronic poll book system (AskED brand technology) that allows voters to check-in digitally when they arrive at the polls. This met with great success: it facilitated check-ins and data sharing during Early Voting, prevented voters from voting more than once during the Early Voting period or voting again on election day, and increased the convenience for voters. Oliver reports that she received a lot of positive feedback from voters on Bernalillo's smooth check-in process and Ballot-On-Demand.

Having digital information collected during Early Voting also allows election staff to do substantial analysis and metrics to make the system as efficient as it can be. They can figure out which sites are most convenient for voters, which get the most traffic, what days or hours are the most utilized by voters, and much more. This aids the county in determining where their resources are best spent. Using these numbers, they can determine how many check-in and voting machines they require at voting sites, based not only on population density but on actual usage patterns. They can also pick locations that are the most convenient for voters. For example, the statutes for Early Voting require counties to pick Early Voting locations based on geographic convenience, and using data from previous elections, Oliver's staff now includes nearby public transportation as a key element for determining how convenient an Early Voting site is. They have also begun renting space in non-traditional locations, such as strip malls and commercial spaces, where voters are likely to go during the day anyway. As many studies report,[28] using nontraditional locations not only increases convenience for voters, but if a voter runs into Early Voting centers throughout their day, they are more likely to take advantage of the opportunity to vote early.

Bernalillo County experienced other advantages with Early Voting. Oliver notes that Early Voting decreases the chaos of election day. During the longer period of early in-person voting, staff "can deal with problems more quickly" than they would have been able to on election day, improving the quality of elections as a whole. Spreading voters out over twenty days also cuts down on wait times at polls on election day.

Oliver also notes that early in-person voting in Bernalillo County is budget neutral. Costs (such as leasing Early Voting locations, paying and training staff, etc.) are neutralized by the Ballot-

On-Demand system, which saves the county about $1 million in printing costs. As she reports, early in-person voting is "revenue neutral once they invest in voting machines." She also explains that the county has had no problem with security. Bernalillo County transfers ballots out of the scanner to a locked location. Once the county is finished with early in-person voting, staff closes the voting machines and replaces them for election day.

NORTH CAROLINA

Source

Telephone interviews with:

- Spoke to Michael Dickerson, Director of Elections in Mecklenburg County*

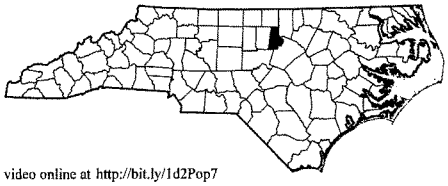
State Overview

Until a change in law passed in July, North Carolina had a "One-Stop Absentee" early option, where voters could walk-in to register during the Early Voting period (same-day registration) and cast an absentee ballot at the same time. It was first implemented in 2002, and has "evolved" over the years. We consider this in-person absentee voting, because the voter's eligibility to register and vote is determined after the voters casts a vote, meaning that his or her vote can be retrieved and canceled.

North Carolina State Early Voting Requirements[29]

System	In-Person Absentee ("One-Stop Absentee"), No Fault
Dates	Formerly E-19 to E-3
Times	Hours of operation vary by county, but One-Stop Absentee had to be available on Saturday.
Locations	The state requires at least one in-person absentee site at the county Board of Elections office, or an alternative site. County board of elections can designate additional sites if they choose. All sites must be in locations that are paid for in part by public funds (libraries, schools, etc.).
Voting Technology	Varies by county
Ballots and Security	All absentee voters must be recorded in a pollbook, which is delivered to precincts in time for election day, though absentee votes are only tabulated after 5:00 pm on election day. Counties using optical scan devices can scan the ballots ahead of time without printing the results, to maintain the secrecy of the vote. In order to establish One-Stop Absentee voting, a county must have a system where all ballots are retrievable, in case an individual's absentee ballot application is disapproved.
Budgeting	Not mentioned in statutes—managed on the county level

Charlotte-Mecklenburg County, NC: Facts[30]



* Participated in Early Voting Panel in New York City on May 20; video online at http://bit.ly/1d2Pop7

- Geography: Northern North Carolina, includes the City of Charlotte and 6 other municipalities
- Population: 919,628, the state's most populated and most densely populated county
- Race: 50.6% White, 30.2% Black or African American, 12.2% Hispanic or Latino, 4.6% Asian
- Election Administration: Three person County Board of Elections appointed by the State Board of Elections from names submitted by each political party, with a professional Director of Elections hired by the Board to administer elections.

Charlotte-Mecklenburg County, NC: Experience with Early Voting

Michael Dickerson, Director of Elections in Charlotte-Mecklenburg County, truly believes in the Early Voting system, after witnessing its 10 years of growth in North Carolina. As he says, "It's the only way to vote!" In his county, Dickerson has worked to expand Early Voting in a way that gives greater opportunities to voters, but is also practical and efficient.

Dickerson and his staff set up 21 Early Voting locations during the 2012 general election. In accordance with state regulations, they presented sites to the county elections board, which votes on them. As Dickerson says, "We try to provide them with sites that are convenient to all voters." They consider a variety of different factors, from parking availability to demographics, to use their local knowledge to pick the most accessible locations. In particular, Dickerson points out that it is good to pick sites located near office or working centers, so citizens can vote during their lunch breaks. North Carolina requires that Early Voting locations be in buildings and offices that are paid for in part by public funds, and Dickerson and his staff work within these parameters to locate sites near "natural congregation points [...] where you know you have a captive audience," such as shopping malls, libraries, senior centers, etc.

Experience with Early Voting also allows Dickerson and his staff to organize their Early Voting system around consistent trends, to put their resources where they are most needed and save money. Because they noticed that early voters generally head to the polls around lunch time and after work, with a drop off after 7:00 pm, Mecklenburg county offers voting hours from 11:00 am-7:00 pm. Also, the flexibility built into North Carolina's statute allowed Mecklenburg County to devise smart elections strategies for different elections. This means that Dickerson can expand Early Voting for bigger elections and decrease it for smaller elections, according to demand. Building this sort of flexibility in statutes is important, Dickerson believes, because it allows the people who know the counties best to determine how elections should proceed.

Making these sites accessible is the most important thing to Charlotte-Mecklenburg County. As Dickerson explains, "The goal is not to vote more Ds or more Rs. The goal is to get more people to vote." And, in fact, their smart tactics are making a year-to-year difference. As elections staffers learn more about implementing Early Voting, and as the system has gotten more established, Early Voting turnout has ballooned. Early Voting started out small, with about 20-

30,000 voters. The next year, it more than doubled to 60,000 voters, and now around 250,000 people take advantage of Early Voting in this county. Dickerson reports that 64% of voters voted early in the 2012 general election. Next year, before the change in the law, he hoped to reach 75% voting early.

Spreading voter turnout over the two and a half week Early Voting period made election day much less chaotic and much more manageable in Charlotte-Mecklenburg. For one, it greatly reduced line and wait time on election day. "You didn't see my name in the paper this year!" Dickerson jokes, referring to the many articles about long lines during the 2012 election. His county finds that it is not difficult to implement Early Voting. In particular, Dickerson points out that they already have more than enough regular elections staffers and voting equipment on hand to cover the Early Voting period. Dickerson typically hires and trains a large pool of staff for election day, and this is the same pool he draws from to staff Early Voting. He has found that his staff is more than ready to jump in and cover his Early Voting needs. For voting machines, again, election day machinery more than covers Early Voting needs.

Of course, some of this does require work and thoughtful action on the part of elections officials. But, Dickerson believes all of this is worth it: "I'm not in this to make it easier for Michael Dickerson. I'm in this to make it easier for the voters of Mecklenburg County. And they love Early Voting."

Mecklenburg County also takes significant steps to prevent voter fraud and assure the safety of voting equipment throughout the Early Voting period. North Carolina's system is not early in-person, but in-person absentee, which means that there are certain special requirements for counties, including, for example, that all ballots are retrievable (so that, if an absentee voter is deemed ineligible after the fact, his or her vote can be retracted). Since the voted ballots are absentee ballots, the county cannot tabulate the votes until the polls close on election day. However, having a digitized system facilitates this process, the votes can be counted at the push of a button, and the data is processed so quickly that the early vote outcome is typically the first number elections officials report that night.

Electronic polls books and machines also help the elections staff with security. When voters first arrive, they check in through an electronic poll book process that is tied into a statewide system. This means that voters are flagged right away if they attempt to vote again at another Early Voting site. The elections staff then coordinates the poll books the weekend before election day. The county has an arrangement with a printing company to print the poll books overnight so that they are ready for election day. Dickerson would recommend this sort of business arrangements for states like New York that continue to use paper ballots. But though this certainly does the job, Dickerson says that having an electronic poll book system for election day would "allow me to do this at the snap of a finger."

At night, the Early Voting locations are locked up "like a bank," with additional security on top of what already exists in these government-funded buildings. Also, the electronic voting machines allow staff to record the total number of votes that were cast that day before they leave for the night. If the number changes overnight, they would know that there was a problem and would be able to correct it before votes are counted on election day.

Dickerson says that Early Voting certainly requires work to set up, but he believes it is completely worth it.

OHIO

Source

Telephone interviews with:

- David Gully, County Administrator, Warren County
- Brian Sleeth, Director of Elections, Warren County
- Kim Antrican, Deputy Director of Elections, Warren County

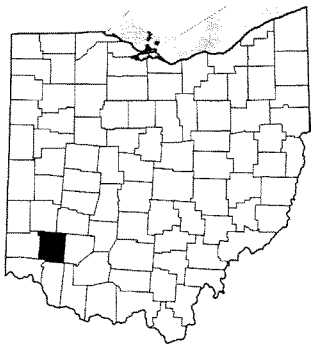
State Overview

Ohio has an in-person absentee system, and offers same day registration for the first five days of the in-person absentee period (which officials call a "golden week"). Ohio was one of the states in the middle of the early voting debate during the 2012 general election. Legislators attempted to restrict early voting to military personnel on the last weekend before Election Day, saying that they did not have the resources to support a fully-fledged early voting weekend. After a heated public debate led by President Obama's campaign, Ohio's Supreme Court denied the cuts to early voting, explaining that any elections measures "must be offered to all voters if it is offered to the military."[31]

Ohio State Early Voting Requirements[32]

System	In-Person Absentee, No Fault
Dates	E-35 to E-4
Times	Voters can cast their ballots at an in-person absentee voting center from 8:00 pm-7:00 pm through the Thursday before election day (E-35 to E-5). The weekend leading up to election day is the only weekend where counties must offer early voting. The required hours are as follows: • Friday (E-4): 8:00 am-6:00 pm • Saturday (E-3): 8:00 am-2:00 pm • Sunday (E-2): 1:00 pm-5:00 pm • Monday (E-1): 8:00 am-2:00 pm Though the Secretary of State established these extended hours during the 2012 election cycle, the hours in different Ohio counties still vary, as some counties offer extended hours, and others do not. A recent revision of election law does, however, require that voting locations stay open late to accommodate long lines of early voters during the in-person absentee period.
Locations	Counties may make use of any location for early voting, including using publically-funded buildings, renting privately owned space, or building "removable buildings" for elections. Ohio recently passed a bill to ensure that voting locations are accessible to people with disabilities.
Voting Technology	Optical Scan, DRE, Paper ballots
Ballots and Security	While the ballots are the same as the ones used on election day, voters also must fill out a ballot envelope and an absentee ballot application.
Budgeting	Managed on the county level

Warren County, OH: Demographic Facts[33]



- Geography: Southwestern Ohio
- Population: 212,693, a 34.29% increase from the 2000 census
- Urban/Suburban/Rural: 7.6% urban, 55% of land used for crops (rural)
- Race: 89.0% White, 3.9% Asian, 3.2% Black or African American, 2.3% Hispanic or Latino
- Election Administration: Four person Board of Elections with two persons from each principal party supported by Director and Deputy Director of Elections

Warren County, OH: Experience with Early Voting

Warren County officials David Gully, Kim Antrican, and Brian Sleeth gave two interviews for this report—the second just after a special election that had early voting fresh on their minds. Warren County and the state of Ohio have had two big experiences with early voting during the 2008 and 2012 general elections. No matter how you look at it, these officials say, it's a lot of work. Ohio offers a "golden week" for elections just at the start of the early voting period, where voters can register and cast their vote at the same time. "It's a lot for us to handle," Antrican explains. "I understand why [the state offers this golden week], but it is still difficult to get it done. It's a question of resources." Early voting takes manpower, money, and time, but, as these officials explained, early voting gets smoother with each election: "The first time you do it, it's a mess. But each time, it gets better."

Warren County uses just one early voting center in the spacious Commissioners Chambers, which they keep open in accordance with the state's requirements. They find that they get a very high volume of voters, especially during the last two weeks of voting. During the last two weeks of the 2012 general election, they served 1,000 voters each day. Having seen the volume of voters interested in voting early, they are dedicated to "give everyone who wants to vote a chance to vote."

However, having run early voting many times now, they can certainly see ways to improve the system. They suggest that 35 days of early voting might be excessive, and that 14- 17 days of voting would be sufficient. Not only would this cut costs and decrease the burden on administrators, but it also would make sure that voters don't cast a vote a month before the election, only to change their minds later. A shorter voting period would allow voters to hear more on the "campaign bombs" that typically come out closer to election day and "vote more wisely." They referenced the fact that early voting is a significant challenge to normal campaign strategy, because an extended voting period "renders the bombs useless."

They also recommend that states give their elections officials the option to take the weekend to prepare for election day. In Warren County, they have experienced early voting both with and without the last weekend. During the primary where early voting stopped on the Friday before election day, they had a comfortable amount of time to run their books and make up the supplemental lists, and print paper ballots. When asked about the typical last weekend rush that other counties experience, Gully explained that "early voting is pushed by the press" and that "however big they want to make [early voting] is how big it turns out."

Because of all the media attention to early voting, Warren County's voters were encouraged to vote early to avoid the long lines at polls. Ironically, this made early voting lines hours long, while election day voters only had to wait 15-20 minutes at most. However , officials found that early voters were generally happy to wait. "Voters will stand for three hours for absentee voting, but if it's longer than 20 minutes on election day, you start to hear grumbling," they explain. During the early voting period, these citizens "chose to come here and wait," were generally "hyped up" about the election, and specifically "made time to do it."

Voters are also more willing to wait during early voting because they "see that it moves fast" and generally appreciate the measure Warren County takes to ease the process. Warren County, like other counties in this report, uses Ballot-on-Demand to both cut costs and time. By using two printers on site at once, they are able to quickly print the ballot for each voter in line. They also speed up the process by having separate lines: one line for check-ins and absentee applications, and one for printing and distributing ballots to approved absentee voters. They also have a separate line for voters that are voting in the correct precinct, and sometimes open up another table for provisional ballots when the center is particularly busy. Another significant factor is just that their center in the Commissioners Chambers is spacious enough to support early voting. They have ample room for different lines and voting booths, something that other counties lack. Though they'll be transitioning to a new location for future elections, this large space has so far served them well.

Another excellent effect of this divided process is that Warren County is able to verify voters for absentee ballots on the spot, before giving them their ballots, so that 99% of their applications, envelopes, and ballots are accurate. This means that voters do not have to worry that their votes will be invalidated after the fact, as they might in other in-person absentee states. Warren County's system is so secure that 100% of their early ballots are counted, since all errors would be caught much earlier in the process. The county officials also explained that Ballot-On-Demand also betters the security of early voting, because they never have extra, empty ballots to worry about. Warren County begins scanning all absentee ballots (including ones cast in person) 10 days before the general election, as per statute guidelines, but do not tabulate the votes until election day. The scanners are kept secure at a different location.

Warren County has not done any specific research on their budgeting practices, but they did tell us that while there are some costs, there are also some savings. Generally, early voting costs

include mailings and staff. Just because they only use one location, they explain, does not mean that they hire fewer poll workers or election judges. However, having so many capable people in one place does come in handy in case of confusion or error—there are always a lot of people in the room that are able to tackle any problems. The biggest staffing cost, however, is hiring staff to open absentee envelopes and arrange them to be scanned, which is laborious. In terms of savings, Ballot-On-Demand also saves Warren County a significant amount of money, and cuts down on waste.

Despite the challenges of early voting, Warren County's officials do whatever they can to promote the system and make it run smoothly. During the 2012 election, Gully even made his voters pancakes to keep them happy while they waited in line. That sort of dedication is clearly paying off, because their count has met with great success. In the 2012 general election, the county had a 76% turnout, making it one of the highest voting counties in Ohio. "There's a lot of pressure on Election Day to go and vote, but you never know what's going to happen," Antrican explained. "What if your car breaks down? What if your kid gets sick?"

"The majority of people are happy with it," Sleeth explained. "People like the choice, even the ones that don't use it, because they know it's there if they wanted to."

Recommendations

Common Cause/NY has surveyed state elections officials, county officials, and elections experts from nonprofits and think tanks, all of whom have firsthand experience with Early Voting in their states. Each state has developed its own rules and has had to address different challenges to implement this voting option. However, they all unanimously lauded Early Voting as a credible and important voting system that betters democracy by making voting more convenient and readily available for the voter. These administrators have been through the process of implementing Early Voting, of finding out what works and does not work, and their experiences and innovations can now help states like New York examining this process themselves.

Common Cause endorses the adoption of early in-person voting, which does not require voters to apply to vote in advance, does not require them to have an excuse to vote early, and uses the same voting process as on election day. We make the following suggestions for establishing practical and effective Early Voting systems:

- *Recommendation #1: Allow Early Voters to Cast Ballots Anywhere in the County*

  Most of the early-in person systems we examined allow voters to vote at any precinct. This means that voters can truly pick the locations that are most convenient to them during the Early Voting period, and that they won't be disenfranchised simply because they cast a provisional ballot at an incorrect precinct.

- *Recommendation #2: Use Ballot-On-Demand*

  For states like New York that use paper ballots, Ballot-On-Demand is a good way to decrease the workload and save resources during the Early Voting period. If voters can cast ballots at any county voting center, Ballot-On-Demand ensures that this measure, which increases voter convenience, does not involve unreasonable costs and waste. Instead of having to estimate and print out enough copies of every precinct's ballot ahead of time for every Early Voting site, which would cost a lot of money and waste an enormous amount of ink and paper, Ballot-On-Demand allows poll workers to print a voter's precinct ballot when they arrive at the voting center. Some note that this could create lines at voting centers since voters would have to wait for their ballots to print, so Common Cause recommends that counties print out the standard, county-wide ballot ahead of time, and only print the precinct-specific ballot using the On-Demand system.

- *Recommendation #3: Use Electronic Poll Books*

  Common Cause suggests that modernizing the election process to include electronic poll books is a great step that states and counties can take to prevent voter fraud and reduce the labor associated with Early Voting. Electronic poll books allow poll workers to

check-in voters as they come in to vote and record that they have voted early. Because these poll books are networked together, this means that if a voter were to attempt to check-in to vote at another site, they would be flagged right away and would be prevented from voting again (or would vote a provisional ballot that would then be rejected). The New York bill, on the other hand, only requires that administrators record and collect the names of early voters at the end of the day, a system which is not as secure as this digitized one. Electronic poll books also make the transition from Early Voting to election day much easier. Instead of having to manually enter all of the Early Voting data into paper poll books for election day, this information can be collected and organized digitally in minutes. The other benefit of electronic poll books is that it provides very useful data. These electronic records would let them know quickly what locations, dates, and times got the most traffic, so that they can decide how to best allocate their resources the following year.

- *Recommendation #4: Make Early Voting Location Wait Time Available Online*

In states with Early Voting, voters are typically allowed to cast their votes at any voting center in the county. In order to make this even more convenient for voters, Florida's state administrators have developed a system that publishes the wait time to vote at every voting center online, in real time. Similarly, Bernalillo County, New Mexico provides similar information regarding waiting times during Early Voting. This is a clever innovation, as it allows busy voters to decide whether they'd like to wait in line to vote, go to another voting center, or try again another day. Common Cause recommends this system to administrators in other states.

- *Recommendation #5: Build Flexibility into State Statutes*

Because counties differ so dramatically in geography, demographics, and voting habits, Early Voting legislation should allow local elections administrators to tailor the Early Voting system to their particular county. In terms of date and time, for example, counties may notice trends in what days and times receive the heaviest traffic. In some locales, many voters in an office or industrial location may vote during lunch, while in other counties, voters may tend to cast their ballots before or after work. Elections administrators should be able to respond to these patterns and allocate their resources where they are most needed. States that mandate specific daily voting hours do not allow for this type of flexibility. Another example of this is voting on Sundays. In some counties, many voters, and especially minority voters, go to the polls together on Sundays after church as part of "souls to the polls." Some state statutes do not allow Early Voting on the weekends, or restrict weekend hours, which obviously impacts those voters who vote on Sundays. On the other hand, in a county where voters do not typically vote on

Sundays, requiring counties to hire poll workers and run an Early Voting facility over the weekends could be a waste of resources.

The current New York bill, which requires Early Voting sites to be open from 8:00 am-7:00 pm, will likely encounter these same problems. Common Cause recommends that state requirements allow counties more flexibility in determining how many hours they must offer on particular days. We recommend that states establish a minimum number of hours that Early Voting must be offered each day and on weekends. This way, counties can determine whether to offer additional hours, and can schedule their day according to voter trends. Also, states should consider the fact that general elections (and especially presidential elections) usually have a far greater turnout than state or local elections, and allow counties to set rules accordingly.

Additionally, states have very diverse ways of determining how many Early Voting locations each county should have. New York's proposed bill mandates that every county should have at least five centers. Not only does this mean that New York would have an unusually large number of Early Voting centers—310, to be exact—but it does not allow counties to have fewer locations. Rural counties with a lower population density might find having fewer locations would still serve their counties; urban counties may want to use fewer locations and place them in areas that are readily accessible using public transportation. Statutes regarding the number of locations should be far more flexible. If not, counties are either forced to waste money setting up unneeded locations, or disenfranchise voters because they can't set up enough. Common Cause/NY recommends a system like Maryland's or Illinois' that set a minimum number of location based on the population of a county, but allows administrators to add more if they so desire.

Recommendation #6: Allow Early Voting in nontraditional locations, and consider more than just population density when choosing Early Voting locations.

The elections administrators we interviewed explained that they would like to have more options as far as what locations can be used for Early Voting. Many states only allow for voting locations in board of elections offices or in publically-owned buildings like libraries and public schools. However, there is no guarantee that these locations would have enough space to accommodate Early Voting, or that they would be centrally-located. Allowing voting in non-governmental buildings would allow elections officials to pick locations that have enough space and parking, and can handle a steady flow of voters over the weeks of Early Voting. This would also let administrators pick nontraditional locations, such as shopping malls or grocery stores, where voters would be more likely to stumble upon voting, which could increase turnout and convenience.

Likewise, administrators have found that locating Early Voting centers near major intersections, at busy or commercial parts of town, or by office and industrial centers are more heavily used than those locations chosen solely because they are close to voters' homes. Additionally, states should consider allowing rural counties to set up mobile voting centers. This is a measure that allows centers to travel to the voters in rural counties with a low population density, where the commute to and from any polling place could be a considerable burden to Early Voting. Common Cause recommends that instead of requiring all Early Voting centers to be in governmental buildings, Early Voting legislation set up safety standards for Early Voting locations. This would give the election administrators the flexibility they need, while also keeping Early Voting secure.

CONCLUSION

While Early Voting, like any revision in voting procedure, requires careful consideration and presents administrators with practical challenges, we were struck by the unanimity of opinion on the value of Early Voting among elections administrators who have firsthand experience with it. All of the administrators whom we interviewed strongly recommend adoption of Early Voting, not withstanding some of the practical challenges to setting it up. We hope that New York and other Atlantic region states will consider the experiences of the jurisdictions we have surveyed in evaluating and, we hope, ultimately shaping Early Voting systems for their own states.

Images

p. 14, Map of Orange County, FL: http://www.floridacountiesmap.com/aalocs/orange.gif

p. 17, Map of Cook County, IL: https://www.familysearch.org/learn/wiki/en/images/6/6f/Il-cook.png

p. 20, Map of Montgomery County, MD: http://upload.wikimedia.org/wikipedia/commons/thumb/b/bd/Montgomery_County_Maryland_Incorporated_and_Unincorporated_areas_Silver_Spring_Highlighted.svg/250px-Montgomery_County_Maryland_Incorporated_and_Unincorporated_areas_Silver_Spring_Highlighted.svg.png

p. 23, Map of Bernalillo County, NM: http://upload.wikimedia.org/wikipedia/commons/8/81/Bernalillo_County_New_Mexico_Incorporated_and_Unincorporated_areas_North_Valley_Highlighted.svg

p. 28: Map of Charlotte-Mecklenburg County, NC: http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_163/gs_163-82.6a.html

p. 32: Warren County, OH: https://familysearch.org/learn/wiki/en/images/7/75/OH_warren.png

---

[1] Governor's Press Office. "Governor Cuomo Outlines Bold Agenda for 2013." Press Release, January 9, 2013. http://www.governor.ny.gov/press/01092013-cuomo-agenda-2013

[2] New York State Bar Association. "State Bar Association Calls For Modernization Of New York's Election System To Boost Low Turnout." Press Release, January 25, 2013. http://www.nysba.org/AM/Template.cfm?Section=President_s_Page_Seymour_James&template=/CM/ContentDisplay.cfm&ContentID=148882.

[3] Siena College. "Siena College Poll: Cuomo Enters 3rd Year Still Riding High with Voters." Press Release, Jan. 17, 2013. http://www.siena.edu/uploadedfiles/home/sri/SNY%20January%202013%20Poll%20Release%20--%20FINAL.pdf

[4] Michael C. Herron and Daniel A. Smith. "Early Voting in Florida in the Aftermath of House Bill 1355 (Draft)," Dartmouth College. January 10, 2012.

[5] Rachel Bardin et al. "Voter Turnout in New York City: Who Does Not Vote and What Can Be Done?" Capstone Report to the New York City Campaign Finance Board. June 11, 2012.

[6] See Herron and Smith 2012, ibid; Glynis Kazanjian. "Early Voting costs counties $2.6M, but hasn't increased turnout yet." *Maryland Reporter.* September 10, 2012. http://marylandreporter.com/2012/09/10/early-voting-costs-counties-2-6m-but-hasnt-increased-turnout-yet/; Barry C. Burden, et al. "The Effects and Costs of Early Voting, Election Day Registration, and Same Day Registration." University of Wisconsin-Madison, presented to the Pew Charitable Trusts. (December 21, 2009); Paul Gronke. "Early Voting is a Crucial Fix, but It's Not Flawless." The New York Times. November 9, 2012. http://www.nytimes.com/roomfordebate/2012/11/08/does-our-voting-system-need-to-be-fixed/early-voting-is-a-crucial-fix-but-its-not-flawless; Joseph D.

Giammo and Brian J. Brox. "Reducing the Costs of Participation: Are States Getting a Return on Early Voting?" *Political Research Quarterly* 63 (June 2010), 295-303. http://prq.sagepub.com/content/63/2/295; Robert M. Stein and Greg Vonnahme. "Early, Absentee, and Mail-In Voting," in *The Oxford Handbook of American Elections and Political Behavior*, edited by Jan E. Leighley (New York: Oxford University Press, 2010), 182-199; Joshua J. Dyck and James G. Gimpel. "Distance, Turnout, and the Convenience of Voting," in *Social Science Quarterly* 86 (2005), 531-548; Robert M. Stein and Patricia A. Garcia-Monet. "Voting Early but Not Often," in *Social Science Quarterly* 78 (September 1997), 657-671; John C. Fortier. "Absentee and Early Voting: Trends, Promises and Perils (Press Release)." *American Enterprise Institute for Public Policy Research*. October 11, 2006. http://67.208.89.102/files/2006/10/11/20061012_FortierPressRelease_g.pdf; etc.

[7] Burden 2009

[8] Giammo and Brox 2010, ibid.; Herron and Smith 2012, ibid; Robert M. Stein et al., "Electoral Reform, Party Mobilization and Voter Turnout," Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL, 2003; Stein and Garcia-Monet 1997, ibid.

[9] Herron and Smith 2012, ibid.

[10] Giammo and Brox 2010, ibid.

[11] Stein and Vonnahme 2010, ibid.; Alan S. Gerber et al. "Voting May Be Habit-Forming: Evidence From A Randomized Field Experiment," in *American Journal of Political Science* 47 (July 2003): 540-550; Eric Plutzer. "Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood," in *American Political Science Review* (March 2001).

[12] Giammo and Brox 2010, ibid.

[13] Herron and Smith 2012, ibid.

[14] Bob Barnes. "Victory for Obama: Supreme Court Stays out of Ohio Early Voting fight." The Washington Post. October 16, 2012. http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/16/victory-for-obama-supreme-court-stays-out-of-ohio-early-voting-fight/

[15] Lydia Saad. "In U.S. 15% of Registered Voters Have Already Cast Ballots." Gallup. October 29, 2012. http://www.gallup.com/poll/158420/registered-voters-already-cast-ballots.aspx

[16] Government Accountability Office. "Views on Implementing Federal Elections on a Weekend." January 2012. http://www.gao.gov/assets/590/587624.pdf; Burden 2009; Fortier 2006, ibid.

[17] Government Accountability Office 2012, ibid.

[18] Anna Oakes. "State elections board takes no action on Watauga Early Voting." The Watauga Democrat. November 5, 2012. http://www2.wataugademocrat.com/News/story/State-elections-board-takes-no-action-on-Watauga-early-voting-id-009526

[19] Paul Gronke. "Early Voting: The Quiet Revolution in American Elections," in *Law and Election Politics: The Rules of the Game*, ed. Matthew J. Streb (2012). New York: Taylor & Francis, 134-148.

[20] Giammo and Brox 2010, ibid.

[21] Dyck and Gimpel 2005, ibid; Stein and Garcia-Monet 1997, ibid.

[22] Herron and Smith 2012, ibid.

[23] Orange County Government. "About Us: At a Glance." http://www.orangecountyfl.net/tabid/120/default.aspx and 2010 Census information provided by http://old.socialexplorer.com

[24] Illinois General Assembly. "Illinois Compiled Statutes: Election Code (10 ILCS 5/)." http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=001000050HArt%2E+19A&ActID=170&ChapterID=3&SeqStart=66400000&SeqEnd=68300000

[25] Cook County Government Facebook Page. "About." https://www.facebook.com/cookcountyblog/info; Cook County Government. "Leadership." http://www.cookcountygov.com/portal/server.pt/community/government/226/leadership/314; and 2010 Census information provided by http://old.socialexplorer.com

[26] U.S. Census. "State and County QuickFacts: Montgomery, Maryland." http://quickfacts.census.gov/qfd/states/24/24031.html; Visit Montgomery. "Stats & Facts." http://www.visitmontgomery.com/discover-moco/stats-facts/; and 2010 Census information provided by http://old.socialexplorer.com

[27] Maggie Toulouse Oliver. "Early Voting in Bernalillo County, NM." Presented at Common Cause/NY's Running Elections Efficiently, A Best Practices Convening. May 20, 2013; New Mexico Compilation Commission. "New Mexico Public Access Law—Statutes and Court Rules." http://public.nmcompcomm.us/nmnxtadmin/NMPublic.aspx; New Mexico Secretary of State. "Voter Information: Absentee and Early Voting." http://www.sos.state.nm.us/Voter_Information/Absentee_and_Early_Voting.aspx

[28] Giammo and Brox 2010, ibid; Herron and Smith 2012, ibid.

[29] North Carolina State Board of Elections. "Election Law Index." Available at http://www.ncsbe.gov/content.aspx?id=56

[30] Mecklenburg County, NC, Government Services and Information. "About Mecklenburg County Government." http://charmeck.org/mecklenburg/county/Pages/GovernmentInfo.aspx and 2010 Census Information provided by http://old.socialexplorer.com

[31] Adam Liptak. "Justices Clear the Way for Early Voting in Ohio." New York Times. October 16, 2012. http://www.nytimes.com/2012/10/17/us/politics/justices-reject-appeal-over-early-voting-in-ohio.html?_r=3&

[32] ACLU Ohio. "Vote Early In-Person Between Now and Election Day." http://www.acluohio.org/archives/alerts/vote-early-in-person-between-now-and-election-day-click-here-for-voting-hours-in-ohio; ACLU Ohio. "Secretary of State's Directive Allowing Early Voting During Three Days Before Election Day Long Overdue." October 16, 2012. http://www.acluohio.org/archives/press-releases/secretary-of-states-directive-allowing-early-voting-during-three-days-before-election-day-long-overdue?c=29; Jon Husted, Ohio Secretary of State. "Voting Early In Person." http://www.sos.state.oh.us/SOS/elections/Voters/absentee/inperson.aspx; Ohio 130th General Assembly. "Amended Senate Bill Number 10." http://www.legislature.state.oh.us/bills.cfm?ID=130_SB_10

[33] Warren County Ohio. "County Overview." http://www.co.warren.oh.us/county/overview.htm; Office of Policy, Research, and Strategic Planning, "Ohio County Profiles: Warren County." http://www.development.ohio.gov/files/research/C1084.pdf; and 2000 Census & 2010 Census information provided by http://old.socialexplorer.com

ELECTION LAW JOURNAL
Volume 10, Number 3, 2011
© Mary Ann Liebert, Inc.
DOI: 10.1089/elj.2011.1035

Non-Precinct Place Voting and Election Administration

Douglas Chapin

THE GROWING ENTHUSIASM across the country for non-precinct place voting (NPPV) presents the election administration field with a series of challenges and opportunities with respect to the design and implementation of jurisdiction-specific programs to put NPPV into practice.

Much of the impact of NPPV has been *temporal*—i.e., tied to the expansion of the notion of Election Day. Traditionally, Election Day marked the only opportunity for the vast majority of voters to cast their ballots; today, Election Day is merely the last day a voter can cast a ballot. Much of the popular scrutiny of NPPV to date, then, has focused on this temporal expansion, along with its attendant effects on candidate and voter behavior.

Equally important, though, is NPPV's *spatial* expansion of election administration. NPPV has inexorably eroded the traditional equivalence between electoral geography—that unique combination of candidate and non-candidate contests that comprise a voter's ballot style—and the physical location where a voter actually casts that ballot.

NPPV's temporal and spatial effects have combined to create a *modal* expansion for voters and election officials alike. Because voters now have more choices about when and where to vote, election administration has had to evolve to become an increasingly complex system to cope with ballots cast at different times and at different places, but also in different forms.

This three-dimensional expansion has created a series of policy challenges for the field.

Douglas Chapin is the Director of Election Initiatives at the Pew Center on the States.

Overlay with voter registration

Despite NPPV's overwhelming change in how, when and where voters cast ballots, the underlying requirement of voter eligibility—specifically, the voter registration process which exists in every state but North Dakota—remains. States with Election Day registration are already familiar with the process of citizens registering and voting simultaneously, but law and policy have had to adjust in states where the registration deadline falls before Election Day.

Different approaches have emerged to deal with this challenge. North Carolina, for example, has developed "one-stop voting centers" where voters can register or update their registration up to the Sunday before Election Day and then cast a ballot on the spot (but, interestingly, not on Election Day). This is not always intentional; a one-week statutory overlap between early voting and the registration period set off a fierce debate in Ohio in 2008 after then-Secretary of State Jennifer Brunner (D) issued a directive creating a so-called "golden week" where voters could register and vote on the same day. Elsewhere, the growing use of electronic pollbooks—whether or not linked in real-time to a voter registration database—has allowed voters to cast ballots outside the limits of the traditional polling place without sacrificing the eligibility check implicit in the registration process.

Synchronization with the political map

While NPPV has, in some sense, loosened geographic and temporal restrictions on voters casting ballots, such restrictions (including the bold grey area that is domicile) are still important to the

determination of whether voters are eligible, and what contests they are eligible to decide. As polling places drift further away from "home precincts" under NPPV, election offices face a two-fold challenge: making sure, first, that each voter is eligible for the ballot he casts and, second, that each voter receives the ballot he is entitled to cast based on that eligibility. In some states, a third challenge has emerged: assuring that the early voting returns can be reallocated back to the geographic precinct for the purpose of political canvassing and redistricting (keep in mind that ballot styles span many precincts, and votes tallied at a county office or satellite location are not necessarily "coded" by precinct of origin).

The response to this challenge has been largely technological. Initially, the advent of direct recording electronic (DRE) machines was seen as a promising means of ensuring that voters receive the correct ballot regardless of voting time and location. As doubts about DREs have grown and more jurisdictions migrate toward opticalscan, we have seen the development of the concept of "ballot on demand", which allows an election worker to produce a ballot as voters appear at NPPV stations.

Ballot on demand technology is still being tested and developed, however. In the meantime, election officials continue to search for ways to efficiently and effectively make voter-specific paper ballots available at NPPV stations. The alternative is a difficult decision on the size of print runs for ballots: too few, and a jurisdiction runs the risk of falling short on Election Day as was the case in Bridgeport, Connecticut in 2010; too many, and the result is a waste associated with huge numbers of unused ballots—a common problem, especially in low-turnout off-year or special elections.

Impact on returns – unofficial and official

It is well-known—indeed, has been well-remarked-upon—what effect NPPV has had on the ballot casting process. There are now so many different options for casting a ballot that the traditional precinct-based Election Day ballot is usually a choice rather than a necessity for most voters. And yet, while election offices open new and different modes for voters to *cast* ballots, the laws and procedures for *counting* ballots are largely unchanged. This creates numerous challenges.

First, the growing percentage of NPPV ballots cast outside the traditional polling place has completely upended the typical Election Night unofficial reporting experience. In 2010, the *Associated Press* announced that its unofficial tallies would be reported as a percentage of the "expected vote" instead of "precincts reporting." Thus, as more and more races come down to the wire—a wire comprised often of NPPV ballots—it is increasingly dangerous for anyone, especially candidates, to make an assumption that Election Night totals will hold.

Second, whether or not one or more contests are close, the advent of NPPV means that before a jurisdiction can begin counting ballots and preparing to certify returns, it must first collect and sort those ballots into a form that allows for counting. In places like California, where vote-by-mail ballots (N.B. that they are no longer called "absentees") can be delivered to any polling place in the county before the close of polls, this sorting process is not trivial and can slow the pace of the count even if it does not delay the official certification of returns. When questions arise about ballots themselves—as they did famously in Minnesota's razor-thin 2008 U.S. Senate race—scrutiny during counting (often accompanied by litigation) can delay the results past the official deadline.

How to reconcile this growing need for deliberation with the ever-accelerating public and media demand for information about election results will be a constant concern for election offices for the foreseeable future.

Administration and efficiency concerns

Even assuming that election offices overcome all of these other challenges, they will be left with the question of how to make NPPV work—and how to pay for it. To date, every state that employs NPPV is layering it onto a pre-existing election framework (with the exception of Oregon and Washington, which are now all vote-by-mail). As the proportion of voters using NPPV grows—with the dollars available to cover election costs staying flat if not decreasing—jurisdictions must find a way to align demand for voting across all different modes with the resources available to support them.

We are already seeing initial efforts in this direction, both in terms of jurisdictions closing or consolidating Election Day polling places and in their

rethinking how and when to offer NPPV. Georgia recently reduced its early voting period by a week, after its research indicated that most voters did not use early voting during the first week it was offered. (Anyone who has heard ELJ Co-Editor Paul Gronke speak in the last several years will be familiar with this research.)

The next step, however, will be for the election community to engage in more detailed calibration in response to NPPV's "supply and demand." As NPPV expands, researchers are going to learn more and more about who uses NPPV and why. Similarly, as more and more jurisdictions begin to collect data on what it costs to administer elections, they will get clarity on what NPPV costs—both alone and in relation to traditional polling places. Someday, these two strands of data will converge and election officials will be able to allocate resources to NPPV and traditional polling places much as an investor does to stocks, bonds and cash—maximizing return at the most affordable cost. Such analysis will never replace the tough policy decisions—unlike funds in a portfolio, voters are not fungible—but it will almost certainly result in a better-managed election system.

Address correspondence to:
Douglas Chapin
Director of Election Initiatives
PEW Center on the States

E-mail: dchapin@umn.edu

June 25, 2014

The Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Committee,

My name is Julie Alexander and I would like to submit comments which can be included with other testimony information that is gathered at the June 25, 2014 hearing on the subject of "Examining How Early and Absentee Voting Can Benefit Citizens and Administrators". Please include these comments with other testimony gathered at today's hearing on this subject.

I am an individual with a disability who utilizes Absentee Voting as a mechanism to provide my input into the political system in the United States. I am not in favor of adding more restrictions to current rules relating to Absentee Voting. I also am in favor of not changing any rules relating to Early Voting. I also am aware of other individuals with disabilities that utilize both of these options to vote and be part of the American Electorate. I believe that this is a civil rights expression of providing options for American citizens to provide comment on who should be their leaders and elected representatives. I think that putting more restrictions on this issue keeps people from voting and being involved in deciding on leadership in the United States and how different laws should be enacted.

Secondly, at this time there are major difficulties with many polling places being physically and programmatically accessible to individuals with disabilities. Individuals who use wheelchairs are not able to get into polling places because of architectural barrier issues. Also, individuals who are able to get into many polling places are not able to utilize voting machines because the machines themselves are not accessible. In addition to this, there are many individuals that need private assistance from voting personnel in polling places to actually vote and this is difficult to get currently because of lack of appropriate training and knowledge.

In conclusion because of all of the issues stated above I believe that it would be a travesty to change Early and Absentee Voting regulations at this time. The Right to Vote is the Fifteenth Amendment in the United States Constitution. Putting restrictions on this right goes against our Constitution and the privileges is grants American citizens.

Thank you for listening to my comments.

Sincerely,

Julie Alexander
7224 W State St #1A
Wauwatosa, WI 53213

Washington
Secretary of State
Kim Wyman

Legislative Building
PO Box 40220
Olympia, WA 98504-0220 Tel 360.902.4151
Fax 360.586.5629 www.sos.wa.gov

June 25, 2014

Senate Committee on Rules and Administration
Washington, D.C.

Chairman Schumer and Honorable Senators:

It is a pleasure to join Oregon Secretary of State Kate Brown in commending vote-by-mail. Like Oregon, Washington now conducts elections entirely by mail (and drop boxes) and does not require traditional polling sites and all the attendant access concerns.

Our transition to vote-by-mail was driven by the voters themselves. Almost 30 years ago, seniors and voters with a disability were authorized to request to vote by absentee ballot on an ongoing basis – and many did. In 1993, our Legislature extended this option to all voters – and many signed up for permanent, no-excuse absentee voting. Within 10 years, over 68 percent of the voters had signed up for this method of casting ballots.

In 2005, the Legislature took note of the unmistakable trend and authorized our counties the option to conduct all their elections by mail. Within just two years, 36 of our 39 counties had switched. The final three came on by 2011.

This method of voting is very popular with our voters. It allows them to have their ballots in hand for 18 days and cast them when convenient. They may use the postal system or free county dropboxes to return voted ballots. Voting centers and special assistance remain available to those who need it.

Having the ballot in hand reminds the voters of the civic duty and privilege that awaits, and gives a chance to do any homework they need to do. It's a teachable moment, a civic ritual, for the whole family to discuss voting and watch how it's done.

This method is convenient, of course. There is no driving across town to a crowded poll site, possibly with a long, long line. A voter can cast a ballot at midnight in pajamas at home and stick it in the outbound mail.

In addition to being accessible, voting by mail is secure. The returned ballot envelope bears the voter's signature attesting to an oath. Each signature is checked against the voter's signature on file to verify that the ballot was returned by the voter. Election administrators also verify that the voter only returned one ballot before including it for tabulation.

Our turnout rates are some of the highest in America.

Administrators appreciate the change. Vote-by-mail is cost-effective and counties don't have to search for poll sites and find and train poll workers anymore. Also, counties don't have to run two types of elections – by absentee and in-person polling places.

We recommend this process to states everywhere. Voters, particularly in the West, are shifting to this user-friendly system. I urge the Committee and Congress to encourage and enable the states to move toward greater use of vote-by-mail.

Sincerely,

Kim Wyman
Secretary of State

Chairman Charles Schumer
U.S. Senate Committee on Rules and Administration

Hearing
"Election Administration: Examining How Early and Absentee Voting Can Benefit Citizens and Administrators"

Questions for the Record – Dr. John Fortier

Question

1. In your testimony, you mentioned concerns with both vote by mail and early in-person voting. Would you prefer to see the United States move to voting on a weekend or holiday? Or do you think 7-10 day in-person early vote window mentioned in your testimony is preferable?

Response

First, I don't believe there should be a one size fits all national policy on early voting and voting by mail. But my recommendations to states is that they should consider moving to a short, concentrated period of early voting. I prefer this to weekend voting or holiday voting. While none of these reforms (early voting, voting by mail, or weekend voting) show a substantial turnout increase in federal and statewide elections, there is some evidence and some legitimate concern that weekend voting and/or a voting holiday might be detrimental to turnout. Not only might voters be out of town, but also it is likely that early morning and evening hours would not be popular, and perhaps most importantly, many of the political party people and groups who organize to get out the vote might not be available. A short period of early voting, with long hours and good voting locations would make voting available to those who prefer the weekend, but would also give voters more options. So my preference is that states adopt 7-10 days of early voting with long hours and good locations.

Chairman Charles Schumer
U.S. Senate Committee on Rules and Administration

Hearing
"Election Administration: Examining How Early and Absentee Voting Can Benefit Citizens and Administrators"

Questions for the Record – Mr. Lomax

Question

1. Having administered elections with a robust early voting program, would you want to go back to running an election with just an Election Day option for voters?

Response

Absolutely Not.

I would probably be lynched by irate voters. I cannot emphasize enough how popular early voting is and how much the voters appreciate (and have expressed their appreciation to me) the opportunity to vote at a time and place convenient for them.

Early voters are "happy" voters because they are at the polling place because they want to be, not because they have to be. The atmosphere at an early voting site is generally festive and people will wait in lines (if necessary) without complaining because they have the choice to vote somewhere else or on another day if they prefer. I describe Election Day voters as "grumpy" voters because they have been compelled to go to a specific location on a specific day. They do not tolerate lines and are quick to complain.

Administering an election is so much easier when 50% - 60% of the in-person voters have "happily" cast their ballots prior to Election Day. For example, in Clark County's 2012 presidential election, 437,000 early voters were out-of-the-way on Election Day and not standing in line in polling places to delay the 205,000 voters who chose to vote on Election Day. It's a win – win situation that keeps the voters happy which makes the election administrators (and politicians) happy.

Since we conduct early voting in the malls and since Las Vegas is a tourist destination, every election hundreds of tourists (who are shopping in a couple of the malls that attract tourists) see our early voting sites and stop by to ask us what is going on. When we explain that for two weeks, our residents can vote in the mall while they are shopping, the response (if I have heard once I have heard it a thousand times) is, "Why don't we do that in our state?"

Question

2. In your testimony, you mention the benefit that election poll workers gain a significant amount of experience in the two weeks of early voting that Clark County has – can you expand on that or the types of issues that are reduced or eliminated?

Response

The biggest problem in any election is a voter being given the wrong ballot style [Each style presents a unique set of contests on the ballot in which voters living in certain precincts are eligible to vote]. In a typical Clark County election, we have about 300 ballot styles and because of the manner in which political districts are drawn in Nevada, virtually every polling place has multiple ballot styles.

If a voter is issued a ballot with the wrong style, it means the voter can either vote in a contest in which he/she should not vote, is deprived of voting in a contest in which he/she is eligible to vote, or both. Because in post-election auditing, we can tell how many times and where this occurs, in a close race it can potentially change the outcome.

In spite of the fact that we do all we can in training to ensure the workers understand how to properly process a voter (which will prevent this from ever happening) and the significance of issuing the wrong ballot, it happens on Election Day far too often.

Dealing with voting machine issues is the second area where experience makes a big difference. Although the machines work very well, things can happen (paper jams, stuck activation cards, power issues, etc.), which if handled incorrectly can cause the voter's ballot not to be counted, or in other cases, can allow the voter to vote twice. Again, either way can change the outcome of a close election.

I should point out that our early voting workers not only work for the two-week early voting period, but most return each election. They also receive more training than Election Day workers. Thus, they have significantly more experience and knowledge than someone working only on Election Day.

HEARING—THE DISCLOSE ACT (S. 2516) AND THE NEED FOR EXPANDED PUBLIC DISCLOSURE OF FUNDS RAISED AND SPENT TO INFLUENCE FEDERAL ELECTIONS

WEDNESDAY, JULY 23, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room SR–301, Russell Senate Office Building, Hon. Angus S. King, Jr., presiding.

Present: Senators King, Schumer, Udall, Klobuchar, Roberts, McConnell, Blunt, and Cruz.

Staff Present: Kelly Fado, Staff Director; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Sharon Larimer, Professional Staff; Julia Richardson, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Correspondent; Leigh Schisler, Special Assistant; Jeffrey Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Republican Communications Director; Trish Kent, Republican Senior Professional Staff; and Rachel Creviston, Republican Senior Professional Staff.

OPENING STATEMENT OF SENATOR KING

Senator KING. Good morning. The Rules Committee will come to order. Good morning to everyone who has joined us. Senator Whitehouse is at the table.

This hearing is the Committee's second hearing following the Supreme Court's McCutcheon decision earlier this year that looks at issues surrounding money in our political system.

In April, the Committee met to hear from a panel of experts about the McCutcheon decision and how our campaign finance landscape has changed in recent years. We know that McCutcheon coupled with the Citizens United decision have created an environment where we will see record amounts of money spent to influence elections around the country. Today's hearing will focus specifically on the issue of campaign finance in American politics and the need for expanded disclosure.

Our constitutional system contains many provisions that are in tension with one another, important provisions which often touch our basic rights and responsibilities in sometimes conflicting and contradictory ways. One of these, which I wrestle with daily as a member of the Intelligence Committee, for example, is the tension between the fundamental charge of the Preamble that we are to provide for the common defense and ensure the domestic tranquility, while at the same time observing the privacy protections of the Fourth and Fifth Amendments.

Another example is the subject of today's hearing: How do we respect and enhance the freedom of expression enshrined in the First Amendment while protecting the Government from being corrupted by the unchecked flow of money to public officials? We have wrestled with this problem for well over 100 years through periodic scandals and periodic corrections, new laws and new ways to evade those laws. But as I observed at the outset of our Committee's hearing on this subject several months ago, we have never seen anything like what is happening today.

The average Senator now must raise more than $5,000 a day, 7 days a week, 365 days a year for 6 years in order to be prepared for the next election. But as disheartening as that is, it is only part of the story.

Over the last decade, and accelerating in the last 4 or 5 years, is a new phenomenon: the unchecked, unlimited, undisclosed gusher of money from individuals, interest groups, and shadowy organizations that has become a kind of parallel universe of essentially unregulated campaign cash.

In recent years, the Supreme Court has steadily chipped away at two of the three pillars of the campaign finance regulation concept, which goes back to the early days of the last century, and has effectively eliminated limits on sources and amounts. But the Court's fundamental basis for doing so was the assumption that the third pillar—disclosure of the source of contributions—remained as a bulwark against corruption which would otherwise threaten the heart of our political process.

Justice Roberts in the McCutcheon case said, "Disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based upon a governmental interest in providing the electorate with information about the sources of election-related spending. They may also deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."

That is Justice Roberts. And he makes total sense. But, sadly, this kind of disclosure, the disclosure which the Court relied upon as a principal justification for the McCutcheon and Citizens United decisions simply does not exist under today's campaign finance laws, and the result is an almost total loss of accountability, the hiding of vital information from voters—who it is that is trying to influence their votes—and an inevitable slide toward corruption and scandal.

I know that many consider this a partisan issue. I do not. Although the momentary advantage under the present system appears to favor the Republicans, the whim of a couple of liberal billionaires could change that perception overnight. This is a systemic issue which should be fixed with an eye to the long-term health of our democracy, not a fine calculation of who might gain an edge in the next election.

Today we meet to consider a bill to remedy the shortfall. Senator Whitehouse has been a leader on this issue for many years. His bill is not the only bill. I also have a bill, the Real Time Transparency Act, which would require Members of Congress, PACs, and political

committees to report $1,000 donations electronically within 48 hours.

Probably the purest form of free political speech in America is the traditional New England town meeting. It is a place where citizens from all walks of life gather together, usually on a cool Saturday morning in early March, to debate, argue, and decide the school budget, whether to buy a new police cruiser, or which roads will be paved in the coming year. I have been to those meetings in Maine, and I have heard the spirited debates and seen some folks go home angry and hurt when their point of view did not prevail.

But everyone speaks up for themselves in Maine, and I have never seen someone stand to speak in disguise. I have never seen someone stand to speak in disguise. We know who is doing the talking, and that in itself is valuable information. And so it should be in November. Because what is an election but a big town meeting where the people decide the future of their community or their country? And an essential part of the debate, an essential part of how we make decisions is knowing who is doing the talking.

Senator Roberts.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman.

For those of us who opposed the McCain-Feingold bill, it is always an interesting experience to hear concerns being expressed about the current state of our campaign finance system. I opposed that legislation, along with most of my Republican colleagues, because we feared it would make our system worse, not better. We feared it would not get money out of the system but would simply divert it to other sources. That has now come to pass. It was not hard to predict.

Unfortunately, instead of recognizing the folly and the futility of the last regulatory scheme, the majority seeks to impose a new one, this time under the guise of disclosure.

Now, that sounds harmless enough. It sounds very reasonable, especially when it is articulated by my good friend. The bill before the Committee today has been introduced in one form or another in each of the last three Congresses. Though the provisions have varied in some respects, the goal has been consistent: to suppress speech by imposing costly and burdensome regulations on its exercise.

While other efforts to achieve this goal have been struck down as unconstitutional by the courts, the majority has attempted to use disclosure as a means to erect a new regulatory scheme to silence their opponents. This effort must be seen in the context of their larger goal to amend the First Amendment to permit even more regulation of political speech.

I have here the Constitution of the United States and also the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech." It also mentions the press and the right of the people peacefully to assemble and to petition the Government for a redress of grievances, whether it be in Kansas or in New England.

This effort must be seen, again, in the context of the larger goal to amend the First Amendment to permit even more regulation of political speech. I repeated that on purpose.

The Judiciary Committee has reported a constitutional amendment, which our Majority Leader has said we will be voting on in September that would allow the Congress to impose reasonable restrictions on speech. Luckily, previous considerations of the DISCLOSE Act provide some insight into what the majority regards as reasonable.

For starters, when the DISCLOSE Act was considered by the House in 2010, the restrictions and obligations it imposed were applied to groups disfavored by the majority. A number of corporations were simply prohibited from speaking. Government contractors and TARP recipients were prohibited from making independent expenditures. During floor consideration, an amendment was added to also prohibit speech by companies that explore and produce oil and gas on the Outer Continental shelf. What is that all about? Well, the bill was on the floor soon after the Deepwater Horizon spill, you see, so this was an easy target.

Not surprisingly, the majority thought it was perfectly reasonable to prevent any of these companies from speaking, but did not think it was necessary to extend those restrictions to the unions that might represent the workforce in these companies. Republican amendments to extend the restrictions to these unions were rejected. The majority did not find them reasonable, apparently. In some cases, groups were excluded from the disclosure obligation solely because the votes were not there to include them.

That is what happens once the Congress starts to impose speech restrictions. The restrictions get applied to whoever does not have enough votes in the Congress to prevent them. That is why the First Amendment begins, "Congress shall make no law . . . " Imposing speech regulations based on the whims of whatever party happens to be in the majority in Congress at a given time is not a reasonable exercise, but it is exactly what happens once we start down this path.

I give this little recent history lesson, Mr. Chairman, because I think it is important we not try to fool ourselves or anybody else about what is going on here. There is no mystery about the purpose of the DISCLOSE Act, this version or any other prior one. We know the majority is upset about the ads that are attacking them and their agenda. We know they want those ads to stop. We know they hope new disclosure requirements will achieve that goal. We know they think the requirements they want to impose are reasonable. We just do not agree.

We do not believe new regulations will improve our system. We do not think imposing new costs on the exercise of free speech rights will improve our democracy.

If the IRS targeting scandal has taught us anything, it should be that giving Federal bureaucrats control over the political activity of American citizens is a recipe for disaster. It is time to admit the failure of the regulatory model and reverse the mistake we made when we passed McCain-Feingold and the Federal Election Campaign Act before it. I know my friends in the majority want to silence their opponents by any available means, but they should stop

trying. New regulations will not make our system better. Getting rid of the regulations we have will.

If we really want disclosure, we should be advancing proposals that will redirect resources to the candidates and the parties. That is long overdue. They are fully accountable and fully disclose everything they spend and receive. Getting rid of the limits on parties and candidates would increase transparency and enhance disclosure. If disclosure is the goal, that is the way to achieve it. Unfortunately, the DISCLOSE Act has another goal, one no American who supports the Constitution should support.

Thank you, Mr. Chairman.

Senator KING. We are pleased to have join us this morning the distinguished Republican Leader, Senator McConnell. Senator McConnell, a statement?

OPENING STATEMENT OF SENATOR McCONNELL

Senator MCCONNELL. Thank you, Mr. Chairman, Senator Roberts. I appreciate the opportunity to be here to talk about the DISCLOSE Act, and I will get right to it.

The proposal is not new. This is the third time we have seen it. But it is precisely because of the doggedness of the proponents of this bill that I have come here today to make my observations.

For more than two centuries, we have had regularly scheduled elections in our country. Every 2 years, the major parties present a vision for the future with confidence in the people, with confidence that the marketplace of ideas, the best arguments, will win out. And yet every 2 years now, with near metronomic regularity, our friends on the other side can now be expected to propose some new attempt to silence their critics, or in the case of the DISCLOSE Act, an old attempt to silence critics.

Sadly, it has now come to the point where you can set your clock to the Democrats' attempt to stifle the free speech rights of the American people. To me, this means they have either lost confidence in the centuries-old bargain that said the best political argument will prevail or they have simply lost faith in the First Amendment itself.

But either way, it is now fairly clear that our friends on the other side have given up on the power of their governing vision alone to carry the day electorally. That is not just a shame; it is not just a commentary on the left, and it is not simply some political stunt aimed at exciting the base in an election year, because if that is all it was, we could just dismiss it and move on.

But it is actually far worse than all that. Collectively and individually, these continued efforts to weaken voter participation in our elections poses a real threat to the right of free speech in this country, something which is guaranteed by the First Amendment to the Bill of Rights and which has ensured the integrity of the political process in this country for more than two centuries. We have not always lived up to the promise of the First Amendment as a Nation, but we have always had recourse to it in correcting past mistakes. And no one—no one—should be tampering with it.

Yet again and again in recent years, that is just exactly what we have seen. We saw it on shameful display at the IRS, as detailed in the IG report on the agency's activities leading up to the 2012

election and in the administration's subsequent efforts to codify through regulation just the kind of targeting that took place. We saw it in recent efforts by Democrats to empower Congress, as Senator Roberts pointed out, through a constitutional amendment to limit the free speech rights of individuals and groups—a truly radical proposal that would end all arguments about what little regard our friends on the other side have for the rights of free citizens to set the direction of our country. And we have seen it three times now in the biennial revival of the DISCLOSE Act.

Let me be blunt. This proposal is little more than a crude intimidation tactic masquerading as good government. And the fact that we have been forced to consider it once again is the clearest proof yet that our friends on the other side are fixated—on suppressing speech.

It is no secret that the First Amendment has been a consuming passion of mine for many years. I have fought hard to defend it on the Senate floor and in the highest Court of the land. It has pitted me at times against members of my own party, including President Bush. And in its defense, I have occasionally formed alliances with some unlikely allies. Among them is the American Civil Liberties Union, and I would like to ask, Mr. Chairman, consent to enclose a letter from the ACLU opposing the DISCLOSE Act in the record at this point.

Senator KING. Without objection.

[The letter was submitted for the record:]

Senator MCCONNELL. It is to the great credit of the ACLU that, even though largely not aligned with most members of my party on most issues, they have stood strong in opposition to the DISCLOSE Act. I am grateful for their efforts on this issue yet again.

Some might say that the arguments on both sides of this proposal hardly need repeating since Democrats have now proposed it on three separate occasions, but I see it differently. In my view, it is precisely when we stop speaking out against proposals like this that we are in the greatest danger of ceding our rights to those who would deprive us of them.

Whenever our friends spring from behind closed doors with a bill like this one, we need to be ready to respond in kind. And in this case, the first part of that response should be to point out the obvious. At a time when millions of Americans are struggling to find work, small businesses are sputtering under the weight of an increasingly brazen regulatory state, our VA system is failing our veterans, and tens of thousands of unaccompanied minors have been flowing across the border without any clear policy solution from either the White House or Democratic leaders in Congress, Democratic leaders should not be focused on a bill the primary purpose of which is to silence their critics. Their persistence at this particular moment is eloquent testimony to where the priorities lie.

The second thing I would like to say about this proposal is that the entire premise for it is utterly baseless. The supposed justification of this bill is the need to "do something" about certain people in voluntary associations participating in the political process. But this, of course, gets it exactly backwards. We should not be trying to think of ways to keep people from participating in the political process. We should be encouraging more of it. As veteran columnist

George Will has noted, the political process is not some private club in which the parties and candidates control the membership. And yet that is precisely what the DISCLOSE Act aims to do.

Now, I know our Democratic friends are frustrated. Prior attempts to pass a constitutional amendment limiting political speech have failed spectacularly, hitting a high watermark of 40 votes in 2001.

The Supreme Court has also spoken clearly and emphatically that, under the Constitution, free speech is not limited to corporations that own liberal media outlets.

The purpose of the DISCLOSE Act is to get around all of that. If the supporters of this proposal cannot suppress individuals or groups, the thinking on the left goes, then they should just go after the funding that amplifies the message, and they will do it in the old-fashioned way, through donor harassment and intimidation.

We have seen this kind of thing before, my friends, perhaps most vividly in the 1950s when the State of Alabama tried to get its hands on the donor list of the NAACP. The Supreme Court knew what that was about, which is why they ruled against forced disclosure then. They knew that the forced disclosure of donors mitigated against the rights of free association, because if people have reason to fear that their names and reputations will be attacked because of the causes they support, well, then, they are less likely to support them, of course. And that is the last thing we should want in a free society.

The FEC, interestingly enough, has applied this same principle, by the way, in protecting the donor list of the Socialist Workers Party, which most of you probably did not even known existed. The FEC has supported protecting the donor list of the Socialist Workers Party since 1979. So we have seen what the loudest proponents of disclosure have intended in the past, and it is not good government.

The President likes to say that the only people who oppose disclosure are people who have something to hide. History tells us otherwise. The sad fact is this kind of Government-led intimidation is part of a much broader effort that has been underway within the Obama administration for years. We have seen parallel efforts at suppressing speech at the FCC, the SEC, the IRS, DOJ, and HHS. And the tactics we saw during the 2012 campaign speak for themselves, from the enemies list of conservative donors on the Obama campaign's Web site to the strategic name dropping of conservative targets by the President's political advisers. And that is what this proposal is about. It is about harvesting the names of donors in the hopes of driving them off the playing field. We have seen it before, and we are seeing it now.

So let me just repeat today what I have said elsewhere on this entire effort. No individual or group in this country should have to face harassment or intimidation or incur crippling expenses defending themselves against their own Government simply because that Government does not like the message they are advocating. It is pretty simple, really. If you cannot convince people of the wisdom of your policies, it is time to come up with better arguments.

But tampering with our First Amendment rights is a dangerous business, and that is what this legislation before us aims to do. It

is an unprecedented requirement for groups to publicly disclose their donors, stripping a protection recognized and solidified by the courts. From the NAACP to the Sierra Club to the Chamber of Commerce, every one of them would now be forced to subject their members to the kind of public intimidation we have seen at other moments in our history.

The authors of this bill have sought bipartisan cover for this latest effort by claiming that labor unions would also be required to disclose their donors under this bill. Upon closer inspection, however, it becomes clear that through a cynical and elaborate scheme of thresholds and triggers, these unions are given, of course, a free pass, and that just underscores who the true targets of this legislation are. The targets are anyone who criticizes Democrats.

Which brings me to the final point. For 4 years now, we have heard how the Supreme Court unleashed a torrent of corporate money into the political process through the Citizens United ruling. Well, here is the truth. Individuals from New York to California have given tens of millions of dollars to candidates and causes, as is their First Amendment right. But the big money, it turns out, is coming from the same unions that are exempted from this bill, which, by one count, have spent nearly $4.5 billion over the past 9 years on politics, including $800 million in 2008 alone.

So for those who want to "do something," allow me to make a humble suggestion. Instead of suppressing free speech, let us look to State models for guidance. The endless web of campaign finance laws we have seen at the Federal level have done nothing but sow confusion. But they have been good for one group: The election lawyers are doing great.

A simpler, more reasoned approach would be for us to adopt the Virginia plan: remove the limits, allow candidates to accept and report all contributions, and let the citizens decide what is proper or not. Money will never be removed from politics. It is just like trying to put a rock on Jell-O. It just moves somewhere else. The intellectually honest approach is to remove the rock.

So, in closing, Mr. Chairman, I will continue to do everything in my power to protect the First Amendment rights from this latest iteration of the DISCLOSE Act and every other effort to suppress the free speech rights of the American people. And I sincerely hope my colleagues, all of whom swore the same oath to support and defend the Constitution that I did, will stand up. The First Amendment undergirds all other rights. We need to defend it with everything we have got.

Thank you.

Senator KING. Thank you. Thank you, Senator McConnell.

Senator Udall.

OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you, Chairman King, and it is good to see my good friend Senator Whitehouse here, who has always been a champion of open and fair elections. And I very much support his DISCLOSE Act and hope that we can move it forward.

We have a serious problem and a great challenge. Our campaign finance system is failing and it is broken. It is being dismantled step by step by a narrow majority of the Supreme Court, taking us

back to Watergate-era rules, the same rules that fostered corruption, outraged voters, and prompted campaign finance regulations in the first place, from 1976 in Buckley v. Valeo, when the Court first tied campaign cash to free speech, to Citizens United, when the tortured logic reached its peak and corporations became people. The Court's McCutcheon decision in April was the latest blow, further opening the floodgates for wealthy individuals to donate to an unlimited number of candidates. At this point, five conservative Justices have said preventing outright bribery is the only legitimate basis for regulation.

This is not about free speech, and the American people know it. It is about wealthy interests trying to buy elections, in secret, with no limits, period. Because the speech we are talking about here is not free, Citizens United and McCutcheon are not about the grassroots small donor. It is about the big guys, the really big guys—billionaires and millionaires.

Politico reporter Ken Vogel has come out with a book about the new era of campaign spending. He calls the book "Big Money." He reports that outside groups, super PACs, and other independent outfits spent $2.5 billion in the 2012 campaign. Open a newspaper. We are seeing more and more political coverage about which billionaires are spending tens of millions of dollars on the political system. This is all coming at the expense of middle-class citizens and the challenges they face. It is a broken system based on a flawed premise that spending money on elections is the same thing as free speech.

There are only two ways to fix this: the Court overturns Buckley, which is not likely, or amend the Constitution to overturn previous misguided Court decisions and prevent future ones. That is why I built on bipartisan efforts going back decades and introduced S.J. Res. 19 last June to restore the historic authority of Congress to regulate the raising and spending of money for Federal political campaigns. This would include independent expenditures and would allow States to do the same at their level. It would not dictate any specific policies or regulations, but it would allow Congress to pass sensible campaign finance reform laws that withstand constitutional challenges.

We are seeing momentum. S.J. Res. 19 was just reported by the Judiciary Committee last month. It now has 46 cosponsors. And a companion measure has been introduced in the House with more than 110 cosponsors. I will continue to push for a constitutional amendment. We need comprehensive reform, but then in the interim we also need to follow the money, which is exactly what Senator Whitehouse and the DISCLOSE Act intend to do.

The DISCLOSE Act of 2014 asks a basic and more than fair question: Where does the money come from, and where is it going? The American people deserve to know who is spending all this money to influence their vote, and they deserve to know before, not after, they head to the polls. That is what the DISCLOSE Act will achieve. It is practical, sensible, and long overdue. We have a broken system. McCutcheon is the latest misguided decision. It will not be the last. Congress needs to take back control by passing a constitutional amendment. We all know that it will take time. In

the meantime, the checkbooks will be out, the money will keep flowing. We should pass the DISCLOSE Act.

Billionaires may keep spending, but they cannot keep hiding. Americans are losing faith in our electoral system. There is just too much money hidden in the shadows. It is time to restore that faith. The DISCLOSE Act is a step in the right direction.

You know, it was said here several times over and over again that somehow this is about free speech. What DISCLOSE is about is the basic core principle of the voters knowing where the money is coming from. Hundreds of millions of dark money—and I see a chart here on the table that I know Senator Whitehouse is going to talk about. Hundreds of millions of dark money in 2012 and in 2010 are infiltrating the system. Nobody knows who gives that money except the billionaires and millionaires who are doing it.

So thank you, Senator Whitehouse, for being here today, and thank you very much, Chairman King, for holding this very, very important hearing on our democracy.

Senator KING. Thank you, Senator Udall.

We have two panels today. The first is Senator Whitehouse, who is the principal sponsor of the DISCLOSE Act, and he has been involved in this issue for some years. And, Senator Whitehouse, we look forward to your testimony.

STATEMENT OF THE HONORABLE SHELDON WHITEHOUSE, A UNITED STATES SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you very much, Chairman King and Ranking Member Roberts, for convening this important hearing on the need for public disclosure of who is behind the funds raised and spent to influence Federal elections, not to silence or limit that speech, to be clear, just to have the public know who is behind the funds raised and spent to influence Federal elections.

I am pleased to testify about the DISCLOSE Act, which I introduced with 50 colleagues last month, to end the toxic scourge of massive, undisclosed spending in elections, a scourge that is undermining public faith in our democracy, happily for the special interests who want to pull strings behind the scenes and who profit from a discouraged citizenry.

The Supreme Court's 2010 Citizens United decision opened the floodgates to unlimited corporate in elections. Every day it becomes clearer that this decision will go down as one of the Court's worst, like such discredited rulings as Lochner v. New York. Citizens United is so far the crowning achievement of a set of politicized, activist judges who are acting, to quote Justice Breyer, "like junior varsity politicians."

This term's McCutcheon decision, which struck down aggregate limits on individual donations, has compounded the need for this transparency. This year, the toxic influence of Citizens United can be seen in the country's most competitive Senate races. According to the Wesleyan Media Project, roughly 90 percent of all television ads in both the Michigan and North Carolina Senate races have been run by outside groups. Many of these independent groups mislead voters and give no clear idea of who is supporting or opposing the candidates.

When groups can run ad campaigns without disclosing their true identities, they freely resort to vicious and dishonest attack ads with no fear of anyone being held accountable for those claims.

The DISCLOSE Act would help rein in what one Kentucky columnist has dubbed this "Tsunami of Slime." The bill, which is unchanged from the version introduced in July 2012, would require organizations spending money in elections, including super PACs and tax-exempt 501(c)(4) groups, to promptly disclose donors who have given $10,000 or more during an election cycle. The bill includes robust transfer reporting requirements to prevent political operatives from using shell corporations to hide donor identities. Provisions such as the high disclosure threshold protect membership organizations from having to disclose their member lists and allow organizations to exempt donors who do not wish their contributions to be used for political purposes.

We do have to do this together. We tried to get this legislation passed in 2010, and Republicans filibustered. We tried again in 2012, and again Republicans filibustered. It will take Republicans to join us to get this done.

There is a chance of that. It was not too long ago that Republicans supported disclosure. Here is what Republican colleagues have said about disclosure in the past:

"I do not like it when a large source of money is out there funding ads and is unaccountable," one said.

As another put it, "I think the system needs more transparency so people can more easily reach their own conclusions."

A third colleague summed it up nicely: "Virtually everybody in the Senate is in favor of enhanced disclosure, greater disclosure. That is really hardly a controversial subject."

Leader McConnell back in the day said, "Virtually everybody in the Senate is in favor of enhanced disclosure. Public disclosure of campaign contributions should be expedited," he said, "so voters can judge for themselves what is appropriate."

They were right then, and Americans know it now.

Americans of all political stripes are disgusted by the influence of unlimited, anonymous cash in our elections and by campaigns that prize billionaire backers and secretive slush funds. We need to pull together and solve this.

Passing the DISCLOSE Act would at least make transparent the anonymous money pouring into elections and would signal to the American people that Congress is committed to fairness and openness. As a Republican former Federal Election Commission Chairman, Trevor Potter, has said, this bill is, and I will quote him, "appropriately targeted, narrowly tailored, clearly constitutional, and desperately needed."

In 2010 we came within one vote in this chamber of passing the DISCLOSE Act. This year, let us redouble our efforts to contain the damage done by Citizens United with transparency. We must preserve Government of the people, by the people, and for the people from this tide of unlimited, unaccountable, and anonymous money polluting our elections from this tsunami of slime.

Thank you very much, Mr. Chairman. Thank you for the opportunity to testify.

Senator KING. Thank you, Senator Whitehouse. I appreciate your testimony, and I appreciate your sponsorship and strong support of this legislation.

I would like to ask our second panel to take their seats at the table, please. We will now hear from our second panel.

First, Ms. Heather Gerken, who is the J. Skelly Wright Professor of Law at Yale Law School and a Commissioner on the Bipartisan Policy Center's Commission on Political Reform.

And, second, Mr. Bradley A. Smith, Chairman of the Center for Competitive Politics.

I see that Senator Schumer, the Chair of the Committee has joined us. Senator Schumer?

Chairman SCHUMER. Yes, I was going to congratulate Senator Whitehouse on his great work here, so I will do that and now turn it back over to you, Mr. Chairman. And I will be back in a minute.

Senator KING. Thank you.

And Mr. Daniel Tokaji, the Robert M. Duncan/Jones Day Designated Professor of Law at the Ohio State University, Moritz College of Law, was planning to be here today, but a plane delay has kept him from joining us. But his testimony will be inserted into the record. He will be available to answer questions for the record.

[The prepared statement of Mr. Tokaji was submitted for the record:]

Senator KING. Thank you both for joining us today, and I would like to ask each of you to limit your statements to 5 minutes, and then we can ask questions. And I know that you both have submitted longer written statements, which will be submitted into the record of the Committee, without objection.

Ms. Gerken, could you proceed, please? You need to press the button, I think, to start your microphone.

STATEMENT OF HEATHER K. GERKEN, J. SKELLY WRIGHT PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Ms. GERKEN. Thank you very much, Chairman King and Senator Roberts.

Robust disclosure mechanisms are an essential foundation for any campaign finance system, and ours are neither adequate nor effective. Dark money flows freely through the system and grows in significance each election cycle. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign finance system, leaving American politics even more vulnerable to money's hidden influence than before.

I want to make three points today.

First, disclosure rules have garnered considerable bipartisan support, and with good reason. Disclosure sits at the sweet spot in policymaking, where democratic idealism and political realism meet. These rules provide the American people with the information they need to make informed decisions without placing restrictions on where and how donors spend their money.

As a result, outside of Washington's tight circles, transparency measures enjoy a high level of support among policymakers, academics, and the American people.

As one of the 29 Commissioners on the Bipartisan Policy Center's Commission on Political Reform, which was chaired by Senators Trent Lott, Olympia Snowe, and Tom Daschle, Secretary Dan Glickman, and Governor Dick Kempthorne, I witnessed firsthand what happens when a bipartisan and savvy group debates about transparency.

After a lively debate, the Commission recommended the disclosure of "all political contributions, including those made to outside or it groups," and I would like to emphasize that it did so unanimously.

My academic work has also convinced me of the importance of robust disclosure rules. What I have called "shadow parties" have emerged—independent organizations like 501(c)(4)s and super PACs that exist outside of the formal party structures and closely cooperate with campaigns even if they do not, as a legal matter, coordinate with them. These shadow parties enjoy substantial advantages over the formal parties in terms of fundraising capacity. But many—specifically, 501(c)(4)s—also offer donors another significant advantage: anonymity.

These shadow parties are shifting the center of gravity away from the formal party apparatus into private and non-transparent organizations. An important report authored by Professor Tokaji and Renata Strause offers compelling evidence of the new problems associated with this regime, and I would be happy to discuss that during questions and answers.

Second, transparency mandates stand on firmer constitutional footing than any other type of campaign finance regulation. Do not let cases from the 1950s, when lynching and murders occurred, mislead you. While the First Amendment limits Congress' ability to regulate campaign finance generally, the Court has concluded that transparency rules promote First Amendment values by providing Americans with the information they need to evaluate the ads that they watch. With the exception of Justice Thomas, the Justices who are the most skeptical of campaign finance regulations generally have consistently voted to uphold transparency measures and have authored many of the touchstone opinions in this area.

Finally, there are a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. Wade Gibson, Webb Lyons, and I have proposed a new one aimed at the central problem in campaign finance law which Senator Roberts mentioned, which is keeping up with the ever changing strategies that donors use to conceal their influence. Whenever regulations make it harder for wealthy donors to fund politics through one outlet, they tend to find another. And Congress and the FEC have long struggled with this question as each new election cycle new organizations emerge. We think of it as the carnival equivalent of Whack-A-Mole.

Our proposal avoids what Senator Roberts is worried about, which is the Whack-A-Mole problem because it regulates the ad, not the organization. Rather than trying to guess which organizations will emerge in the next campaign cycle, we offer a very simple fix. Any advertisement funded, directly or indirectly, by an organization that does not disclose its donors must simply acknowl-

edge that fact with a truthful disclaimer: "This ad was paid for by X," which does not disclose the identity of its donors.

The fix is universal and flexible enough to accommodate changes in future election cycles, and because it offers universal disclosure, it guarantees that regulations will keep pace with politics.

For all these reasons, now is the right moment for Congress to pass new disclosure requirements. This is one of the rare instances where the need for change is significant, the time is ripe, and the American people are ready.

Thank you very much.

[The prepared statement of Ms. Gerken was submitted for the record:]

Senator KING. Our next witness is Mr. Brad Smith, Bradley Smith, who is the Chair of the Center for Competitive Politics. Mr. Smith, we are delighted to have you here. I read your testimony in full, and I must say very impressive and thoughtful testimony. I appreciate the effort that you have put forth to discuss this issue with us. Mr. Smith?

STATEMENT OF BRADLEY A. SMITH, CHAIRMAN, CENTER FOR COMPETITIVE POLITICS, ALEXANDRIA, VIRGINIA

Mr. SMITH. Thank you, Mr. Chairman, for your kind words, and thank you, Senator Roberts, as well.

Let us start with the basic fact. There are currently more laws mandating public disclosure of politically related spending than at any time in our Nation's history. None of these disclosure laws have been altered in any way by the Supreme Court in Citizens United, in McCutcheon, or in any other decision. Candidates, political parties, PACs, super PACs already disclose all of their donors and expenditures beyond the most de minimus amounts. Federal law also requires reporting of all independent expenditures over $250 and of all "electioneering communications" of over $10,000, including the names of donors who contribute for those purposes. This information is all publicly available on the FEC Web site. 527 organizations that are not State- or FEC-registered PACs also report all donors to the Internal Revenue Service, which makes that information available to the public.

Additionally, the FCC requires broadcast ads to include the identity of a spender to be made public within the ad itself and requires further information to be made available through the political file each station is compelled to maintain.

Given this extensive disclosure regime, it is simply a misnomer to talk of dark money or non-disclosing groups. Rather, what we have is a system in which some politically related spending occurs with less information than some people would like about the spenders' members, donors, and internal operations.

Assuming that this is a problem, the question is how big a problem is it. The FEC reports that $7.3 billion was spent on Federal races in 2012. Approximately $311 million of that was spent by organizations that did not itemize and disclose all of their donors; that is, a bit under 4.5 percent of total spending came from groups that did not itemize their donors.

Even this number tends to overstate the issue because many of these groups are well known to the public, groups such as the

League of Conservation Voters and the United States Chamber of Commerce. But some still ask, Why not seek still more information? Why not dig further into the disclosure well? Well, there are several reasons.

First, studies show that compulsory disclosure disproportionately limits smaller grassroots organizations, particularly organizations that rely on volunteers. This is simply because of the regulatory compliance issues.

Second, transfer provisions of the DISCLOSE Act would create a fundraising nightmare for nonprofits, even those that do no political work at all, hindering general nonprofits' social welfare activity in society at large.

Third, the DISCLOSE Act creates a great deal of junk disclosure. Much of the disclosure required by the act would actually confuse the public. It would be unfair to persons who would have their names attached to speech they did not intend to or did not actually fund, and it would be misleading as to the amounts actually spent on political activity by requiring double, triple, and even more frequent counting of the same money.

Finally, we cannot overlook the costs in privacy that come with excessive compulsory disclosure, costs which have led the Supreme Court to repeatedly strike down excessive disclosure laws, including in the 1970s, 1990s, and 2000s. DISCLOSE, if passed, will certainly be challenged on constitutional grounds. But even if it were to withstand those challenges, this body should recognize and show consideration for the privacy and other interests that would justify such a challenge. The purpose of disclosure is to allow citizens to monitor their Government. It is not to allow the Government to monitor the political activity of its citizens.

As the ACLU has put it, "Absent anonymity, some donors on both the left and right will simply not donate out of a legitimate fear that they will be harassed or retaliated against for their advocacy."

We cannot have a serious hearing today without recognizing the cost that compulsory disclosure has for unpopular speakers and new, often unpopular, ideas—that may in later years become quite popular, as was the case with abolition or more recently same-sex marriage. The CEO of a consumer business in West Virginia or Kentucky who believes that coal should be more heavily regulated; the small-town Alabama businessman who wants to fund a suit by the ACLU challenging prayer in the area's public schools; a Montana businesswoman who favors gun control—these people should not be compelled by the Government to put forward information that will lead others to boycott them and destroy their businesses.

Rightly or wrongly, and regardless of what some members of this panel may want to hear, millions of Americans already believe that their Government is inappropriately spying on them. Tens of millions of Americans do believe—and I think there is enough evidence that this is hardly irrational, even if some think it is incorrect—that the IRS is being used as a tool to harass points of view that are critical of the current Executive. There are millions of Americans who hear a Senator publicly call for criminal prosecutions of political activity, and they see themselves as the intended target of that Senator's wrath.

Too often today, disclosure is not used to evaluate messages; rather, people admit that they openly hate the message and seek to use disclosure to stop the speech altogether. As one organizer stated a while back, years ago we would never have been able to get a blacklist together so fast and quickly. Thanks to compulsory disclosure and computers, it is much easier to blacklist fellow Americans than in the past, but many Americans will not see this as progress.

Frankly, the approval of this bill is unlikely to improve trust in Government precisely because many people do not trust the Government now. If you wish to increase that trust and create a climate in which serious improvements, bipartisan improvements in disclosure laws can be considered, then you must at least appear to take seriously the fact that the Inspector General for Treasury has found that the IRS targeted speakers on the basis of their political activity, that the key IRS employee involved has pleaded the Fifth Amendment and similarly lost a large cache of e-mails in what a poll shows a substantial majority of Americans believe are highly suspicious circumstances.

We must stop proposing to amend the Constitution for what appears to millions of Americans to be nothing more than short-term partisan gain, and we must no longer tolerate the disgraceful, ongoing vilification on the floor of the United States of individual citizens because of their lawful political activity.

In other words, if we wish to create improved trust in Government and create a climate favorable to meaningful and serious revision of disclosure laws, we must first act within this body to create a climate of trust. This bill is not helpful.

Thank you.

[The prepared statement of Mr. Smith was submitted for the record:]

Senator KING. Thank you, Mr. Smith.

We will have 7-minute rounds and questions for both witnesses.

Ms. Gerken, you mentioned the NAACP case, and I believe Senator McConnell mentioned it as well, where the Supreme Court recognized in that case the importance of protecting donor lists. Can you distinguish that case from the situation that we are talking about here this morning?

Ms. GERKEN. So it has always been true that the Supreme Court has made sure that there are protections for people who are likely to suffer a real threat of harassment, and the case involving the NAACP is, of course, the quintessential version of that. We all know what was going on in the Deep South in the 1950s. It was a dangerous time to be seen as donating and supporting the NAACP.

The Supreme Court continues to reaffirm that precedent, so anyone who is concerned about this level of harassment need only show a reasonable probability of harassment.

What we have not seen, however, is many people succeeding under these standards. The National Socialist Workers Party has done so, but in two recent high-profile cases, which are often invoked as examples of harassment, when Federal courts look at the facts, they have concluded that that level of harassment is not actually a problem. People taking signs off of your doorstep, and

mooning on one occasion someone, does not constitute a sufficient harassment to undermine disclosure rules.

And I should just note that oftentimes when people talk about what constitutes harassment, they talk about consumer boycotts. If we are going to talk about the civil rights movement, we should remember, consumer boycotts have long been a robust and treasured tool of those who believe in the First Amendment and use their power as consumers in order to pursue their aims.

So harassment of the sort that the National Socialist Workers experienced is grounds for suspending disclosure rules. Harassment of the sort that we have seen in recent years has not been.

Senator KING. Thank you.

Mr. Smith, you talk very movingly about the plight of the small donor, but doesn't this bill only apply to $10,000 and above? I would not call that necessarily a grassroots donation. Isn't there a distinction to be had? This bill that is before us has a $10,000 and above cutoff and does not deal with small contributions.

Mr. SMITH. Well, obviously most Americans cannot afford to contribute $10,000 to any type of cause. However, millions of Americans can, and in fact do, and they often speak for other Americans of more modest means who share their points of view. And many of these people I think will be dissuaded from participating in the system.

The academic literature is really pretty clear on this that disclosure does dissuade people from spending—not everybody, not most people, but it does discourage some people from participating in campaigns.

Senator KING. But what about the issue of information? Part of the—it goes back to the beginning of the country. It goes back to the statement that Chief Justice Roberts made in McCutcheon, that knowing who is doing the talking is part of the information voters need in order to assess the message. Isn't that a legitimate public interest?

Mr. SMITH. I think that is, and I think that is why we have as much disclosure as we have. But the Court has never approved, for example, it has never given its blessing to something like this act. It might do so if given this act, but there is good reason to think that it would not. Again, in Buckley v. Valeo, for example, it vastly trimmed down the disclosure statutes, in McIntyre v. Ohio Election Commission. And so I think that we cannot assume that the Court is going to approve this, and there are reasons why we should be hesitant about it. What we see more and more now is that, as I mentioned, people are not saying, "Boy, I need to understand this ad." Rather, people are saying, "I hate that speech. I want to stop that speech."

A group called "Media Matters" is out raising funds specifically promising to distort and harass people's speech, i.e., their giving and the speech that it funds, in order to gin up public backlash against them and "dissuade" them from participating. And I do not think Congress should be a party to forcing people to provide information that their political opponents will use to harass and vilify them and try to dissuade them from participating in democracy.

Senator KING. Well, on the constitutional question, the issue of disclosure was specifically endorsed very strongly by both Kennedy

in Citizens United and Roberts in McCutcheon, and it was not a minor matter because Justice Thomas dissented on that issue. So it clearly looks to me like eight members of the Supreme Court have asked us to enact greater disclosure requirements because that is the only thing left after they have dismantled the other protections. They have said it is okay that we are doing this because we have disclosure, which, of course, we do not.

Mr. SMITH. Well, I think that that would be something that you would undertake at your peril. I mean, they have not endorsed this particular item. What they have said is we have a disclosure regime and that is adequate. They have not said if Congress did more we would have an adequate disclosure regime. They have specifically talked about what we have on the books and viewed that as significant enough.

It is true, however, that I think the courts—let us put it this way: Without those statements, I would tell you flat out I think this bill is unconstitutional, and I can only tell you that there would be a serious challenge made to it. We should remember, though, that anonymity has a long history in the United States, from the Federalist Papers; former Chief Justice John Marshall used to fund anonymous political speech; Thomas Jefferson used to fund anonymous political speech; Abraham Lincoln used to fund anonymous political speech. We know that now only years after their death, and we should be aware that, again, you can dissuade and discourage people from speaking, and we need to be sensitive to that. And I think at this point we have a great deal of disclosure, and one of the reasons people are hostile to the idea of extending it further is that they see this as a partisan effort and they see the IRS investigations and they say this is exactly why I do not want to disclose.

Senator KING. I can assure you that this Senator does not view this as a partisan issue. As I said in my opening statement, I think this is a democracy issue. And all we need is a couple of liberal billionaires to start spending in a way that others are, and suddenly you would see a change in the atmosphere around here.

Ms. Gerken, Professor Gerken, is there a disclosure problem? Mr. Smith makes the case that we really do not have a disclosure problem; we have got lots of disclosure. But what about what has been happening in the last 5 years?

Ms. GERKEN. No, I appreciate Professor Smith acknowledging what the Court said in Citizens United. I have a lot of trouble imagining the Court finding this type of regulation to be a problem because all it is doing is leveling the playing field. Right now, super PACs and political parties have to do a great deal of disclosure. No one has suggested that this violates the First Amendment or burdens speech unduly. And so now all we are doing is extending—all that the Congress is proposing to do is extending this idea to organizations like 501(c)(4)s. And it is incredibly important to do that. If you do not level the playing field, then as we have seen over time, the (c)(4)s will become increasingly important players because they offer something that no one else can offer, which is unlimited fundraising ability and anonymity in doing so.

So this is in some ways the game of regulatory Whack-A–Mole. This is imperative. If you do not stop the money here, it is just

going to keep moving into the (c)(4)s, which is exactly what we have seen. Between 2008 and 2012, the amount of money spent in the system by undisclosed dark money is roughly three times what it was before.

So this is just simply extending a set of regulations that we have lived with for a long time that have never been subject to any serious constitutional doubt to the new organization on the block which is spending money in a new way in campaigns.

Senator KING. Thank you.

Senator Roberts.

Senator ROBERTS. Well, thank you, Mr. Chairman. Thank you both for coming and for giving excellent testimony.

Ms. Gerken, your testimony did not endorse the DISCLOSE Act, or at least that is how I read it, but I think in terms of your commentary, you probably support it. Do you endorse it?

Ms. GERKEN. You know, actually no one has ever asked me if I have endorsed anything because I am not a Senator. So I do think that, one, we need more disclosure rules for the 501(c)(3)s. I think, two, this act is constitutional. It is narrowly tailored and sensibly targeted at the right opportunities.

Senator ROBERTS. So you support it.

Ms. GERKEN. I would support it. If I were in your shoes, I would vote for it.

Senator ROBERTS. Okay. Well, you are not in my shoes.

Chairman SCHUMER. Maybe one day.

Senator ROBERTS. They would be a little different shoes, Mr. Chairman.

You like cowboy boots?

[Laughter.]

Ms. GERKEN. I am a New Englander. We do not wear cowboy boots.

Senator ROBERTS. That is part of your problem.

[Laughter.]

Senator ROBERTS. Your bio indicates you were a senior legal adviser to the Obama campaign in 2008 and 2012. The President has been criticized for attending fundraisers in the midst of a number of international crises. Last week, he was in Manhattan to attend a fundraiser for the House Majority PAC. That is a super PAC dedicated to electing a Democratic majority in the House.

The House Majority PAC is one of a number of groups that gets support from the Democracy Alliance. Another group that gets support from the Democracy Alliance is the Scholars Support Network. You are a member of that. Is that correct?

Ms. GERKEN. That is right.

Senator ROBERTS. Following its annual meeting at the Ritz Carlton in Chicago this year, Politico reported on a memo to the board of the Democracy Alliance that contained the recommendations on how to deal with media inquiries about the conference and its participants. This is what the memo said:

"As a matter of policy, we do not make public the names of our members. Rather," the memo went on, "the Alliance abides by the preference of our members. Many of our donors choose not to participate publicly, and we respect that. The Democracy Alliance ex-

ists to provide a comfortable environment for our partners to collectively make a real impact."

Why would disclosure make some of the members of this alliance uncomfortable?

Ms. GERKEN. So I actually do not know the reason for that. I am simply one member of the organization. But I will just say that there is a fundamental difference between many of the organizations that we are talking about here and those that are trying to affect politics with large amounts of money. The reason why——

Senator ROBERTS. All right. Would you——

Ms. GERKEN [continuing]. Justice Kennedy——

Senator ROBERTS. Would you agree—I am sorry to interrupt, but we have got 4 minutes here, although the Chairman has been very liberal with his time allowance. Do you agree this desire to remain comfortably anonymous should be respected?

Ms. GERKEN. I will say that if you are trying to use large amounts of money to influence politics, then you should do exactly what Justice Scalia says, which is to have the civic courage to have your name publicly listed. And so I am in support of this bill, and if the Scholars Strategy Network started to try and influence politics with large quantities of money, I would be in favor of disclosure.

Senator ROBERTS. Does the Scholars Support Network publicly disclose its donors?

Ms. GERKEN. I do not actually—I do not think it does, but I do not know the answer to that question. As I said before, it is not trying to influence——

Senator ROBERTS. Shouldn't that be respected?

Ms. GERKEN. It is not trying to influence Federal elections. And if it were, this bill would ensure that it, in fact, disclosed all of the donors that were trying to do so. That is the key to this bill. This bill allows for the privacy of groups engaged in a variety of public-oriented activities to remain anonymous——

Senator ROBERTS. All right.

Ms. GERKEN [continuing]. But when they try to influence elections, that money——

Senator ROBERTS. I got it.

Ms. GERKEN [continuing]. And donor must be disclosed. And I support that heartily.

Senator ROBERTS. I got it.

As a 501(c)(3), it is not supposed to engage in any political activity. Is that right?

Ms. GERKEN. A 501(c)(3) has—there are a variety of requirements about 501(c)(3), about what it means. But as a general matter, they are not supposed to.

Senator ROBERTS. Well, how is it then that the Scholars Support Network has been supported by the Democracy Alliance which stipulates that each organization it supports be politically active and progressive?

Ms. GERKEN. So the Scholars Strategy Network is a very simple thing. It is designed to do something that academics are very bad at, which is to figure out how to convey their ideas to the broader public and to policymakers. You have thousands of universities across the country generating good idea after good idea by people

who barely go outside during the day, who have never talked to a reporter, who have certainly never spoken to a Senator, and have no idea how to convey their ideas in a broader way. That network is designed to take a bunch of people who are basically nerds and help them figure out how to convey their ideas to the real world. That is a useful——

Senator ROBERTS. Sort of a nerd network?

Ms. GERKEN. It is a nerd network, but it is a policy-oriented network to get ideas that are already in the public arena to policymakers. That is a very——

Senator ROBERTS. I have every confidence that the Chairman of the Committee sitting to my right gets calls a lot from nerds and all sorts of other people. I do, even in Kansas, the University of Kansas, Kansas State, Wichita State University. We have got a lot of nerds. New England has nerds, don't they?

Senator KING. I do not think there are any in Kansas.

Senator ROBERTS. I can testify there are nerds in Kansas.

[Laughter.]

Senator ROBERTS. What about the American Constitution Society? At the Chicago conference it took credit for helping to make possible the Senate rule changes imposed by the Majority Leader that led to the confirmation of "progressive judges" to the D.C. Circuit. You have also been involved with the American Constitution Society. Is that correct?

Ms. GERKEN. Yes, I have.

Senator ROBERTS. Do they publicly disclose their donors?

Ms. GERKEN. I do not believe that they do, but they also—if the DISCLOSE Act were passed, if they were engaged in using large sums of money to influence politics, they would be required to disclose their donors, and that would be a good thing for democracy.

Senator ROBERTS. Well, my point is you would recognize the Senate rules changes in the appointments to the D.C. Circuit were somewhat politicized. Would you agree with that?

Ms. GERKEN. You know, in this world almost everything is politicized, I suppose.

Senator ROBERTS. I understand. Would the DISCLOSE Act apply to 501(c)(3)s?

Ms. GERKEN. The DISCLOSE Act is going to apply to any organization that uses money to influence politics. If 501(c)(3)s are engaged in some politicking, then they do something very simple, which is they segregate their funds. This is a traditional strategy used by many organizations to keep separate these two kinds of donations. That means that donors, for example, who want to support the American Constitution Society's general activities can give money without having it go to politics. But if they want ACS to use that money to influence politics, to influence the election system, then they have to have a segregated fund. That is a very simple—it is a simple and elegant solution to the kind of problem that you are describing here.

Senator ROBERTS. I do not know—oh, I have been informed here that it does not apply to (c)(3)s. So should it?

Ms. GERKEN. So this goes back to the—if a 501(c)(3) would like to start to influence—to do the things that are outside the usual ambit and it starts to take in large quantities of money that are

going to be used to influence elections, then it is going to have to disclose those activities. It would pull itself outside of 501(c)(3)s. They would become 501(c)(4)s, presumably.

Senator ROBERTS. I think you are talking about a regulatory morass, but at any rate, thank you so much for answering my questions.

Senator KING. Thank you, Senator Roberts.

I understand a vote has just gone, and Senator Schumer wants to have a few words, and then Senator Cruz. We will adjourn to vote, and we will be coming back. You all will talk among yourselves while we go and vote, and we will be back. If you can get this settled while we are gone, that would be good.

Senator Schumer.

Chairman SCHUMER [presiding.] Well, thank you. And first let me thank Senator King. He has been chairing a series of hearings on this very important issue and has done it in his able, fair, and independent way. So thank you very much.

First, I just wanted to note Senator McConnell came and spoke as a member of the Committee and talked about being against the DISCLOSE Act. I recall during the days when we debated McCain-Feingold, Senator McConnell was a leading advocate of disclosure and said that is what we should do, we should not limit contributions but disclosure would be enough. And that was true of most of my colleagues who were opposed to McCain-Feingold from the other side of the aisle. And then, of course, now all of a sudden they are against disclosure, and I would argue that is for political advantage. There is no principled reason to be against disclosure. This is a democracy. Things are disclosed. Justice Scalia's statement makes the same.

And I would just ask my friend Brad Smith, who I know has been involved in this for a long time and opposed McCain-Feingold and every other limitation on campaigns that is here, why wouldn't the same argument apply to voting? I vote. I get protested all the time. Some of those protests are pretty loud and noisy and raucous. Maybe we should keep voting secret, what our legislators do, because it might intimidate them. How can you make the distinction between the two? Both are participating in the political process. The public has a right to know.

You know, for 200 years it has been regarded as progress that there is more and more openness in Government. People decry closed-ness in Government. In fact, there is a bipartisan bill coming about—I think Senator Cornyn in the Republican sponsor, along with Senator Leahy—to make Government more open and available in terms of the bureaucracy.

It is just confounding and strikes me as perhaps self-interested that people are actually against disclosure. There are all kinds of arguments about limitations, what you should limit and what you should not. And Senator Cruz and I have had an ongoing argument about the First Amendment in this regard. That is not what we are discussing today because, clearly, you would say there is no First Amendment block or any sort of First Amendment right to not disclose. Is that right? Or do you think the First Amendment argues for non-disclosure?

Mr. SMITH. Well, you have a bunch of questions, and I appreciate it.

Chairman SCHUMER. Yes, so you can answer them all.

Mr. SMITH. And I do want to say, by the way—and you and I have not been face to face in, I think, 14 years, but I still remember the great courtesy you showed to my children at my confirmation hearing 14 years ago, and I appreciate that.

Chairman SCHUMER. Your kids were cute then. Now they are probably grown up, right?

Mr. SMITH. They are.

Chairman SCHUMER. But to parents, they are always cute, right?

Mr. SMITH. That is right.

Chairman SCHUMER. Okay.

Mr. SMITH. You asked about voting, to begin with, and that draws, I think, a key distinction that we make at the Center for Competitive Policy. The purpose of disclosure is for the public to keep tabs on its legislators, so when legislators vote, of course, the public needs to know that. And that is why we support disclosure of contributions to candidates, parties, and so on.

However, when you are talking about citizens talking to other citizens, I am less sure that there is a compelling Government interest there. Of course, we note that another type of voting is entirely secret. You are not required to display your vote in any State in the United States anymore. Now, Justice Scalia does not believe that is a constitutionally protected right to a secret ballot, and I think he has got, you know, a solid argument there. But as a policy matter, whether it is constitutionally required or not, we have agreed that people should have the ability to keep their political views quiet. And that goes to the question, when we talk about, you know, people are against disclosure. I think everybody is in favor—pretty much everybody—of some degree of disclosure, and the question is: What should be disclosed?

And I think part of the colloquy between Senator Roberts and my colleague here relates to the question of what should be disclosed, and Heather would say, well, if they are engaged in political activity. But what is political activity? A great many (c)(3) organizations, such as some of the ones Senator Roberts was discussing, are doing things—the American Constitution Society is clearly trying to affect how people think about political issues, and that may ultimately affect how those people vote.

When I was Chairman of the Federal Election Commission, I used to note that if you tell me, you know, what groups you want to silence, I can come up with a neutral method that will get mainly those groups and not many——

Chairman SCHUMER. Well, why would disclosure silence people?

Mr. SMITH. Well, studies——

Chairman SCHUMER. I mean, we are a democracy here, and you can always say that somebody could argue you are wrong. But that is not—I mean, if you—that is the most slippery slope argument I have heard. It just says anytime someone thinks they might be intimidated they do not have to disclose anything.

Mr. SMITH. Well, it does not necessarily go that far. But, again, you might ask, why do we have a secret ballot? Why were the Federalist Papers published anonymously? Why has the Supreme

Court in cases like Buckley v. Valeo, McIntyre v. Ohio Elections Commission, Watchtower Bible & Tract v. Village of Stratton, Thomas v. Cullens repeatedly protected citizens' anonymity when engaged in various types of political activity? Studies do show that disclosure, mandatory, compulsory disclosure, has a deterrent effect on some people participating in politics.

Chairman SCHUMER. But the Supreme Court—no court that I am aware of has made the argument that there is any constitutional requirement for that. Is that right?

Mr. SMITH. Well, the Court has repeatedly struck down overly broad disclosure laws. Whether it would strike this down——

Chairman SCHUMER. But not on a First Amendment basis.

Mr. SMITH. But I have to say, Senator——

Chairman SCHUMER. Right? Is that right? Not on a First Amendment basis?

Mr. SMITH. No. On First Amendment grounds, it has narrowed statutes or struck them down. And I have to say, Senator, that you yourself, when you earlier introduced a version of this act, you stated that, "The deterrent effect should not be underestimated." So I think you do recognize that there can be a deterrent effect.

Chairman SCHUMER. Oh, let me tell you, I think it is good when somebody is trying to influence Government for their purposes, directly, with ads and everything else. It is good to have a deterrent effect. If you cannot stand by publicly what you are doing, then you probably think something is wrong.

Mr. SMITH. So——

Chairman SCHUMER. I do not think you are afraid of being protested or picketed or something like that.

Mr. SMITH. So the author of "Common Sense," the authors of the Federalist Papers——

Chairman SCHUMER. You know, we did not have a democracy then. That is not fair. The British were running the show. Tom Paine was worried he would be arrested. We are not worried that if you publish something here in America you would be arrested.

Mr. SMITH. Well, I can only, again, go back to saying that a great many people feel that they have fears of excessive disclosure, that the Supreme Court has recognized this in many, many contexts, including the context of political giving. And I think it is common sense to all of us that there are times when one would rather not have to be publicly identified with certain political views, such as, again, the examples I gave in my testimony. For example, a person, a small business owner in Kentucky or West Virginia who favors increased regulation of the coal industry might be very concerned about what that could do to his business if he were to voice those views.

Chairman SCHUMER. Well, but different if he gives money to a political campaign to influence the candidate. The disclosure here is not based on what we should know about the individual but the effect on an elected official, and that is the distinction that I think you sometimes fail to make.

Mr. SMITH. But if he gives money——

Chairman SCHUMER. I will give you the last word before we are out of time.

Mr. SMITH. If he gives money to a political campaign, then it is disclosed. It is only—we are talking about giving money to a nonprofit (c)(4) at this point.

Chairman SCHUMER. Okay. I want to thank the witnesses. We are going to be in temporary recess, and Chairman King will come back, and I guess Senator Cruz will come back. Thank you both.

[Recess.]

Senator KING [presiding.] The hearing will resume. The hearing of the Rules Committee on the DISCLOSE Act will resume.

Senator Cruz, your questions.

Senator CRUZ. Thank you, Mr. Chairman, and I want to say thank you to both the witnesses for joining us today.

You know, before we broke, I thought the exchange with Senator Schumer was actually quite revealing where Senator Schumer asked Mr. Smith, well, gosh, why can't we restrict the freedom of American citizens? Because, after all, when Members of Congress vote, our votes are public. And I think that really reveals the issue here, that the votes of Members of Congress are public because we are supposed to be public servants. We are supposed to be accountable to the American people. And indeed what this effort is about and what much of the efforts of this Senate is about is trying to have politicians hold the American people accountable, which is backwards from the way it is supposed to work.

Jefferson famously said when leaders fear the citizens, there is liberty; but when citizens fear their leaders, there is tyranny.

We are just a few months away from an election, and so often Congress will devolve into the silly season where we will have a series of votes that are not intended to pass but are intended somehow to be messaging votes because the majority party thinks it will be beneficial for the upcoming election.

Related to this legislation is a proposal that has been voted on by the Senate Judiciary Committee that 47 Democrats have put their name to a constitutional amendment that would repeal the free speech provisions of the First Amendment. It is the most radical legislation the Senate has ever considered.

In 1997, when the Senate considered a constitutional amendment along similar lines, then-Senator Ted Kennedy said the following: "In the entire history of the Constitution, we have never amended the Bill of Rights, and now is no time to start."

I emphatically agree with Senator Ted Kennedy.

Likewise, Senator Russ Feingold, not exactly a right-wing conservative, said the following: "Mr. President, the Constitution of this country was not a rough draft. We must stop treating it as such. The First Amendment is the bedrock of the Bill of Rights." And he continued, in 2001, "I want to leave the First Amendment undisturbed."

For 47 Senators to put their name to a constitutional amendment that would repeal the free speech protections of the Bill of Rights is astonishing. And it ought to be disturbing to anyone who believes in free speech, to anyone who believes in the rights of the citizenry to express their views and politics.

And, Mr. Smith, I want to ask a question to you: At the Constitution Subcommittee's hearing on that proposed national amendment—I am the Ranking Member on that Subcommittee; the

Chairman is Senator Durbin—I asked Chairman Durbin three questions about the amendment that he had introduced.

The amendment, by the way, provides that Congress can put reasonable restrictions on all political speech.

I would note, by the way, the First Amendment right now does not entrust determinations of reasonableness to Members of Congress. Congress thought the Alien and Sedition Acts were reasonable, and indeed the heart of the First Amendment is about protecting unreasonable speech, not reasonable speech.

When the Nazis wanted to march in Skokie, Illinois, Nazi speech is the very definition of unreasonable speech. It is hateful, bigoted, ignorant, and yet the Supreme Court rightly said the Nazis had a First Amendment right to express their hateful, bigoted, ignorant, unreasonable speech. And then all of us have a constitutional right, and I would say a moral obligation, to denounce that speech, because as John Stuart Mill said, the best cure for bad speech is more speech, not restricting it.

So the three questions that I asked Chairman Durbin, I said: Do you believe Congress should have the constitutional authority to ban movies? Do you believe Congress should have the constitutional authority to ban books? And do you believe Congress should have the constitutional authority to ban the NAACP from speaking about politics?

And what I observed is that for me the answer to all those three questions is easy: Absolutely no, in no circumstances. And yet in the amendment that every single Senate Democrat on the Judiciary Committee voted for, Congress would have the constitutional authority to do all three of those.

My question to you, Mr. Smith, is: What is your view of the dangers of giving Congress the constitutional power to ban movies, to ban books, and to ban groups like the NAACP from speaking about politics?

Mr. SMITH. Well, thank you, Senator. You know, I think the danger is obvious, and it goes to the core of why we have a First Amendment. And you have hit the point I think very well when you said, you know, the precise idea of the First Amendment is to prevent Congress from deciding what is reasonable. There is a view that this was too dangerous a power to cede to the Government.

During the first panel, Senator Whitehouse mentioned that he did not want to dissuade anybody from speaking; he just wanted to have people disclose their information. But if you look at, for example, this bill, many parts of it require a regulatory regime that will dissuade people from speaking, including the possibility of prosecution if people make mistakes in knowing what other folks they are going to give money to will do. And Senator Whitehouse has been very vocal in urging criminal prosecutors against political speakers.

So, you know, I think the First Amendment is there precisely to say this is just too dangerous a power to give to the Government. As Chief Justice Roberts said in the McCutcheon decision, the last people we want deciding, you know, who needs to speak more or who needs to speak less in a campaign or what is reasonable regulation is the Government itself, the people who have a vested interest in being returned to office.

And as I have often pointed out, even assuming the good faith of all actors, if rules and regulations tend to favor the party in power and the incumbents, then they will remain in place. And if they tend to disadvantage those people, then they will be changed. So we do not have to assume bad faith to see the danger in giving Government that kind of power.

Senator CRUZ. Well, and we have seen—in the Senate Judiciary Committee there were some Democratic cosponsors of the amendment who said, "It is not our intention to ban movies or ban books or ban the NAACP from speaking." And at that hearing I observed this is the Judiciary Committee of the United States Senate. The inchoate intentions of members of this Committee that may be buried in their hearts are not terribly relevant when 47 Senators are proposing a constitutional amendment to the Bill of Rights that would explicitly, under the language of the amendment, give Congress the power—and the amendment says—"to prohibit speech from any corporations." Paramount Pictures is a corporation. Under the language of that amendment, you could prohibit Paramount Pictures from publishing a movie critical of a politician.

Indeed, Citizens United, which is the subject of so much demagoguery, was the Federal Government trying to find a movie maker who dared to make a movie critical of Hillary Clinton. I think the movie maker has a constitutional right to do so, just like Michael Moore has a constitutional right to make movies that I think are pretty silly, but he has got a constitutional right to continue to make them for all time.

As regard to books, Simon & Schuster is a corporation. Under the text of the constitutional amendment, Congress could prohibit Simon & Schuster from speaking. As the ACLU said—for those of you who are here today who may say, "Well, Cruz is a Republican. I am skeptical of what Republicans say." If you are skeptical of what I say, perhaps you are not skeptical of the ACLU. The ACLU said in writing, this amendment would fundamentally abridge the free speech protections of the First Amendment, and they said it would give Congress the power to ban Hillary Clinton's book, "Hard Choices."

There is a reason that I have referred to the proponents of this amendment as the "Fahrenheit 451 Democrats," because they are literally proposing giving Congress the power to ban books. That ought to trouble everyone.

And with respect to the NAACP and La Raza and the Human Rights Committee and Sierra Club and Planned Parenthood, who are all corporations—and they should not be prohibited from speaking—we should be empowering the free speech of the citizens, not empowering the IRS and Congress and Government to silence and regulate the speech of the citizenry.

Thank you, Mr. Chairman.

Senator KING. Thank you, Senator.

As one of the sponsors of that amendment, I am not sure we are talking about the same document, because the one I sponsor talks about regulating campaign contributions. It does not talk about banning books or movies or in any way abridge the free speech. But I am sure that is a debate that you and I can have at a later date. Thank you for your questions.

Senator——

Senator CRUZ. Mr. Chairman, just in response to the question you ask, I would note that the text of the amendment says, "Congress and the States shall have the power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations, or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections." And since book publishers are almost always corporations, under the explicit text of that constitutional amendment, Congress would have the power to prohibit corporations like Simon & Schuster from publishing books, which I would note is exactly what the ACLU said in response to it as well.

So that is the plain text of the amendment that has been introduced, and I think it is a very dangerous suggested addition to the Bill of Rights of our Constitution.

Senator KING. A discussion which we shall undoubtedly continue at a later date. Thank you, Senator.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you to our witnesses. Good to have you back, Ms. Gerken. I remember the hearing that I chaired. You did a good job.

Ms. GERKEN. Thank you very much for having me again.

Senator KLOBUCHAR. Okay. Very good. Thank you, Mr. Smith. Mr. Smith goes to Washington. You can say that now, I guess, at the hearing. That was a little joke.

It is good to be here. Obviously Senator Cruz and I disagree, and I wanted to refocus this, first of all, on the bill before us, the DISCLOSE Act, which, it is my understanding, having looked at these cases, the Supreme Court, the Roberts Court, actually anticipated that we might have some limits on disclosure and that those would not be allowed. Is that right, Ms. Gerken?

Ms. GERKEN. Yes. In fact, I actually think it would be fair to say that Citizens United at least was premised on the idea that there would be adequate disclosure. So Justice Kennedy, the author of the opinion, notes that as long as you have adequate disclosure, you need worry much less about independent expenditures. What Justice Kennedy may not have contemplated was the possibility that $310 million in the last election cycle was being spent independently by groups that were not disclosing the identity of their donor.

But Kennedy was absolutely clear that disclosure promotes First Amendment values, the ability of everyday people to make decisions to hold their representatives accountable. That is why disclosure rules are consistent with the First Amendment.

Senator KLOBUCHAR. So he specifically used the words "disclosure rules" in the opinion?

Ms. GERKEN. He not only specifically used the words. He actually specifically affirmed them and rejected the kinds of challenges that have been levied against the DISCLOSE Act by noting that because disclosure rules are not stopping someone from spending their money and are not putting the kinds of hard caps on that you see in other parts of the campaign finance regime, that they are subject to a much more generous constitutional standard, that Con-

gress has much more leeway to impose them, precisely because they further First Amendment values rather than undermine them.

Senator KLOBUCHAR. And I bring this up because Senator Cruz's long speech there was mostly focused on the constitutionality of this. First of all, he was talking about the amendment, which I support, and I will get to that maybe a little later, but this is about the DISCLOSE Act today. And that the Court clearly contemplated the DISCLOSE Act—the disclose rules—I am not going to say this act—that rules could be constitutional.

Ms. GERKEN. Yes, exactly. And if you begin to sort of think a little bit about the sorts of arguments that are being made against the constitutionality of this provision, of this act, they would, I would think, also prevent you from regulating super PACs and the political parties. That is, there are all sorts of instances where we require donors to have the civic courage to acknowledge that they have given money to support a political candidate or influence elections. And that is all that the DISCLOSE Act does. It levels the playing field, subjecting (c)(4) organizations, which have become immensely powerful in the elections process, to the same kinds of regulations we see for super PACs and parties.

Senator KLOBUCHAR. Which have been allowed as reasonable limits in the past.

Ms. GERKEN. I mean, the statement—the kinds of arguments that would be made that would knock those down are so radical that——

Senator KLOBUCHAR. That you would not be able—that they could not go after you for yelling "Fire" in a theater.

Ms. GERKEN. Well, I will just say that the First Amendment law that exists on the books, written by the Justices who have been the most skeptical of campaign finance regulation, have, with all but one exception—eight of them have affirmed these kinds of disclosure rules, and with good reason.

Senator KLOBUCHAR. Good. Well, then, let us go from there.

What I am concerned about here—and I talked about it when you were here; I talked about it at the Judiciary Committee—is just the fact that, in fact, the situation we have now with these hundreds of millions of dollars drowns out the speech of regular people so that they cannot speak because they are not going to be able to have a voice if you have a regular person running for office that basically cannot bring in millions into the campaign, has to raise money, let us say they do what they are supposed to, I know what this was like, calling, calling, calling, raising $500, raising $1,000, and then all of a sudden someone could just come in and plow in hundreds of millions of dollars, or in the case, I think, of some of these recent races, $25 million so far against individual candidates, to the point where it almost becomes ridiculous for you to raise your own money because you could be plowed down and stamped on by this outside money.

And so the purpose of this bill is to simply make sure that we have adequate disclosure to know that money is coming from, to give that person an adequate fighting chance, to say look who is funding the attacks against me. Is that right?

Ms. GERKEN. Yes. In fact, a lot of my research has been on what I call the "rise of the shadow parties," these organizations outside

the formal party structure, which are having an increasingly large influence over the elections process. And the trouble with shadow parties is that unlike your party and unlike the Republican Party, they are not open to average and everyday people; that is, the price of admission to a 501(c)(4) is money, money, money, and more money. That means that the everyday people who inhabit our parties, the party faithful and the voters, are losing the chance to influence the shape of the political process precisely because all the power is moving in the direction of the shadow parties. This is a step toward halting that flow. It will not fix it entirely, but at least it will do something to help us hold these groups accountable.

Senator KLOBUCHAR. One of the things that the Supreme Court pointed to in its recent McCutcheon decision was that now more things are online for people to take a look at. They may be true, but as you know, not everything is written online. It is very hard for people sometimes to find things.

Do you think that improving the technology that we use for disclosing money—this is outside of—it is part of the DISCLOSE Act but not in the bill—in elections to help make it easier for groups to report on this and for the public to know what is really happening?

Ms. GERKEN. I think that anything that can be done to make it easier on the public to figure out the source of an ad is helpful, which is one of the reasons why we made the proposal that we did, that for ads that are essentially paid for by groups that do not disclose their donors, that should be on the ad, because citizens have a right to know who is behind the money. And I will say that for the average citizen, even the system we have now requires an inordinate amount of work for them to figure out who is behind some of these ads and who is not.

So, yes, anything that can be done, both in terms of putting labels on the ads and increasing the transparency of the way money flows through the system, is a good thing, in my view.

Senator KLOBUCHAR. I totally know this because even how I have not had a lot of independent ads run against me, they have had issue groups do it sometimes. I have tried to figure out who is financing when my name is in it, and I cannot figure it out.

Ms. GERKEN. No, I actually once made a joke in my election law class that you could have a group called "Americans for America," and then one of my students proposed—I do not know if this is true—that, in fact, that group exists. So you never know who is behind it.

Senator KLOBUCHAR. There you go. So one of the things that has intrigued me with this is that this just has not been a partisan issue in the past. People have come together on trying to find a way to regulate campaign contributions, understanding that it becomes actually corrupt when there is so much outside money and people cannot tell where it is coming from. And I truly believe the integrity of our electoral system is at stake, and from what I am seeing, there is a bipartisan support in the public for doing something about all this outside money, but we are not seeing it here.

Why do you think that is? How do you think we can change that?

Ms. GERKEN. Well, I do think that there is actually generally bipartisan support. The American people overwhelmingly favor

transparency. I also think that when you move a little bit outside of Washington, you find that people on both sides of the aisle are in support of transparency.

Certainly when McCain-Feingold was debated, virtually everyone on both sides of the aisle was in favor of transparency, and I had the pleasure of working on a commission with Senator Trent Lott, with Representative Henry Bonilla, with Senator Olympia Snowe, and we unanimously decided to endorse transparency rules for independent funding. And in many ways, I think that one way to understand what that commission's purpose was to think about the relationship between elections and governance, because governance is breaking down in Washington. And the group as a whole was deeply concerned with that. Transparency rules are part of what makes governance work. It helps the American people hold their representatives accountable. And it helps us all figure out where the money is flowing and how power is working in Washington.

Senator KLOBUCHAR. Mr. Smith, you know, one of the witnesses that we had at the Judiciary Committee was—actually I pushed him a little, and he said when—remember, this is not about the DISCLOSE Act. This is about the constitutional amendment that Senator Cruz was referring to. And he basically said he thought we should not have any limits at all on—any kind of limits on contributions. Do you share that view?

Mr. SMITH. You are asking me?

Senator KLOBUCHAR. Yes.

Mr. SMITH. I am sorry. Well, let us put it this way: I think we should have good, reasonable limits on contributions. The current limits on contributions are substantially less than what they would be had they even been raised for inflation since they were first enacted in 1974, and it is worth noting that, prior to 1974, we never had any limits on direct contributions by individuals to campaigns. Individuals up to 1974 were free to contribute $20 million directly to a campaign if they wished to do so.

Several States still allow that, and there is nothing that indicates to me that it has had detrimental effect. In fact, those States consistently rank near the top of the best governed and least corrupt States in America.

So I guess the better question to me would be, you know, what really—how strong is the justification for limits, especially limits at the low levels that we have them now? When people ask me, you know, would I do away with all limits, I guess I always say, you know, might, but, look, I understand why people want limits. I think what we need are more reasonable limits. That would be a good starting place.

Senator KLOBUCHAR. But do you think it would be—it is constitutional to have those limits in place?

Mr. SMITH. Well, the Supreme Court has repeatedly said that it is constitutional to have limits on contributions.

Senator KLOBUCHAR. Right.

Mr. SMITH. There are several Justices, both now and former Justices, who have disputed that, but it has never been a majority position on the Court.

Senator KLOBUCHAR. And then do you think there is a constitutional issue then with actually disclosing the names of those people that there are limits——

Mr. SMITH. They are disclosed. I mean, if you give money to a campaign, your name is disclosed.

Senator KLOBUCHAR. But you have an issue with the DISCLOSE Act then?

Mr. SMITH. Yes, I do, because I think we need to recognize, first, the Roberts Court has not said that rules like "this" are constitutional. It has said—it has been generous toward disclosure. It has never ruled on rules like this. In Citizens United, in McCutcheon, it is ruling against a background of existing disclosure rules. And as I mentioned in my prepared testimony, we have more disclosure now than at any time in American history. And the Court has looked at that and said this is the solution, this is adequate. It should not be read to suggest that the Court is saying go ahead and do whatever things more you want to do.

Senator KLOBUCHAR. But what is so wrong with disclosing the people that give these kinds of contributions?

Mr. SMITH. Well, the question, again——

Senator KLOBUCHAR. Why would that make it different than the other rules?

Mr. SMITH. The question is who or what is going to be disclosed. For example, this act does not require disclosure by the American Constitution Society of its donors. Maybe it should. The American Constitution Society would escape it because it is a (c)(3). It does not engage in a certain type of political activity. But anybody who says that it is not out there trying to influence politics is not serious. I mean, that is what a lot of groups do.

So, again, the question is not that people are opposed to disclosure as if this is some clear, obvious thing. The question is: What should be disclosed—right?—when and how? And to what extend do we want to tie our system up trying to get, you know, the last little bit of disclosure out of the system?

501(c)(4)s have long done very, very hard-hitting issue ads. The NAACP ran ads in 2000 that re-enacted the lynching of a man named James Byrd, and the narrator specifically blamed it on then-Governor George W. Bush. It ran these ads in October just before the election. They did not disclose their donors. Nobody got upset about it at the time. This is not something new in that respect. It is not new since Citizens United. It has only been viewed as a crisis, so to speak, since Citizens United, and I think that really is a reaction to Citizens United rather than a serious, you know, re-evaluation of the need for added discussion in this area.

So, you know, again my organization and I have supported disclosure. I have supported it in my academic writings. But it is a question of what should be disclosed and how much. The Supreme Court has not endorsed all disclosure. In many cases, in the 1970s, 1980s, 1990s, and 2000s, it has protected the right of citizens to engage in political activity anonymously, and nothing in Citizens United or McCutcheon overrules any of those decisions.

Senator KLOBUCHAR. Do you have concerns that once—you know, we do not know where this money is coming from because it is not

disclosed, that you could have foreign money come in when we do not know what the money is and——

Mr. SMITH. You can have foreign money come in anyway. People just would not have to—they would not report it. They would——

Senator KLOBUCHAR. Yeah, but if they have to report it——

Mr. SMITH. If they want to break the law, they will break the law.

Senator KLOBUCHAR [continuing]. You can add it up and see what it adds to. It would take another step if you made up where the money was from. This time you would at least be able to know where it was from.

Mr. SMITH. Right. Well, as I pointed out, it is about 4 percent of the money that is not itemized by donors that is in the system, and so I think we need to keep that in perspective. And I think the end result is I think that one could consider changes to disclosure rules, and there may be some things that we would want to do. But I think that this bill in particular has a lot of problems, again, as I pointed out, it brings up what we call "junk disclosure," double counting of funds, relating people to money that they did not give for purposes of advertising, misdirecting the public about who is giving, in fact, or who is not giving. And so I think that we need to be conscious of the fact that this is simply not a good bill on its own technical merits. But I think also as we design bills, we need to be conscious of the fact—and I think the data supports this pretty clearly—that excessive disclosure discourages honest, good political participation, and we need to be careful about that and sensitive to that reality. And it can be misused in the same way that anonymity can be misused when people intentionally say our goal is going to be to smear and attack people based on political activity they might be vaguely related to through some financial transaction.

Senator KLOBUCHAR. Okay. Ms. Gerken, do you want to respond?

Ms. GERKEN. Well, I want to agree with Professor Smith that the Supreme Court said what it said about disclosure when it robustly and emphatically affirmed the validity of disclosure rules. It did so against a background in which super PACs are regulated, political parties are regulated in the same way that 501(c)(4) organizations would be regulated going forward. They are the outlier. All that this bill does is pull 501(c)(4)s into the ambit of the kind of disclosure rules that we have had for a very long time without anyone worrying about the First Amendment or suppressing speech.

Senator KLOBUCHAR. I just think it so much weighs on the side of getting this disclosed, and this is just from my own—you know, I am not the constitutional expert that you two are. It is just based on my practical experience. I remember when I had a $100 contribution limit in local office. That is what we had in non-election years. So, like, six of my election—six of my years out of eight I had a $100 limit on contributions during the 8 years that I was county attorney. I would still get numerous contributions for $99 because then people knew that their name would not be out there. And, okay, maybe that is okay when you are dealing with $99, $100. But when you are dealing with the millions of dollars we are looking at here, I just do not think it is okay. It is a difference because of the impact that extra money can have. And the outsize im-

pact when you look at what individuals can give in an individual race, so you can get a max of, what, $5,000, a lot of the contributions I get are like $1,000, and then someone coming in with $25 million against you and then you cannot tell who those people are.

Ms. GERKEN. And, Senator, Professor Tokaji is not here to talk about his report, but it really provides compelling evidence that the numbers here are important, but what is more important is the way it is changing the political landscape. There are $310 million—there is complete agreement that at least that amount of money was not disclosed in 2012. But the way that it is changing how people run their campaigns and work with these shadow parties is quite astonishing. The parties are becoming more sophisticated. This is looking a lot more like what anyone in the world would call "coordination" except for a few lawyers. And so it is becoming an increasingly worrisome problem, and it is hard to imagine 2016 is going to be any better.

Senator KLOBUCHAR. Right. And the last thing I would say politically, as the Chairman, as someone who likes to get things done and try to find some common ground, I just think this money in these extreme forms from the outside is not going to foster that at all, because people are not—they are going to know something is going to hit them that will just outweigh all that money that normal people give you at $100 or $500 or $50 or $20, it will just be outweighed by some interest group who does not agree with you on one issue or that you have not toed the party line on one thing, either right or left, and that money is just going to come in and blow you out. And that is why I think that in the end not only is this bad for just the traditional idea that we should know who is giving money, I just think it is bad for our democracy in terms of getting things done.

So thank you very much.

Senator KING. Thank you, Senator.

Just a couple of follow-up questions. It occurs to me, Mr. Smith, that the reality—and this is a change that has happened almost overnight, really just in the last few years. Yes, there were 501(c)(4)s back along—but I would argue that the quantitative change equals a qualitative change. And what we have now is it is like the legends of the Trojan War where the Greeks and the Trojans fought each other, but the gods were fighting in the skies. We have parallel universes of campaigns, and it is getting to the point where the candidates themselves are the little guys, and the real fight is between the billionaires who are controlling it. And we have had for 100 years various kinds of controls that have come and gone, but it has all been because of scandals and the danger of corruption that people have recognized since Teddy Roosevelt. That has not gone away. Human nature has not changed. And it just seems to me that all we are talking about here—and you yourself have said we have got lots of disclosure, and I would agree that we do, except in this one area.

You have indicated you think it is only 4 percent, but you are counting, I think, as I carefully read your testimony, you are counting as disclosure when a group is listed, Americans for Greener Grass, as the contributor, that is disclosure. That is not disclosure.

Disclosure is knowing who gave the money to Americans for Greener Grass.

So I think you are—the 4-percent number, if it were true, we would not be wasting our time here. But the truth is there is a ton of money coming in, it is accelerating, and I think most of us have said, okay, the Court has said what they said, and those are the rules about campaign finance. But the only tool they have left us is disclosure. And it seems to me—and you talk about, well, you know, there could be harassment. I think Justice Scalia said it very well. This is part of civic engagement. And if a billionaire can spend millions of dollars attacking my record or my character, I at least ought to have the opportunity to know who it is. To me, it is just—again, go back to the New England town meeting. No one is allowed to speak in a Maine town meeting with a bag over their head. Who the speaker is, is part of the information, and that is the purest form of political speech in our country today.

Give me your thoughts. All we are talking about, I think Professor Gerken is right, we are talking about applying to the (c)(4)s and whatever the next iteration is the same rules that we have had for years where, if somebody contributes to my campaign, if it is 100 bucks, I have got to list their name, address, phone number, occupation, but then somebody can spend $20 million and have no idea who they are or where they are from.

Mr. SMITH. Right. No, I think those are all good points. Let me try to address those in some order that may not correspond to their importance or the order in which you raised them.

But, first, let us note that I think that the McCutcheon decision, if that is the concern, is actually a good decision in that, again, McCutcheon allows more money to flow directly into political campaigns.

Senator KING. I understand.

Mr. SMITH. Which is fully disclosed.

Senator KING. And that may actually diminish the pressure toward these un——

Mr. SMITH. Yes, I do not see it having a major effect, but I do see it having some effect there. And I think along with that, as I noted earlier in response to Senator Klobuchar, we have not raised contribution thresholds to anything close to what they would be even if adjusted for inflation. And in my view, they should be substantially higher than that inflation adjustment, and that would also, I think, relieve some of the pressure on office holders' fundraising and help to make them, again, more important in their own races, so to speak. This is a self-inflicted wound when I hear office holders complaining about this.

Now, you make a good point. You know, things change, right? And people change, and how things operate changes. And there is no doubt that is true. All I can say is that I do not think there is much evidence at all that these campaign finance—this web of regulation we have thrown at our political activity, mainly since 1974—before that the laws were pretty easily evaded, there were very few rules enforced. I do not think there is much evidence that it has helped. And if we look at States that are deregulated versus States that are highly regulated, there is little evidence that the latter group performs better in almost any measurement you

choose—educational attainment, personal income, unemployment, almost any measure of Government policy effectiveness you might want to come up with.

And in those old days, we always heard the same sort of stories—"It is just not like it used to be." You know, in the 1920s, the parties were complaining about the expense of getting radio into everybody's house. And in the 1850s, they were complaining about, "Ah, ever since Van Buren, we have to do all these pamphlets and so on." They have always been raising those kinds of issues.

But there are other ways in which society has changed. For example, it used to be if you wanted to see disclosure reports, somebody had to go down and manually look them up. Nowadays you can sit on the computer, pull up your neighbor's finances. There are sites that directly link giving to people's—to maps to people's homes. What is the purpose of that other than intimidation?

And we should be aware that there are increasingly groups out there—Media Matters is one; there are several others, one called "Accountable Americans," and so on—that are very open about wanting to harass and vilify people.

Now, Justice Scalia is being quoted all the time by people who never would quote Justice Scalia for anything else, right? Well, I think Justice Scalia is wrong here. I mean, if this is true, how did America survive until 1974? It is pretty hard to figure out. Why do we have the secret ballot, right?

So, again, the question is not, you know, do we oppose disclosure? No, we do not oppose disclosure. What we want to keep reminding ourselves is our purpose is to allow the people to keep tabs on the Government. It is not necessarily let the Government or let candidates keep tabs on the people. And while those often are intertwined in a way that cannot be separated, I think if we start with that premise in mind and we are sensitive to honest concerns about harassment, then I think we might have some room to devise more effective disclosure rules that would get at some of the issues that seem to spur interest in the DISCLOSE Act.

But what I am not seeing in this act and what I am not seeing in the public statements I have heard about—and I do not mean in this room today or anything; I mean generally when I hear it talked about in the press—is any sensitivity to those kinds of issues or to why some people might fear Government or unofficial retaliation and why those concerns are illegitimate. I think they are legitimate. The people give anonymously for all kinds of reasons. People give to hospitals anonymously, right? And I think we need to respect that. To have the Government compel people to disclose information on themselves is not something we normally do. It needs to be carefully done and with a strong rationale behind it.

Senator KING. I would not disagree that there are not issues in that regard, but it seems to me it is a balancing case, a balancing test of trying to weigh the public interest in knowing who is trying to influence their vote and also the corruption issue against the dangers of intimidation and this is—I tend to agree with Justice Scalia on this, although I do not agree with him on everything.

Mr. SMITH. And so that we can end on a point of agreement, I agree with your statement there up until the point of Justices. But I think obviously the devil is in the details.

Senator KING. Well, I want to thank both of you for your testimony, and I want to thank you for the thoughtfulness with which you have answered the questions and the work that you put into the testimony that you presented to this Committee. This is an important issue. It is one that is not going to go away, and I believe that it is going to continue to bedevil us for some time unless we can find some resolution.

So, again, I appreciate your joining us, and that is on my behalf and on behalf of the Committee. This concludes the second panel of today's hearing. Without objection, the hearing record will remain open for 5 business days for additional statements and post-hearing questions submitted in writing for our second panel of witnesses to answer.

I want to thank Senator Klobuchar and the other Senators who participated today, and there being no further business before the Committee this morning, this hearing is adjourned.

[Whereupon, at 12:11 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Executive Summary of Testimony of Professor Daniel P. Tokaji

Robert M. Duncan/Jones Day Designated Professor of Law
The Ohio State University, Moritz College of Law

U.S. Senate Committee on Rules and Administration

"The DISCLOSE Act (S. 2S16) and the Need for Expanded Public Disclosure of Funds Raised or Spent to Influence Federal Elections"

July 23, 2014

- This testimony addresses three points. First, it describes the goals and methodology of Professor Tokaji and Renata Strause's report *The New Soft Money* (2014). Second, it summarizes existing federal disclosure laws. Third, it discusses the report's key findings pertaining to disclosure.

- The explosion of outside money in federal election campaigns is one of the most important recent developments in American democracy. Since *Citizens United v. FEC* (2010), there has been a rapid increase in both the number of outside groups and the amounts they are spending.

- *The New Soft Money* investigates and analyzes the effects of outside money on congressional campaigns and governance by interviewing those in the best position to know: former members of and candidates for Congress – Republicans, Democrats, and Independents – as well as campaign staff, legislative staff, and political operatives.

- The rise of so-called "Dark Money," the ultimate sources of which are not disclosed, is associated with groups that claim to fall outside the Federal Election Campaign Act's definition of "political committee" and the Internal Revenue Code's definition of "political organizations."

- Across the political spectrum, the people we interviewed largely agree on how the increase in outside spending – much of it from undisclosed sources – has changed the political landscape.

- Lack of disclosure was a common complaint about the current federal campaign finance system, one that arose repeatedly in our interviews. Across the political spectrum, our interviewees generally believed that it is important for both campaigns and voters to have better information about the money spent on federal election campaigns.

- The ultimate value is *accountability* in the eyes of many whom we interviewed. Without adequate disclosure, accountability to the electorate is lacking. As the Supreme Court recently stated in *McCutcheon v. FEC* (2014): "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information."

- Another concern expressed by interviewees is that the lack of disclosure opens the door to *corruption*, as the Supreme Court has recognized since *Buckley v. Valeo* (1976).

- Finally, *The New Soft Money* reveals considerable frustration with the *mechanics* of disclosure. Our interviews indicate the need for simplification and technological modernization, a rare point of bipartisan agreement in this deeply contested area of law.

Testimony of Professor Daniel P. Tokaji

Robert M. Duncan/Jones Day Designated Professor of Law
The Ohio State University, Moritz College of Law

U.S. Senate Committee on Rules and Administration

"The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised or Spent to Influence Federal Elections"

July 23, 2014

Thank you for inviting me to appear before you today. My name is Daniel P. Tokaji, and I am the Robert M. Duncan/Jones Day Designated Professor of Law at The Ohio State University, Moritz College of Law. I am also a Senior Fellow with *Election Law @ Moritz*, a nonpartisan program devoted to providing accurate information, analysis, and commentary on election law and administration. This testimony is solely on my own behalf and does not necessarily represent the views of any entities with which I am affiliated.

My primary area of research and expertise is Election Law. I am co-author of the casebook *Election Law: Cases and Materials* (5th ed. 2012), author of the book *Election Law in a Nutshell* (2013), and former co-editor of *Election Law Journal*, the only peer-reviewed academic journal in the field. I have written numerous academic articles on various Election Law topics, including election administration, voting rights, and campaign finance. I am also the co-author, with Renata E.B. Strause, of *The New Soft Money: Outside Spending in Congressional Elections* (2014), published last month. A copy of that report is included with my written testimony.

I have been asked to describe the research contained in our *New Soft Money* report, particularly that which pertains to campaign finance disclosure. My testimony will address three points. First, it describes the goals and methodology of our report. Second, it briefly summarizes existing federal disclosure laws. Third, it discusses the key findings of our report pertaining to disclosure.

Goals and Methodology

The explosion of outside money in election campaigns is one of the most important recent developments in American democracy. Since the U.S. Supreme Court's decision in *Citizens United v. FEC* (2010), there has been a rapid proliferation in the number of outside groups – those that are not formally affiliated with candidates or parties – coupled with a dramatic increase in how much these groups are spending to influence federal elections.

While there has been considerable attention to raw numbers, there had been much less in-depth analysis of the impact that all this money is having, prior to the report by Ms. Strause and me. *The New Soft Money* investigates and analyzes the effects of outside money on congressional elections and governance, by speaking with those who are in the best position to know.

Over the last year, with the generous support of the Open Society Foundations, we conducted in-depth interviews with forty-three key political players. Among our interviewees were fifteen former members of or candidates for Congress – Republicans, Democrats, and Independents – as well as campaign staff, legislative staff, and political operatives. Our report also includes a detailed analysis of the changes in federal law over the years, and the current legal and political landscape as revealed in FEC proceedings, the congressional record, and publicly available reports. We aimed to get a clear-eyed, real world perspective on how this new world of increased spending affects elections and governance today.

Federal Disclosure Law

It is no secret that the law of campaign finance is extraordinarily complex. Chapter I of our report provides a primer on federal campaign finance laws, including the relevant statutes and regulations as well as key constitutional decisions. My testimony will focus exclusively on the law governing disclosure.

Under the Federal Election Campaign Act (FECA), some but not all of the money raised and spent to influence federal election campaigns is reported to the Federal Election Commission (FEC) and made public. Groups that are considered "political committees" under federal law, 4 U.S.C. § 431(4) are required to disclose their contributions received and disbursements made. These groups include candidates' campaigns, party committees, and other groups (commonly referred to as "political action committees" or "PACs") whose "major purpose" is to nominate or elect candidates for office.

The complexities of federal disclosure arise mainly with respect to individuals and groups that are *not* "political committees" under FECA. Those which spend more than $250 for express advocacy in a calendar year must disclose those expenditures, along with certain other information. 2 U.S.C. § 434(c). In addition, those making disbursements for "electioneering communications" aggregating over $10,000 in a calendar year must disclose those disbursements and certain other information. 2 U.S.C. § 434(f). An "electioneering communication" is defined to include broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, within 30 days of a primary or 60 days of a general election. 2 U.S.C. § 434(f)(3). This provision, enacted as a part of the Bipartisan Campaign Reform Act (BCRA), was designed to capture certain advertisements that, while not expressly advocating the election or defeat of a candidate, are intended to influence federal election campaigns.

In addition to FECA, Section 527 of the Internal Revenue Code imposes certain requirements on "political organizations," groups whose primary purpose is to influence elections or appointments at the federal, state, or local level. 26 U.S.C. § 527. This definition includes some groups that are not "political committees" under FECA. Section 527 political organizations are generally tax-exempt but are subject to taxation if they do not disclose their donors.

Many groups spending money in connection with federal elections today are not – or at least claim that they are not – covered by federal disclosure requirements. Prominent among them are various nonprofit organizations, typically organized under Section 501(c) of the Internal Revenue Code. So long as their major purpose is not to influence federal elections, they are not considered "political committees" under FECA; and so long as their primary purpose is not to influence elections or

appointments, they are not "political organizations" under Section 527. The rise of so-called "Dark Money," the ultimate sources of which are not disclosed, is associated with groups that claim to fall outside these definitions.

Findings on Disclosure

Perhaps the most striking feature of our interviews with former elected officials, candidates, campaign staff, and others – across the political spectrum – is the widespread agreement on how increased outside spending has changed the political landscape. To be sure, there is disagreement over whether these changes are desirable and what if anything should be done about them. But there is general agreement on what is actually happening on the ground.

Groups engaged in outside spending may be divided into two categories: those which disclose their donors and those which do not. Political committees – including so-called Super PACs, contributions to which are unlimited – are required to disclose their donors. But some of these organizations receive money from other groups, including nonprofits, that do not disclose their donors. Thus, the ultimate source of much of the money now being spent to influence federal election campaigns is undisclosed.

Inadequate disclosure was a common complaint about the current system, which arose repeatedly in our interviews.* Respondents across the political spectrum believe that it is important for both campaigns and voters to have better information about the money spent on federal election campaigns.

For many of those we interviewed, the ultimate value is *accountability*. Without adequate disclosure, accountability to the electorate is lacking. Because candidates are required to disclose contributions they receive, they and their donors are accountable in a way that many outside groups and their funders are not. While there is disagreement over what to do about this problem, there was widespread agreement among our interviewees that the lack of accountability arising from inadequate disclosure is a serious problem.

Another concern, expressed by some of our interviewees, is that the lack of disclosure opens the door to *corruption*. This is consistent with Supreme Court precedent, going back to *Buckley v. Valeo* (1976), which recognizes the prevention of both the appearance and reality of corruption as a justification for requiring disclosure of campaign-related contributions and expenditures.

Finally, we heard numerous complaints from our interviewees about the *mechanics* of disclosure. This system has been described as "byzantine" in prior testimony to this committee, and our interview subjects generally agreed.

Recent U.S. Supreme Court cases highlight the importance of having a well-functioning system of disclosure. As Chief Justice Roberts put it in his decision for the Supreme Court earlier this year in *McCutcheon v. FEC*: "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.... Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time that *Buckley* or even

* Our main findings regarding disclosure appear at pp. 50-56 of *The New Soft Money*.

McConnell [2003] was decided." Yet our interviews reveal considerable frustration with how the disclosure system actually functions in practice, among those who are in the best position to know. They expressed the need for simplification and technological modernization of campaign finance disclosure. This is a rare point of bipartisan agreement in this deeply contested area of law.

Thank you for the opportunity to speak with you. I would be happy to answer any questions you have.

Professor Daniel P. Tokaji

Bio

Daniel P. Tokaji is the Robert M. Duncan/Jones Day Designated Professor of Law at The Ohio State University, Moritz College of Law, and a Senior Fellow with *Election Law @ Moritz*. Professor Tokaji is an authority on election law, including voting rights, election administration, and campaign finance. He is co-author of *Election Law: Cases and Materials* (5th ed. 2012) and *The New Soft Money: Outside Spending in Congressional Elections* (2014), the author of *Election Law in a Nutshell* (2013), and former co-editor of *Election Law Journal*.

Professor Tokaji's scholarship addresses questions of political equality, free speech, racial justice, and the role of the federal courts in American democracy. Among the publications in which his work has appeared are the *Michigan Law Review*, *Stanford Law & Policy Review*, and *Yale Law Journal*.

His published articles include "Responding to *Shelby County*: A Grand Election Bargain," 8 *Harvard Law & Policy Review* 71 (2014), "The Future of Election Reform: From Rules to Institutions," 28 *Yale Law & Policy Review* 125 (2009), "The New Vote Denial: Where Election Reform Meets the Voting Rights Act," 57 *South Carolina Law Review* 689 (2006), and "First Amendment Equal Protection: On Discretion, Inequality, and Participation," 101 *Michigan Law Review* 2409 (2003).

Professor Tokaji teaches a variety of courses at Ohio State, including Election Law, Legislation, First Amendment, Federal Courts, and a seminar on Money and Politics. He previously taught courses on Election Law and Federal Courts at Harvard Law School, while serving a Visiting Professor and Ralph Shikes Fellow.

In addition to his scholarship, Professor Tokaji has litigated many election law, free speech, and civil rights cases. He was lead counsel in a case that struck down an Ohio law requiring naturalized citizens to produce a certificate of naturalization when challenged at the polls. He was also counsel in cases that kept open the window for simultaneous registration and early voting in Ohio's 2008 general election, and that challenged punch-card voting systems in Ohio and California after the 2000 election. He successfully represented demonstrators at the 2000 Democratic National Convention.

A graduate of Harvard College and Yale Law School, Professor Tokaji clerked for the Honorable Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. Before arriving at Ohio State, he was a staff attorney with the ACLU Foundation of Southern California and Chair of California Common Cause.

EXECUTIVE SUMMARY
Testimony of Professor Heather K. Gerken
J. Skelly Wright Professor of Law
Yale Law School
Submitted to the United States Senate Committee on Rules and Administration
July 18, 2014

Robust disclosure mechanisms are an essential foundation for any campaign finance system. In the United States, however, our disclosure rules are neither adequate nor effective. "Dark money" – money spent on campaigns by donors who are untraceable – flows freely through the system and grows in significance each election cycle. Hundreds of millions of dollars of independent spending occurred in 2012, with much of it untraceable. Experts expect that number to increase during the next two election cycles. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign-finance system, leaving American politics even more vulnerable to money's hidden influence.

I will make three points in my testimony. First, disclosure rules have garnered considerable bipartisan support, and with good reason. Outside of Washington's tight circles, transparency measures enjoy a high level of support among policymakers, academics, and the American people. Unsurprisingly, they have been endorsed by political leaders on both sides of the aisle.

Second, transparency mandates stand on firmer constitutional footing than any other type of campaign-finance regulation. Even members of the Supreme Court who are deeply skeptical of campaign-finance regulations have offered full-throated endorsements of disclosure requirements.

Finally, there a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. I offer a new proposal here, one that is aimed at the central problem in campaign finance law: keeping up with the ever-changing strategies donors have found to conceal their influence. Congress and the FEC have long struggled to keep up with the emergence of new, nontransparent organizations in each election cycle, facing a regulatory version of "whack-a-mole." This proposal avoids that problem by regulating the advertisement, not the organization. It's a universal disclosure rule that requires any advertisement funded directly or indirectly by an organization that does not disclose its donors to acknowledge that fact with a simple and truthful disclaimer: "This ad was paid for by 'X,' which does not disclose the identity of its donors." The fix is universal and flexible enough to accommodate changes in future election cycles and ensure that disclosure regulations keep pace with politics.

For all of these reasons, now is the right moment for Congress to pass new disclosure requirements. This is one of the rare instances when the need for change is significant, the time is ripe, and the American people are ready.

Testimony of Professor Heather K. Gerken
J. Skelly Wright Professor of Law
Yale Law School
Submitted to the United States Senate Committee on Rules and Administration
July 18, 2014

Robust disclosure mechanisms are an essential foundation for any campaign finance system. In the United States, however, our disclosure rules are neither adequate nor effective. "Dark money" – money spent on campaigns by donors who are untraceable – flows freely through the system and grows in significance each election cycle. Hundreds of millions of dollars of independent spending occurred in 2012, with much of it untraceable. Experts expect that number to increase during the next two election cycles. The need for adequate disclosure mechanisms has become even more important as the Supreme Court dismantles much of our current campaign-finance system, leaving American politics even more vulnerable to money's hidden influence. Moreover, outside of Washington's tight circles, transparency measures enjoy a high level of bipartisan support and impeccable constitutional credentials. The time to act is now.

I will make three points in my testimony. First, disclosure rules enjoy considerable bipartisan support, and with good reason. Second, transparency regulations stand on strong constitutional footing and have been endorsed even by members of the Supreme Court who are most skeptical of campaign-finance regulations. Finally, I will propose a new solution to the problem of dark money, one that helps solve the central problem in campaign finance law: keeping up with the ever-changing strategies donors have found to conceal their influence. Congress and the FEC have long struggled to keep up with the emergence of new, nontransparent organizations in each election cycle, facing a regulatory version of "whack-a-mole." Our proposal solves this problem by regulating the advertisement, not the organization. It's a universal disclosure rule that requires any advertisement funded directly or indirectly by an organization that does not disclose its donors to acknowledge that fact with a simple and truthful disclaimer: "This ad was paid for by 'X,' which does not disclose the identity of its donors."

A. Bipartisan Support for Disclosure Rules

Outside of the narrow confines of Washington's partisan politics, disclosure rules enjoy substantial bipartisan support, and with good reason. Disclosure sits at that sweet spot in policymaking, where democratic idealism and political realism meet. These rules provide the American people with the information they need to make informed decisions about the advertisements they watch and the politicians they support. It does so without placing restrictions on where and how donors spend their money, trusting the political marketplace – not top-down government regulation – to do the work.

As a result, transparency rules enjoy broad support among policymakers, academics, and the American people. Dating back more than a century, federal disclosure provisions have been termed "probably the most successful element of our campaign finance system" and "are the most widely adopted form of campaign finance regulation in democracies around the world."[1] Most academics view them as an essential feature of a well-functioning campaign-finance system. And poll after poll shows that Americans value transparency when it comes to funding elections.

As one of the 29 Commissioners on the Bipartisan Policy Center's Commission on Political Reform, I witnessed first-hand what happens when a politically savvy bipartisan group deliberates about the relationship between transparency and democracy. The Commission -- chaired by Senators Trent Lott, Olympia Snowe, and Tom Daschle, Secretary Dan Glickman, and Governor Dick Kempthorne – included academic, political, and community leaders. The Commission just issued a report making 65 recommendations for improving American democracy.

One of the Commission's most important recommendations concerned transparency. Recognizing that one of the central problems plaguing our election system is that Americans don't know who is funding our elections, the Commission recommended the disclosure of "all political contributions, including those made to outside or independent groups." The Commission did so *unanimously*. The Commissioners made this recommendation after a lively debate, and they were well aware that this policy debate – like most issues in election law -- is divisive in some circles. But every person on the Commission agreed on the importance of disclosure reform, including the many highly respected elected officials who had witnessed the damaging effects of dark money first-hand. It's worth keeping in mind that the Commission included individuals with wide range of political commitments and was led by political figures who are highly respected on both sides of the political aisle. And yet even in today's heated political environment, this bipartisan group came together to affirm that transparency measures are the type of common-sense reform that will make our democracy stronger.

It's not just my work on the Commission that has convinced me of the importance of robust disclosure rules. My academic work has focused on the emergence of what I call "shadow parties" – independent organizations (like 501(c)(4)'s and SuperPACs) that exist outside of the formal party structure, house party elites, carry out a great deal of campaign work, and closely cooperate with the campaigns even if they do not, as a legal matter, "coordinate" with them under the rules promulgated by the FEC.[2] These "shadow parties" are shifting the center of gravity away from the formal party apparatus into private, nontransparent organizations. That's because these "shadow parties" enjoy substantial advantages

---

[1] Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 Elec. L. J. 273, 273 (2010).
[2] For a full analysis, see Heather K. Gerken, "The Real Problem with *Citizens United:* Campaign Finance, Dark Money, and Shadow Parties," *Marquette Lawyer* 10 (Summer 2014).

over the formal parties in terms of fundraising capacity. But many – specifically, the 501(c)(4)'s -- also offer donors another significant advantage: anonymity.

As my recent work makes clear, these shadow parties are reshaping the political landscape in ways that ought to concern us all. A new report issued by Ohio State's Moritz College of Law[3] provides compelling evidence of the problems associated with this new regime. Because one of its authors, Professor Tokaji, is testifying today, I'll leave it to him to provide you further details. I will just note for purposes of this hearing that many independent spending organizations will continue to enjoy an important structural advantage over the formal parties unless and until Congress passes a more robust disclosure regime.

B. Transparency's Solid Constitutional Foundations

Disclosure rules aren't just good policy; they also rest on the firmest of constitutional footings. Even as the Supreme Court has upended much of campaign-finance law, it has repeatedly affirmed the constitutionality of transparency measures.

It is well established that Congress has the power to ensure that election spending is transparent. See, e.g., Burroughs v. United States, 290 U.S. 435 (1934) (upholding congressional power to create disclosure rules for federal elections and take other steps to "preserve the departments and institutions of the general government from impairment."). While the First Amendment limits Congress's ability to regulate campaign finance generally, the Court has concluded that transparency rules *promote* First Amendment values:

> 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 v. Fed. Election Comm'n, 558 U.S. 310, 370-71 (2010).

The Court has reaffirmed this principle in a variety of settings, including a case involving the public disclosure of signatures in support of a referendum. "Public disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot," the Chief Justice wrote in that case. For that reason, public disclosure "is substantially related to the important interest of preserving the integrity of the electoral process." Doe v. Reed, 561 U.S. 186, 199 (2010).

---

[3] Daniel P. Tokaji & Renata E.B. Strause, "The New Soft Money: Outside Spending in Congressional Elections" (2014).

If anything, the Court's controversial decision in *Citizens United* has strengthened the constitutional case for disclosure. Even as the Court struck down restrictions on independent expenditures, it offered a ringing endorsement of transparency rules. That portion of the opinion was joined by every Justice save one. Moreover, the Court's dramatic unwinding of the current campaign-finance regime has been premised on the assumption that Americans would have adequate information about the money spent on campaigns. Justice Kennedy, who penned *Citizens United,* assured us that disclosure rules were an important safeguard against independent spending's potentially damaging effects. Such transparency ensures that "shareholders can determine whether their corporation's political speech advances the corporation's interest," and "citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." Citizens United, 558 U.S. at 370.

That's why the Court in *Citizens United* explicitly rebuffed the parties' First Amendment challenge to disclosure rules, including those requiring rapid disclosure. As it noted, there were stronger First Amendment interests on the other side: "the public has an interest in knowing who is speaking about a candidate shortly before an election," Justice Kennedy wrote. Id. at 369. So, too, in *McConnell* the Court held that the government's interest in the timely disclosure of campaign expenditures was "unquestionably significant." McConnell v. Fed. Election Comm'n, 540 U.S. 93, 200 (2003). Congress can therefore regulate as long as there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important governmental interest.'" Citizens United, 558 U.S. at 366-67 (quoting Buckley v. Valeo). A "sufficiently important governmental interest" includes "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." McConnell, 540 U.S. at 196; see also Citizens United v, 558 U.S. at 366-67.

Finally, note that there is robust support for transparency even among the Court's most conservative members. With the exception of Justice Thomas, the Justices who are the most skeptical of campaign-finance regulation have consistently voted to uphold transparency measures. They have even authored many of the touchstone opinions in this area. Justice Kennedy, for instance, penned *Citizens United,* and Chief Justice Roberts wrote for the Court in *Doe v. Reed.* So, too, one could not ask for a more full-throated endorsement of disclosure than that recently offered by Justice Scalia:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Doe, 561 U.S. at 228 (Scalia, J., concurring in the judgment).

III. A New Path toward Transparency

Disclosure requirements are only effective if they are timely and accessible. Information must be disclosed before the election, and data dumps do little to promote transparency if they cannot be easily accessed and sorted. Moreover, as Richard Briffault has pointed out, there are limits to how much disclosure is useful. If too much information is disclosed, it becomes difficult for reporters and public interest groups to sort the wheat from the chaff.[4]

The core obstacle to transparency efforts is evasion. As we have seen in recent years, donors can hide behind shell organizations to shield their identity behind a vague but inspiring name. Donors can also evade disclosure rules by giving money to multipurpose organizations (those that engage in political and nonpolitical activities) without specifying whether the money is for political activities. Here the states have led the way in dealing with problems like these. Washington State, for instance, has prevented donors from using vaguely named fronts to shield their identity by requiring disclosure of the sponsor or the "top five contributors" of a political advertisement within the advertisement itself. Wash. Rev. Code § 42.17.320. Similarly, California has addressed efforts to evade disclosure rules by failing to earmark donations to multipurpose organizations. It has specified when a non-earmarked donation to such an organization will be deemed a form of political contribution for disclosure purposes. See California Gov't Code §84211; 2 CCR § 18215(b)(1).

Wade Gibson, Webb Lyons, and I have proposed another, novel solution to help solve the problem of evasion.[5] In our view, the core problem with disclosure efforts is what we term the regulatory game of "whack-a-mole." Whenever regulations make it hard for wealthy donors to fund politics through one outlet, donors find another outlet for their energies. Congress closed the "soft money" loophole for political parties, and money flowed into issue ads and 527s. 527s have now been displaced by SuperPACs and 501(c)(4)'s. The risk is that donors will always find new organizations to hide behind.

In order to avoid the "whack-a-mole" problem, our proposal regulates the ad, not the organization. Rather than trying to guess which organizations will emerge in the next campaign cycle, we offer a simple fix: Any advertisement funded directly or indirectly by an organization that does not disclose its donors must acknowledge that fact with a simple and truthful disclaimer: "This ad was paid for by 'X,' which

---

[4] Briffault, *supra* note 1.

[5] See Heather Gerken, Wade Gibson & Webb Lyons, "Rerouting the flow of 'dark money' into political campaigns," *Washington Post* (Apr. 3, 2014); see also Heather K. Gerken, "Nondisclosure Disclosure: Giving Lawmakers an Excuse to Avoid the Hard Questions," electionlawblog.org (Apr. 8, 2014). What follows draws heavily upon those two pieces.

does not disclose the identity of its donors." This "nondisclosure disclosure" would thus require all organizations that do not publicly identify their donors to acknowledge that fact. It provides voters with a helpful shorthand while giving donors an important choice: put their money into transparent organizations (like political parties or SuperPACs), or fund groups that keep their donors hidden but risk running ads that may not persuade cynical voters.

Unlike most of the proposals on the table, ours would apply not just to all of the entities we currently worry about – social welfare groups *and* labor unions *and* the chambers of commerce *and* private individuals – but future organizations built to funnel dark money into the system. The fix is universal and flexible enough to accommodate changes in future election cycles. Congress and the FEC have always had trouble keeping up with those changes. Because our proposal offers universal disclosure, it guarantees that disclosure regulations will keep pace with politics.

Another core benefit of our proposal is that it doesn't place an unfair burden on voters. Voters could presumably try to trace all the organizations and shell organizations behind any given ad, but it would require them to know a great deal about election law (even corporate law), and it's very hard to do. Rather than ask voters to do so every time a 30-second ad flashes across the screen, voters should be told the simple fact of the matter: Some ads are funded anonymously. There's no reason voters shouldn't be able to sort between ads funded transparently and ads funded anonymously. In that respect, our proposal is little different from the "stand by your ad" requirement. That requirement demands that the connection between the ad and a candidate is identified. Ours demands that the connection between the ad and an anonymous donor is identified.

Finally, rather than attempt to sail against political headwinds, our proposal works with rather than against political incentives. It harnesses politics to fix politics. We are under no illusions that donors are going to stop seeking anonymous outlets for funding. But our proposal should reduce the value of those anonymous outlets by giving voters a reason to be skeptical of ads they put out. Donors will thus be forced to choose. They can fund organizations that disclose their donors, like the political parties or SuperPACs. Or they can fund groups that keep donors' identities hidden, knowing their ads will lose some of their oomph in the eyes of cynical voters. Political incentives will push money into transparent organizations rather than away from them. Money and political influence will be easier to trace. That's not a full remedy for our ailing system, but it's the type of reform that makes bigger and better reform possible.

Conclusion

Now is the right moment for Congress to pass new disclosure requirements. A disclosure regime is one of the basic building blocks of a healthy campaign finance system, and ours is sorely in disrepair. Transparency mandates stand on firmer constitutional footing than any other type of campaign-finance regulation, and they

enjoy substantial bipartisan support. Moreover, there a variety of models for ensuring that disclosure requirements remain robust and efficacious over many election cycles. This is one of the rare examples of reform for which the need is significant, the time is ripe, and the American people are ready.

Biographical Information

Heather K. Gerken is the J. Skelly Wright Professor of Law at Yale Law School. Professor Gerken specializes in election law and constitutional law. She has published in the *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Review*, *Political Theory*, and *Political Science Quarterly*. Her most recent scholarship explores questions of election reform, federalism, diversity, and dissent. Her work has been featured in *The Atlantic*'s "Ideas of the Year" section and the Ideas Section of the *Boston Globe* and has been the subject of a festschrift and a symposium. Professor Gerken clerked for Judge Stephen Reinhardt of the 9th Circuit and Justice David Souter of the United States Supreme Court. After practicing for several years, she joined the Harvard faculty in September 2000 and was awarded tenure in 2005. In 2006, she joined the Yale faculty. She has won teaching awards at both Yale and Harvard, has been named one of the nation's "twenty-six best law teachers" in a book published by the Harvard University Press, and has won a Green Bag award for legal writing. Professor Gerken served as a senior legal adviser to the Obama for America campaign in 2008 and 2012. Her proposal for creating a "Democracy Index" was incorporated into separate bills by then-Senator Hillary Clinton, then-Senator Barack Obama, and Congressman Israel and turned into reality by the Pew Trusts, which created the nation's first Election Performance Index in February 2013.

Summary of Testimony of Bradley A. Smith
Chairman, Center for Competitive Politics and
Visiting Judge John T. Copenhaver, Jr. Chair of Law, West Virginia University

The current federal disclosure regime is the most extensive in U.S. history. Data from the Federal Election Commission and the Center for Responsive Politics show that groups who do not disclose information on individual donors accounted for just over 4 percent of spending in the 2012 elections. Any policy produces diminishing marginal returns and rising costs as it aims for 100 percent achievement of its goal, and compulsory disclosure appears to have reached that point of diminished returns.

If enacted, S. 2516, the "DISCLOSE Act of 2014," will discourage both small and large donors from contributing, expose them to the risk of harassment, burden volunteer-run campaigns, and ultimately produce "junk disclosure" data that is not only not useful to voters, but in many cases misleading. Placed in the context of existing disclosure requirements, which are already thorough and over inclusive, this bill is a regulatory overreach that will do mostly harm and little good to public knowledge and trust in government.

S. 2516 suffers from several flaws. These include:

1) The bill would force nonprofits to radically alter their fundraising and public advocacy efforts.
2) The bill's new definition of "functional equivalent of express advocacy" is vague and raises constitutional concerns.
3) The bill is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.
4) The bill's rule regarding covered transfers is likely unenforceable and will be a compliance nightmare for many nonprofits.

Ironically, this bill comes at a time when there is growing recognition that our existing disclosure requirements are regulatory overkill, and increasingly unhelpful. Excessive disclosure may actually be fueling the money chase, even as it discourages some donors from giving.

Ultimately, the purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. The IRS Harassment Scandal and subsequent proposed rulemaking governing the permissible activities of 501(c)(4) social welfare organizations illustrates how partisan pressure for disclosure can decrease, rather than increase, public confidence in government. Tinkering with the First Amendment and the speech rights of American citizens to score political points in an election year is an idea fraught with peril.

Testimony of

Bradley A. Smith
Chairman, Center for Competitive Politics, Alexandria, Virginia
Visiting Judge John T. Copenhaver, Jr. Chair of Law, West Virginia University

Before the Committee on Rules and Administration
United States Senate
July 23, 2014

Mr. Chairman and members of the Committee, thank you for the opportunity to present my view at this hearing on, "The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections."

The Committee has expressed some interest in using this hearing to explore new disclosure requirements for spending on politics and public affairs through the DISCLOSE Act, ostensibly due to recent Supreme Court decisions, including the Court's ruling striking down the federal aggregate limit on overall political contributions in *McCutcheon v. FEC.* With that in mind, it is worth noting that the *McCutcheon* ruling is disclosure's friend. By freeing donors to contribute more aggregate funds directly to candidates and party committees, one likely effect of *McCutcheon* will be to encourage donors to give directly to those candidates and party committees, where their contributions are subject to the most rigorous compulsory disclosure rules, rather than to organizations that may have fewer disclosure requirements. So, *McCutcheon* is good for disclosure advocates.

Compulsory disclosure seeks to improve politics through transparency, but poorly designed or excessive disclosure requirements can damage politics by discouraging small and large donors from contributing, exposing them to the risk of harassment, burdening volunteer-run campaigns, and producing "junk disclosure" data that is not only not useful to voters, but in many cases misleading. To truly improve transparency, disclosure requirements should be narrowly tailored to avoid these common pitfalls and constitutional controversies.

The bill being considered today is not narrowly tailored. While the stated goal of the DISCLOSE Act is to increase disclosure of spending to elect or defeat candidates, this radical bill would chill speech, force nonprofits to fundamentally alter their fundraising and public advocacy efforts, and implement several vague and unenforceable requirements on citizen groups attempting to speak out on issues of public importance. Placed in the context of existing disclosure requirements, this bill is a clear overreach that will do mostly harm and little good to public knowledge and trust in government.

The alleged disclosure "problem" itself, as I will outline below, is routinely overstated. Data from the Federal Election Commission and the Center for Responsive Politics show that *just over four percent* of political expenditures in 2012 were financed by groups that did not itemize their donors. And in all cases, the name of the group making the expenditures was disclosed (at least if they were operating legally under already existing disclosure rules).

Legislation regulating the discussion of public affairs should be grounded in a realistic understanding of what the law actually is; it must be based on a realistic assessment of the effects it has in practice; and it must take into account the actual costs, as well as alleged benefits, of added compulsory disclosure. Discussion of disclosure should eschew loaded terms like "dark money," that to do little to enlighten and much to obscure those costs and benefits.

The Scope of the Issue

Information about political donors, it is believed, can help guard against officeholders becoming too compliant with the wishes of large spenders, and provide information that might be valuable to voters in deciding for whom to vote and how to evaluate political messages.

In the wake of this year's Supreme Court decision in *McCutcheon*, those who wish to further regulate political speech have renewed calls for even more mandatory disclosure, continuing a pattern established after the decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*,[1] and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission*.[2]

The claim by those demanding more regulation has been that the public lacks information on the sources of vast amounts of political independent spending. This concern, while serious if true, has been artificially ramped up by many mistaken comments in the media about "secret" contributions to campaigns, as well as a widely held, but mistaken belief that under *Citizens United*, corporations and unions may now contribute directly to candidate campaigns. (Both types of entities are prohibited from contributing directly to candidates under federal law; states may choose to ban such contributions for state candidates and several have done so). In particular, there have been concerns that nonprofit organizations formed under Section 501(c)(4) of the Internal Revenue Code have been engaging in extensive political campaigns using what critics have rather unhelpfully dubbed "dark money."

Politically-related spending by 501(c)(4) organizations is not new, and long predates the decision in *Citizens United*. Express advocacy in favor of or against candidates was allowed for certain types of 501(c)(4) organizations even before *Citizens United*, as a result of the Supreme Court's 1986 ruling in *Federal Election Commission v. Massachusetts Citizens For Life ("MCFL")*.[3] That decision allowed qualified nonprofit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the

[1] 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds).
[2] 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits).
[3] 479 U.S. 238 (1986).

Citizens United decision and included groups such as the League of Conservation Voters and NARAL Pro-Choice America.

In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates. For example, in 2000, the NAACP Voter Action Fund, a nonprofit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

> *Renee Mullins (voice over):* I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it was like my father was killed all over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election.[4]

This ad was perfectly legal to run at any time prior to 2003, with no donor disclosure, and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*.[5] In short, political spending by 501(c) organizations is nothing new, and those organizations have never been required to disclose the names of their donors and members unless donors gave specifically to support a particular independent expenditure.

It should also be noted that neither the *Citizens United* nor *SpeechNow.org* decisions struck down any disclosure laws; nor has Congress or the FEC loosened any disclosure rules in place at the time those two decisions were issued in the spring of 2010. There has been no change in the laws governing disclosure of political spenders and contributors.

Despite heavy media focus in 2012 on so-called "dark money," "secret money," and "undisclosed spending," in fact, the United States currently mandates more disclosure of political spending and contributions than any time in its history. Candidates, political parties, PACs, and Super PACs disclose all of their donors beyond the most *de minimis* amounts. This disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and the amount given, and recipients are also required to seek information and report on donors' occupation and employment.[6] These entities also report all of their expenditures.

---

[4] Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).
[5] 551 U.S. 449 (2007).
[6] *See* 2 U.S.C. § 434(b) and (c).

Current federal law also requires reporting of all independent expenditures over $250, and of all "electioneering communications" (as defined in 2 U.S.C. § 434(f)) over $10,000, by any individual, corporation, union, or organization. Like individuals, for-profit corporations, and unions, 501(c)(4) organizations, such as the National Rifle Association and the Sierra Club, must disclose their independent expenditures, electioneering communications, and the individual information on donors who give money earmarked for political activity. All of this information is freely available on the FEC's website.

Current law also requires disclosure of the spender on all campaign advertising itself. All broadcast political ads (like, in fact, all broadcast ads, political or not) must include, within the ad, the identity of the person or organization paying for the ad. Finally, organizations operating under § 527 of the tax code, but not required to file with the FEC or state campaign finance regulators, must disclose their donors to the IRS, where they are made public.

Given this extensive disclosure regime, which is more extensive than that existing in the U.S. at any time prior to 2003, and more extensive than that in most democracies, it is a misnomer to speak of "undisclosed spending." Rather, more accurately, some ads are run with less information about the spender, and contributors to the spender, than some might think desirable. Recognizing the reality of this extensive disclosure regime, rather than railing about the meaningless slogan "dark money," is the first step to understanding the nature of the issue and possible legislative action.

The FEC reports that approximately $7.3 billion was spent on federal races in 2012. Approximately $2 billion, or less than 30 percent, was spent by "outside groups" (that is, citizens and organizations other than candidate campaign committees and national political parties).[7] According to figures from the Center for Responsive Politics, approximately $311 million was spent by organizations that did not provide itemized disclosure of their donors.[8] That is just under 4.3 percent of the total. $311 million sounds like a lot of money – four percent of total spending on federal races doesn't sound like much money at all.

Moreover, that four percent tends to overstate the issue because many of the largest 501(c) spenders are well-known public groups. Only 28 organizations that did not publicly disclose all of their donors spent more than $1 million on all independent expenditures in 2012. Most of these were well-known entities, including the U.S. Chamber of Commerce, the Humane Society, the League of Conservation Voters, NARAL Pro-Choice America, the National Association of Realtors, the National Federation of Independent Business, the National Rifle Association, and Planned Parenthood. Several of these groups also spent substantial funds on issue ads or express advocacy under the *MCFL* exemption, or on candidate-related issue ads, even before *Citizens United*, suggesting that the growth in "undisclosed" spending is even less than many who favor more regulation lead the public to believe.

---

[7] Jake Harper, "Total 2012 election spending: $7 Billion," Sunlight Foundation. Retrieved on July 18, 2014. Available at: http://sunlightfoundation.com/blog/2013/01/31/total-2012-election-spending-7-billion/ (January 31, 2013); Jonathan Salant, 2012 Elections Cost Will Hit $7 Billion, FEC Chair Weintraub Says," *Bloomberg*. Retrieved on July 18, 2014. Available at: http://go.bloomberg.com/political-capital/2013-01-31/fec-head-weintraub-says-2012-elections-eost-will-hit-7-billion/ (January 31, 2013).

[8] "Outside Spending by Disclosure, Excluding Party Committees," Center for Responsive Politics. Retrieved on July 18, 2014. Available at: http://www.opensecrets.org/outsidespending/disclosure.php.

Even many spenders that are not historically well-known organizations on this list are quite familiar to anyone who remotely follows the news, such as Crossroads GPS and Americans for Prosperity. Indeed, many of these organizations' funders are well-known, even as the organizations themselves do not formally disclose their names. Does anyone on this Committee not know that Tom Steyer provided substantial funding to NextGen Climate Action, a 501(c)(4)? If not, a Google search of the organization's name will provide that information in a matter of seconds.[9]

Furthermore, data from the Center for Responsive Politics shows that the percentage of independent spending by organizations that do not disclose their donors appears to have declined substantially (by approximately 25 percent) in 2012 from 2010. This is not surprising. Because 501(c) organizations may not have political activity as their primary purpose, they must conduct their activities to stay within the IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is political activity faces the effective equivalent of a 50 percent or higher tax on his or her political donations by giving to a 501(c) organization rather than to a "Super PAC," which fully discloses its donors. This is because the group must primarily spend its funds on programs other than political activity, as defined in Section 527 of the tax code. As a result of this inefficiency, it is doubtful that spending by 501(c) organizations will increase substantially as a percentage of independent or total spending. Furthermore, if the group does not conduct its activities in a manner consistent with IRS regulations, it could possibly be reclassified as a Section 527 organization by the Agency and be forced to publically disclose its donors on nearly the same schedule as a political committee, except that the reports are on IRS Form 8872 and listed on the IRS's website.

Lastly, it bears repeating that, contrary to claims by many, the Supreme Court's ruling in *Citizens United* did not change the prohibition on political activity by non-resident aliens and foreign corporations. Specifically, according to 2 U.S.C. § 441(e), any "partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country" is prohibited from contributing in elections. Indeed, despite the President's expressed fear that the decision would allow "foreign corporations"[10] to make expenditures in elections, not only did *Citizens United* specifically not address that longstanding prohibition, but the Supreme Court has summarily reaffirmed that ban since.[11]

In summary, candidates, parties, PACs, and Super PACs already disclose all of their donors. Other groups that spend in elections – primarily 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations – disclose their spending and the names of donors who have contributed specifically for that spending, but not the names of other members and donors. Spending that falls into this latter category is a very small fraction of total

[9] Nicholas Confessore, "Financier Plans Big Ad Campaign on Climate Change," *The New York Times*. Retrieved on July 18, 2014. Available at: http://www.nytimes.com/2014/02/18/us/politics/financier-plans-big-ad-campaign-on-environment.html?_r=0 (February 17, 2014).

[10] President Barack Obama, "Remarks by the President in State of the Union Address," The White House, Office of the Press Secretary. Retrieved on July 18, 2014. Available at: http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (January 27, 2010).

[11] *See Bluman v. Federal Election Commission*, 132 S. Ct. 1087 (2012).

political spending (just over four percent), is not new, and declined as a percentage of total spending in 2012. In considering legislation that expands or retracts disclosure requirements, members of Congress should first understand the extent of the current federal disclosure regime. Viewed through this lens, the rhetoric of "secret money" in American politics is far overblown.

Policy Issues with Disclosure

Given that non-itemized donor expenditures are such a small part of the whole, why not require disclosure of that four percent of spending? The answer is that disclosure does impose costs, and efforts to squeeze the final four percent of non-itemized expenditures may simply mislead the public.

Any public policy finds its costs increasing and its benefits decreasing as it aims for 100 percent achievement of its goal. To take one example, some increase in spending on police, prisons, and courts is likely to reduce crime, but eliminating all crime – with police on every corner and prisons stuffed with petty offenders – is not worth the cost.

Studies have confirmed that the costs of mandated disclosure disproportionately harm grassroots organizations and campaigns run by volunteers.[12] Complying with disclosure laws often requires expensive legal counsel, an accountant, and other record-keeping staff. Ordinary citizens volunteering for a candidate or issue campaign may unknowingly violate the law if disclosure requirements are overbroad or overly complex. Equally worrisome, powerful political interests may seek to use disclosure requirements to raise the cost of doing business for their grassroots competition. One study of the costs of various state disclosure regulations concluded that "regulation of grassroots political activity puts ordinary citizens at risk of legal entrapment, leaves disfavored groups open to abuse from partisan regulators and robs unpopular speakers of the protective benefits of anonymous speech."[13]

In addition to the logistical challenges faced by organizations, increased disclosure requirements often create "junk disclosure" that misleads the public by associating contributions with communications they have no link to or, as is often the case, knowledge of. When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, unions, and trade associations. As a result, if a group decides to make political expenditures as a small part of the organization's multiple activities, many of its donors could potentially be made public, regardless of whether their donations were earmarked for a political expenditure. People give to membership organizations and trade associations not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their views or otherwise advances their interests with benefits or public education. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleads the public. It is "junk disclosure" – disclosure that serves little purpose

[12] *See e.g.* Jeffrey Milyo, Ph. D., "Mowing Down the Grassroots: How Grassroots Lobbying Disclosure Suppresses Political Participation," Institute for Justice. Retrieved on July 18, 2014. Available at: http://www.campaignfreedom.org/doclib/20100419_Milyo2010GrassrootsLobbying.pdf (April 2010).
[13] *Ibid.*, p. 24.

other than to provide a basis for official or private harassment, and that may actually misinform the public.

There are also serious practical problems. As I have recently explained in the St. Thomas University Journal of Law & Policy:

> Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a $100,000 dues payment to the National Business Chamber ("NBC") in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises $350,000 specifically for political activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers $1 million – the $350,000 it raised specifically for political activity, the $350,000 from the NBC, and another $300,000 from general dues – to the Committee for a Better State ("CBS"), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves $200,000 for its own direct spending, and then transfers $800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends $3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?
>
> What should be immediately obvious to any observer is that the question of "disclosure" is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme's initial payment to NBC?... By the time we reach Acme Industries, is the information useful – or even truthful? Would it be truthful to say that Acme Industries is "responsible" or "endorses" messages on a state ballot initiative made by the State Jobs Alliance far down the road?[14]

This Russian Nesting Doll problem, named after the small Russian dolls of decreasing size, placed one inside the other, exemplifies the serious issues with attempts to require disclosure of general members and donors to 501(c) membership organizations. Disclosure requirements like those that would be instituted by the DISCLOSE Act will result in "junk" disclosure that serves to misinform the public, a result that is antithetical to the rationale underlying disclosure laws.

---

[14] Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

Ironically, this bill comes at a time when there is growing recognition that our existing disclosure rules are overkill, and increasingly unhelpful. Excessive disclosure may actually be fueling the money chase,[15] even as it discourages some donors from giving.

Finally, the IRS Harassment Scandal and subsequent proposed rulemaking governing the permissible activities of 501(c)(4) organizations[16] illustrates the dangers of calls for increased disclosure.

This concern over so-called "dark money" and push for increased disclosure requirements comes at a time when Americans' confidence in government has been rocked by information that the IRS systematically targeted groups based on their political beliefs. A number of Senators specifically urged the IRS to investigate conservative nonprofit groups.[17] Such pressure on the Agency appears to have been a major factor in creating the current IRS scandal, which will have longstanding repercussions for the Agency's reputation and the voluntary compliance of citizens with the tax system.

These demands of the IRS by members of Congress are reminiscent of the provisions contained in this DISCLOSE Act, by mandating the disclosure of donations not related to the election or defeat of political candidates. The DISCLOSE Act is sometimes said to be necessary to restore public trust in government. In fact, the partisanship, and apparent quest for partisan advantage behind the bill, make it as likely that the bill will decrease confidence in the fairness and integrity of Congress. This bill is about politics and silence as much as "disclosure." As the lead Senate sponsor said when the first iteration of the bill was introduced in 2010, "the deterrent effect [on citizens' speaking out] should not be underestimated."[18] Not surprisingly, it appears to many that the ultimate aim of this bill is to force trade associations and nonprofits to publicly list all their members along with their dues and contributions, so that such lists can be used by

---

[15] Lindsay Mark Lewis, "The Easiest Fix for Dark Money: Disclose Less Often," *The Atlantic*. Retrieved on July 18, 2014. Available at: http://www.theatlantic.com/politics/archive/2014/07/easiest-Fix-for-Dark-Money-Disclose-Less-Often/374500/ (July 16, 2014).

[16] "Proposed IRS Rules on 501(c)(4) Social Welfare Groups," Center for Competitive Politics. Retrieved on July 18, 2014. Available at: http://www.campaignfreedom.org/irs/ (2014).

[17] On October 11, 2010, Senator Durbin wrote the IRS, asking the Agency to "quickly examine the tax status of Crossroads GPS and other (c)(4) organizations that are directing millions of dollars into political advertising." (U.S. Senator Richard J. Durbin, "DURBIN URGES IRS TO INVESTIGATE SPENDING BY CROSSROADS GPS," Office of Senator Richard J. Durbin. Retrieved on July 18, 2014. Available at: http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99 (October 12, 2010).) Several months later, on February 16, 2012, Senators Schumer and Udall (NM), along with Senators Bennet, Franken, Merkley, Shaheen, and Whitehouse wrote the IRS, asking the Agency to investigate tax-exempt organizations' political activities. In an accompanying press release by Senator Bennet, he opined that "operations such as Mr. [Karl] Rove's [Crossroads GPS] should not be allowed to masquerade as charities." (U.S. Senator Michael Bennet, "Senators Call for IRS Investigations into Potential Abuse of Tax-Exempt Status by Groups Engaged in Campaign Activity," Office of Senator Michael F. Bennet. Retrieved on July 18, 2014. Available at: http://www.bennet.senate.gov/newsroom/press/release/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity (February 16, 2012).) Nearly two years later, on February 13, 2014, echoing the prior calls of Democratic Senators before the IRS scandal revelations in May 2013, Senator Pryor publicly prodded the IRS to regulate 501(c)(4) organizations more aggressively: "That whole 501(c)(3), 501(c)(4) [issue], those are IRS numbers. It is inherently an internal revenue matter. There are two things you don't want in political money, in the fundraising world and expenditure world. You don't want secret money, and you don't want unlimited money, and that's what we have now." (Alexander Bolton, "Vulnerable Dems want IRS to step up," *The Hill*. Retrieved on July 18, 2014. Available at: http://thehill.com/homenews/senate/198298-vulnerable-dems-want-irs-to-step-up (February 13, 2014)).

[18] Jess Bravin and Brody Mullins, "New Rules Proposed On Campaign Donors," *The Wall Street Journal*. Retrieved on July 18, 2014. Available at: http://online.wsj.com/article/SB10001424052748703382904575059941933737002.html (February 12, 2010).

competing groups to poach members and, more ominously, to gin up boycotts and threats to the individuals and corporate members of the groups – indeed, this has already occurred. Further in the background lies the thinly veiled threat of official government retaliation.

Constitutional Issues with Disclosure

The purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. Of course, this distinction can dissolve in practice. For example, if we demand public disclosure of who gave money to a public official, in order to monitor that official, we will necessarily give the government the tools to monitor us. But as a first principle for thinking about what type of disclosure is proper, this distinction provides a good starting point for analyzing the costs and benefits of compulsory disclosure.

Indeed, the Supreme Court has recognized the careful balance between allowing citizens the tools to monitor the government and balancing that consideration with the realization this publicly available personal information can be used by individuals and organizations to threaten and intimidate those that they disagree with.

This evidence is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[19] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[20]

Much as the Supreme Court sought to protect those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular candidates and causes still need protection today. Events in the state of California over the past few years lend credence to this phenomenon. Many supporters of California's Proposition 8 faced harassment from opposing activists, simply because these donors' information was made publicly available through government-mandated disclosure. Indeed, in Justice Thomas' opinion in *Citizens United*, he dissented in part, noting harassment issues stemming from the disclosure of political information. In his dissent, Justice Thomas made specific reference to the experience of Proposition 8 supporters: "Some opponents of Proposition 8 compiled this [disclosure] information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result."[21] Similarly, it is hardly impossible to imagine a scenario in 2014 in which donors to controversial candidates and causes that make independent expenditures – for or against another same-sex marriage initiative; for or against abortion rights; or even persons associated with others who have been publicly vilified, such as the Koch family, Sheldon Adelson, or George Soros, might be subjected to similar threats.

[19] 357 U.S. 449 (1958).
[20] *Id.* at 462.
[21] *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).

Indeed, very recently, Mozilla CEO Brendan Eich was ousted from his position due to a pressure campaign orchestrated by those who support same-sex marriage over a $1,000 donation by Eich to the campaign for California Proposition 8 in 2008. As Eich's longtime business partner and defender of the need for his resignation, Mozilla Executive Chairwoman Mitchell Baker, noted when discovering that he gave money to the Proposition 8 campaign: "I never saw any kind of behavior or attitude from him that was not in line with Mozilla's values of inclusiveness."[22] In other words, Eich was forced out not for his actions, but for his opinions. As one legal news site pointed out, "Brendan Eich's situation shows how donor disclosure laws can lead to reprisals that may change the legal analysis. Eich didn't purposefully publicize his views on Prop 8. California law required the disclosure of his identity as a contributor – donating the princely sum of $1,000."[23] Ultimately, Eich was forced to resign.[24]

Worse still, as the Eich example shows, little can be done once individual contributor information – a donor's full name, street address, occupation, and employer – is made public under government compulsion. It can immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. This problem is best addressed by limiting the opportunities for harassment by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates,* and those who give to organizations whose *major purpose* is political advocacy – and not to organizations engaging in issue advocacy about a particular issue relevant to the voters, especially when that advocacy is but a part of the organization's overall mission.

The 1995 decision in the case *McIntyre v. Ohio Elections Commission,* in which the U.S. Supreme Court upheld the claim of a right to anonymously publish and distribute pamphlets opposing a school tax that was on the ballot, further illustrates how disclosure can impact First Amendment freedoms.[25] Justice John Paul Stevens, writing for the majority in *McIntyre*, noted that "Anonymity is a shield from the tyranny of the majority.... It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular."[26]

Justice Stevens went on to explain, for the Court majority, several of the many benefits to free speech from anonymity:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S., at 64. Great works of literature have frequently been produced by authors writing under assumed names. [footnote omitted] Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by

[22] Conor Friedersdorf, "Mozilla's Gay-Marriage Litmus Test Violates Liberal Values," *The Atlantic*. Retrieved on July 18, 2014. Available at: http://www.theatlantic.com/politics/archive/2014/04/mozillas-gay-marriage-litmus-test-violates-liberal-values/360156/ (April 4, 2014).
[23] Tamara Tabo, "Cupid's Arrow Strikes Eich: OkCupid, Mozilla's CEO, And Campaign Finance Laws," *Above The Law*. Retrieved on July 18, 2014. Available at: http://abovethelaw.com/2014/04/cupids-arrow-strikes-eich-okcupid-mozillas-ceo-and-campaign-finance-laws/ (April 3, 2014).
[24] *Id.*
[25] 514 U.S. 334 (1995).
[26] *Id.* at 357.

> fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. [footnote omitted] Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[27]

> The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.*, at 64. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. *Id.*, at 64-65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in Talley related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. [footnote omitted] This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.[28]

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens,[29] who receive their information because of the forced disclosure. In short, mandatory disclosure of political activity should require a strong justification and must be carefully tailored to address issues of public corruption and to provide information of particular importance to voters.

---

[27] *Id.* at 341-342.
[28] *Id.* at 342-343.
[29] *Brown v. Socialist Workers' '74 Campaign Comm.*, 458 U.S. 87 (1982).

Almost two decades after *NAACP v. Alabama*, in the landmark Supreme Court case, *Buckley v. Valeo*, the Court ruled that disclosure must be related to express advocacy or controlled by a candidate, party, or political committee, narrowly defined. The Court held that donor or membership disclosure can be compelled "only… [for] organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," or "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[30] Footnote 52 of the ruling defined "expressly advocate" to mean "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[31]

In *Buckley*, the Court struck down disclosure for issue speech because the standard that triggered disclosure requirements was unclear or overbroad. Vague laws are unconstitutional if they provide insufficient notice of what is regulated and what is not. If the law does not make clear what speech is allowed and what speech is not, speakers will curtail their speech more than they otherwise would to avoid violating the law. The security of free speech breaks down when citizens are left to guess how regulations apply. The *Buckley* Court put this danger into context:

> "No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. … Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."[32]

In striking much of the disclosure requirements in the Federal Election Campaign Act, the *Buckley* Court ruled that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment … significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest."[33] As a result, disclosure laws are subject to "exacting scrutiny."

Advocates for greater regulation of political speech often cite the Supreme Court's *Citizens United* decision as an endorsement of expansive disclosure regimes, but that contention is not supported by the actual opinion or holding. The *Citizens United* Court upheld the disclosure of an electioneering communication report, which discloses only the *entity making the expenditure*, the purpose of the expenditure, and the names of contributors giving over $1,000 *for the purpose of furthering the expenditure*.[34] "For the purpose of furthering the expenditure" has been interpreted by the Federal Election Commission to mean contributions earmarked for particular communications, an interpretation recently supported by the U.S. Court of Appeals for

[30] *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976).
[31] *Id.* at 44 n. 52.
[32] *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).
[33] *Id.* at 64.
[34] 2 U.S.C. § 434 (2013); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 913-914 (2010).

the D.C. Circuit in a case involving analogous electioneering communication reporting requirements.[35] *Citizens United* did not endorse the general disclosure of members and donors to groups that did not qualify as political parties, and that did not have the objectively determined primary purpose of supporting or defeating candidates, unless the donations were affirmatively earmarked for that purpose.

In contrast, broader disclosure regimes have been treated with skepticism by the Court. Importantly, the *Citizens United* Court specifically held that the limited disclosure of an electioneering communication report is a "less restrictive alternative to more comprehensive regulations of speech," such as broader disclosure requirements.[36] The *Citizens United* Court specifically invoked *Massachusetts Citizens for Life v. FEC* (*MCFL*), where both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements.[37] The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[38] Likewise, in her concurrent opinion, Justice O'Connor was concerned with the "organizational restraints" imposed by disclosure requirements, including "a more formalized organizational form" and a significant loss of funding availability.[39]

The Court has recognized that the burdens of disclosure may be used to discourage speech in an unconstitutional manner, by forcing organizations to change their organizational structure, spend significant amounts on compliance with regulations, or opt out of making political contributions or independent expenditures altogether due to the burdens imposed by such laws. *MCFL* noted that these sorts of "incentives" serve to "necessarily produce a result which the State [can]...not command directly. It only result[s] in a deterrence of speech which the Constitution ma[de] free."[40]

Four Key Flaws in the DISCLOSE Act of 2014

1) *The bill would force nonprofits to radically alter their fundraising and public advocacy efforts.*

Current law defines a so-called "electioneering communication" as a broadcast ad that mentions the name of a candidate within 60 days prior to a general election or 30 days before a primary. The bill would significantly expand that definition. The new time period would be from January 1 to the Election Day of each election year for congressional candidates.

Therefore, if this bill became law, the following ad by the imaginary group American Action for the Environment (AAFE) would be considered an electioneering communication subject to burdensome restrictions, if aired on January 2 of an even numbered year in the district of a hypothetical congressman, John Doe, who is running for re-election and facing a September primary:

---

[35] *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).
[36] *Citizens United*, 130 S. Ct. at 915 (contrasting independent expenditure reports with the burdens discussed in *MCFL*).
[37] *Massachusetts Citizens for Life* (MCFL) *v. Federal Election Commission*, 479 U.S. 238 (1986).
[38] *MCFL*, 479 U.S. at 253 (plurality opinion).
[39] *Id.* at 266 (O'Connor, J. concurring).
[40] *MCFL*, 479 U.S. at 256 (plurality opinion).

> [Pelosi]: Hi. I'm Nancy Pelosi, lifelong Democrat, and former Speaker of the House.
> [Gingrich]: And, I'm Newt Gingrich, lifelong Republican, and I used to be Speaker too.
> [Pelosi]: We don't always see eye-to-eye, do we, Newt?
> [Gingrich]: No, but we do agree that our country must take action to address climate change.
> [Pelosi]: We need cleaner forms of energy, and we need them fast.
> [Gingrich]: If enough of us demand action from our leaders, we can spark the innovation we need.
> On screen: Call Congressman John Doe and urge him to vote for H.R. 10000. 202-224-3121
> Paid for by American Action for the Environment.

There is scant justification for forcing any additional disclosure on such an ad by this hypothetical group. Yet, S. 2516 would do just that.

AAFE would face several bad choices in funding such an ad. It might have to disclose its donors to the public, as required by this bill, some of whom might be individuals who work for utilities or coal industries. Those donors might have supported the group's clean water efforts in response to an appeal for funds on that specific basis, but had not thought to earmark their checks.

Under this bill, AAFE would report these donors to the Federal Election Commission (FEC), where they would be publicly listed, and may find it difficult to keep their jobs. Worse yet, a donor may not even agree with the ad, but could be listed as a donor because he or she gave to the group for entirely non-political reasons.

Under the Act, AAFE could set up a special bank account and deposit into it only funds from donors who want to support ads that might run in even-numbered years. But that would massively complicate their fundraising efforts, which are already difficult in this economy.

On this issue, the Supreme Court has previously ruled in *Citizens United v. FEC* that the existence of an alternative way of engaging in speech – in that case PACs – did not save a prohibition on the use of general-treasury funds to pay for political advertisements.

A near certain result of this new mandate would be that AAFE and other organizations would witness a dramatic increase in their fundraising costs, their donations would decline, or some combination of the two would occur. Alternatively, many groups would avoid lobbying ads during even numbered years, when many important bills become law.

And what of their donors? The Act's segregated funds provisions require donors to choose between their rights under *NAACP v. Alabama*, the seminal case that allows advocacy groups to shield their membership lists, and their rights under *Citizens United*. Under this law,

they cannot exercise both by keeping membership payments and donations private while still contributing to a group's general fund.

Similarly, donors – many of whom are unfamiliar with campaign finance laws – would have to affirmatively request that their funds not be used on campaign activity in order to remain anonymous. Current law mandating disclosure only when funds are given to further independent expenditures or electioneering communications is sufficient to provide transparency. As written, current law also avoids the misleading possibility that contributors to a group, whether the NRA or the Sierra Club, who do not specifically earmark their contributions, may be associated with advertisements they had no part in developing, and with which they may disagree.

2) *The new definition of the "functional equivalent of express advocacy" is vague.*

Despite claiming to be a "pure disclosure" proposal, S. 2516 adds a new and indecipherable definition to a core element of campaign finance law. The bill would expand the standard for express advocacy where the law defines independent expenditures if an ad:

> "Expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because, when taken as a whole, 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."

Similar definitions for regulating speech have repeatedly been struck down by federal courts as unconstitutionally vague. Doubtless, one could show 50 ad scripts to a randomly-selected group of U.S. Senators and Representatives, and its members would disagree as to which are issue advocacy and which are "the functional equivalent of express advocacy." If individuals who have gone through federal elections cannot agree, how can grassroots organizers, many of whom may be new to politics, be sure of how regulators will evaluate the content of their ad? How is a group to know, in advance, that it has not run afoul of this vague provision? Ultimately, this definition is nothing more than an invitation to burdensome and costly investigations and litigation by federal officials.

The provision is also harmful because the Federal Election Campaign Act uses "expenditures" to define which organizations become forced to register with the FEC as Political Action Committees. Were such a broad definition upheld by a court and actually applied, it would instantly convert large numbers of nonprofit organizations into PACs. This would include numerous organizations that never specifically advocated for the election or defeat of candidates for office, and would run directly counter to *Buckley*.

3) *The Act is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.*

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 to whom it promotes. This existing regulation requires that the expenditure reporting follow the money – both who gives and who receives. For example, in the 2010 Massachusetts Senate race, TeaPartyExpress.org spent hundreds of thousands of dollars on independent expenditures. However, its 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.

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.

2 U.S.C. 434(f) requires groups to report "electioneering communications" when they exceed $10,000.

Current law also requires reporting of "electioneering communications." This mandates the disclosure of the identity of the 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. Contributions made by individuals that exceed $1,000 are disclosed and 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 race in January 2010, 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 January 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 Service Employees International Union and Communications Workers of America. Concerns that corporations like Exxon Mobil could set up "shadow groups" to funnel money for political advertisements are unfounded. That spending would be tracked just as the disbursements by Citizens for Strength and Security were.

Existing law requires other disclosures as well.

In addition to the above reporting requirements, existing law requires that any organization organized under Section 527 of the tax code must also disclose donors who contribute more than $200 in the calendar year with the IRS. In turn, that information is publicly

listed. 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 of more than $200 to the group. Finally, all independent expenditures and electioneering communications already must include "disclaimers" clearly stating who is paying for the ad.

4) *The rule regarding covered transfers is likely unenforceable and will be a nightmare for many nonprofits.*

The bill requires any entity transferring $10,000 or more in funds to a "covered organization" to disclose its donors if a donor knew or "had reason to know" that the "covered organization" – a definition that includes corporations, labor unions, trade associations, 527s, and nonprofit 501(c)(4) organizations – would make expenditures or electioneering communications of $50,000 or more in the coming two years, or had made such expenditures in the prior two years.

The look-back requirement is bad enough; a donor may not know of those expenditures by another, unrelated organization, and has no safe-harbor even if it inquires of the receiving organization and receives an innocent but incorrect answer. The look-forward requirement, however, is worse. If the donating organization does not "designate[], request[], or suggest[]" that the donation be used for "campaign-related disbursements," and does not make the donation in request to a "solicitation or other request" for "campaign-related disbursements," and does not "engage[] in discussions ... regarding ... campaign-related disbursements" – all separate liability triggers – how is it supposed to know that the organization will spend $50,000 on "campaign-related disbursements"?

The provision seems designed to trip up the unwary and provide a means for post-hoc investigations of unsuspecting organizations.

* * *

Considering that just over 4 percent of election spending in 2012 came from groups who do not itemize their individual donors and members, members of this Committee must think carefully about whether it is worth it to expand our already intrusive disclosure requirements even further. Doing so will impose significant costs with dubious public benefit and disproportionately harm those who can afford it least. The proposed bill suffers from many practical flaws – from provisions that are vague to ones that are likely unenforceable. Much of the "disclosure" that the ironically-named DISCLOSE Act would produce is junk that would not accurately reflect the sources of support for candidates and causes, and would not improve transparency or public knowledge.

Notably, at the same time as we discuss this bill to discourage political speech, some members of this body are also pushing for a vaguely worded constitutional amendment that appears to grant unlimited and frightening powers to Congress to regulate speech if lawmakers

can assert any connection to an election.[41] S.J. Res. 19 would revoke nearly four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity (and likely quality) of debate in this country. If adopted, this constitutional amendment would help entrench those in Congress by insulating incumbent politicians from criticism and granting members of Congress unprecedented power to regulate the speech of those they serve.

Whether with the DISCLOSE Act, or a constitutional amendment, Congress does more damage to the public's trust in government by meddling with political speech and association rights in the waning months before the 2014 midterm elections than it would by permitting an insignificant portion of otherwise disclosed election spending to remain unitemized by donor. Tinkering with the First Amendment and the speech rights of American citizens to score political points in an election year is an idea fraught with peril.

Thank you.

[41] Zac Morgan, "Amending the First Amendment: The Udall Proposal is Poorly Drafted, Intellectually Unserious, and Extremely Dangerous to Free Speech," Center for Competitive Politics. Retrieved on July 18, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/05/2014-05-29_Text-Analysis_US_Senate_SJ-Res-19_Amending-The-First-Amendment-The-Udall-Proposal-Is-Poorly-Drafted-Intellectually-Unserious-And-Extremely-Dangerous-To-Free-Speech.pdf (May 29, 2014).

Bradley A. Smith
Chairman, Center for Competitive Politics, Alexandria, Virginia
Visiting Judge John T. Copenhaver, Jr. Chair of Law
West Virginia University College of Law
101 Law Center Drive | P.O. Box 6130 | Morgantown, WV 26505
(304) 293-6789
bsmith@campaignfreedom.org

Bradley A. Smith holds the Judge John T. Copenhaver, Jr. Visiting Endowed Chair of Law at the West Virginia University College of Law and is the Josiah H. Blackmore II/Shirley M. Nault Professor of Law at Capital University Law School in Columbus, Ohio. In addition to his professorship, he is an attorney for Steptoe & Johnson PLLC, where he practices in the areas of Political Law and Government Relations from the firm's Columbus office, and the Founder and Chairman of the Center for Competitive Politics in Alexandria, Virginia.

Professor Smith served on the Federal Election Commission (FEC) from 2000 through 2005, including as the Commission's Vice-Chairman in 2003 and Chairman during the presidential election year of 2004. During his tenure, *The Wall Street Journal* dubbed Smith "the only honest man in this bordello."

Professor Smith's writings have appeared in such academic journals as the *Yale Law Journal*, *Georgetown Law Journal*, and *Pennsylvania Law Review*, and in popular publications such as the *Wall Street Journal*, *New York Times*, *Washington Post*, and *National Review*. His 2001 book, "Unfree Speech: The Folly of Campaign Finance Reform," (Princeton University Press) was praised by columnist George Will as "the year's most important book on governance." He is also the co-author of a leading casebook in the field of voting rights and election law.

In 2010, Professor Smith was awarded the Bradley Prize by the Bradley Foundation of Milwaukee, Wisconsin, as an "innovative thinker" whose work has "strengthened American democratic capitalism and the institutions, principles, and values that sustain and nurture it."

His work was cited in the majority opinion in *Citizens United v. FEC*, and he was co-counsel in *SpeechNow.org*, the case that gave constitutional protection to "Super PACs."

He is Chairman of the Board of the 1851 Center for Constitutional Law, a member of the Board of Trustees of the Buckeye Institute for Public Policy Studies, and a member of the Editorial Board of the Election Law Journal, the Board of Advisors of the Harvard Journal of Law & Public Policy, the Executive Committee of the Election Law and Free Speech Practice Group of the Federalist Society, and the Board of Advisors of the Institute for Politics at the University of Minnesota.

Professor Smith is a *cum laude* graduate of both Kalamazoo College and Harvard Law School.

WASHINGTON
LEGISLATIVE OFFICE

July 22, 2014

The Honorable Charles E. Schumer
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15TH STREET, NW, 6TH FL
WASHINGTON, DC 20005
T 202.544.1681
F 202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T 212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Re: ACLU Opposes S. 2516 – The Democracy is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act

Dear Senator:

In advance of tomorrow's hearing on S. 2516, the Democracy Is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act, we write in opposition to the measure.[1]

It is clear that the sponsors of the DISCLOSE Act seek the laudable goal of fair and participatory federal elections, one that we emphatically share. To that end, we support numerous measures that promote an informed and engaged electorate, including comprehensive public financing like the program proposed in the Fair Elections Now Act,[2] enforcement of laws against straw donations and effective coordination restrictions to prevent campaign or candidate control of outside spending.

We also believe the electorate has a legitimate interest in knowing the source of significant support for a candidate – one of the reasons we are concerned

---

[1] S. 2516, 113th Cong. (2014). S. 2516 is identical, save updating to reflect the reintroduction, to S. 3369, 112th Cong. (2012), the previously introduced version of the DISCLOSE Act. The ACLU opposed S. 3369 and other past iterations of the bill. *See* Letter from Laura W. Murphy et al., Director, Am. Civil Liberties Union Washington Legislative Office, to Senate (July 16, 2012), *available at* http://bit.ly/1p2LhO4; Letter from Laura W. Murphy & Michael Macleod-Ball, Am. Civil Liberties Union Washington Legislative Office to Senate on S. 3628, 111th Cong. (July 23, 2010), *available at* http://bit.ly/1nbAeoF; Letter from Laura W. Murphy & Michael Macleod-Ball, Am. Civil Liberties Union Washington Legislative Office to the House of Representatives on H.R. 5175, 111th Cong. (June 17, 2010), *available at* http://bit.ly/1k8xYjn.

[2] H.R. 269/S. 2023, 113th Cong. (2014).

about the abuse of coordination rules. For groups, however, engaged in advocacy around political issues, even in proximity to elections or primaries, we fear that overbroad disclosure requirements will chill the exercise of rights of expression and association. We agree that transparency in our elections serves to protect the integrity of those elections. Nevertheless, caution must be the watchword when any legislation has the potential to restrict or chill political speech, entitled to the highest level of constitutional protection under the First Amendment.[3]

Because campaign finance restrictions like the DISCLOSE Act have the potential to chill political speech, they must be drafted to minimize any burden on free expression. We fear that the DISCLOSE Act as currently written may strike the wrong balance, and could act to suppress a sizeable amount of issue advocacy by groups—including wholly non-partisan groups like the ACLU—that serves to inform the electorate and improve electoral outcomes without expressing support or opposition for particular candidates.

The DISCLOSE Act extends beyond regulating "Super PACs" or 501(c)(4) organizations engaged in direct partisan political advocacy using secret donations.[4] The DISCLOSE Act, as written, would abrogate the anonymous speech rights of donors to non-partisan groups advocating on controversial issues of the day and not advocating for or against candidates for office.

We offer comments on two areas of concern.

1. **The DISCLOSE Act Would Extend the Period During Which Special Reporting Rules for Pure, Non-Partisan Issue Advocacy Apply**

The DISCLOSE Act expands the period of time during which issue advocates—those taking no position in support of or in opposition to a political candidate—must disclose their donors if they wish to publish issue ads.[5]

The act would expand the "electioneering communications" period—currently the 30 days before a primary and the 60 days before a general election—quite significantly. For communications that refer to a candidate for the House or Senate, the period would begin on January 1 of the election year and end on the election, and would encompass the entire period

---

[3] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . .") (Stephens, J., concurring).

[4] For more on the ongoing controversy over § 501(c)(4) tax exempt social welfare groups, please see the ACLU's comments to the Internal Revenue Service urging it to withdraw its proposed rules governing the definition of political intervention under the relevant regulations, too much of which will jeopardize a group's (c)(4) status. Letter from Laura W. Murphy & Gabe Rottman, Am. Civil Liberties Union Washington Legislative Office, to the Hon. John A. Koskinen on Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed on Nov. 29, 2013) (Feb. 4, 2014), *available at* http://bit.ly/MoPWh4.

[5] S. 2516 § (2)(a)(2).

following the announcement of a special election up to the special election. In concrete terms, the period for communications referring to a member of the House or Senate would extend for a full 10 months before a typical November election, whereas the relevant period under current law is limited to two months.

As a result, the special reporting rules would apply to communications about all members of the House of Representatives and one-third of senators for effectively the entire second session of each Congress. During this period of time—nearly half of every Congress for House members—any advocacy organization wishing to run an ad that even mentions a candidate's name would have to publicly disclose personally identifying information about some of its donors.

Such organizations would face two unsatisfactory choices: protect the privacy of their donors by refraining from issue advocacy or give up the privacy of their donors and place at risk the opportunity for additional donations by those supporters. Either way, this bill would have a chilling effect on political speech about pending legislation for more than 40% of each Congress.

For communications mentioning a presidential or vice presidential candidate, the period would extend from 120 days before the primary or caucus in an individual state.

To take the 2012 election as an illustration, under current law the electioneering communications disclosure period in Iowa—the first state in the Republican presidential nominating process—started on December 4, 2011, 30 days prior to the caucus on January 3, 2012. Were the DISCLOSE Act to have been law during the 2012 election season, that disclosure period for presidential candidates would have extended all the way back to September 5, 2011, *and* would have continue unabated until the election.

Accordingly, pure non-partisan issue advertising that happens to mention a presidential or vice-presidential candidate—including ads commenting, for instance, on a candidate's record on Obamacare, gun control, or the wars in the Iraq and Afghanistan, and even if they assiduously avoid expressing support for or opposition to the candidate—would be subject to the heightened disclosure rules in most states for significantly more than a year before a general presidential election.

For similar ads mentioning other candidates, the special rules period would begin on January 1 of the election year.

These concerns are further heightened when one of the candidates is the incumbent president running for reelection. The result of the extended period is a chilling effect on public criticism of the *sitting* president or vice president, including truly non-partisan criticism on specific policy issues, during more than a fourth of a president's first term. But whether it's the president or a member of Congress, citizens of this country must retain the right to band together and urge an officeholder to take a position on an issue of public importance. This bill, by its very terms, makes it more likely that some citizens will choose to remain silent.

We reiterate our concurrence with the laudable goals of this legislation. At the very least, however, new disclosure rules must distinguish clearly between express advocacy for or against

a candidate for office and commentary on political issues. This legislation fails to draw that bright line, and will therefore chill advocacy at all points on the political spectrum.

2. The DISCLOSE Act Fails To Protect the Anonymous Speech Rights of Donors Who Have No Intention of Making a Gift for Political Communication Purposes.

The DISCLOSE Act would require disclosure in two circumstances. A "covered organization"[6] that spends more than $10,000 in a cycle on "campaign-related disbursements,"[7] and does not maintain a separate segregated account for such disbursements, would have to disclose the identity, specific payments and aggregate amount donated of any person giving more than $10,000 to the entity during the cycle.[8] Any entity that maintains a separate segregated account for such disbursements would only have to do the same for those individuals donating specifically to that account in an amount greater than $10,000.[9]

Even with a $10,000 trigger, the present exceptions in the DISCLOSE Act may still leave the door open to disclosure when a donor had no intention that a gift be used for political purposes.[10] It is both impractical and unfair to hold contributors responsible for every advertisement that an organization publishes, and even donors who give more than $10,000 may be small relative to the size of the covered organization's donor base as a whole.

Any effort to increase voter awareness of an organization's funding must respect the freedom of private association that the Supreme Court recognized in *NAACP v. Alabama.*[11] In that case, the Supreme Court sternly rebuked government-mandated membership disclosure regimes as thinly veiled attempts to intimidate activist organizations by instilling fear of retaliation among members of the activist group.

The disclosure provisions are likely to do one of two things, particularly when an organization is engaged in advocacy on controversial issues with which typical donors or members might not want to be associated publicly.

---

[6] That is, virtually any politically active entity save organizations that are exempt from taxation under § 501(c)(3) of the Internal Revenue Code. S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(e)).

[7] Defined in S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(d)) to include independent expenditures and electioneering communications.

[8] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(a)(2)(F)). We do note and appreciate the raised threshold for disclosure.

[9] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § 441k(a)(2)(E)).

[10] S. 2516 § (2)(b)(1) (proposed new 2 U.S.C. § (a)(3)(B)). The donor would have to specifically prohibit, in writing, use of the funds for any covered payment, and the covered organization would have to agree and then segregate the funds.

[11] 357 U.S. 449, 460 (1958).

First, the organization might refrain from engaging in public communications that would subject its donors to disclosure, in which case the organization's speech will have been curtailed. Alternatively, donors sensitive to public disclosure may refrain from giving to the organization (or may cap disclosure just below the trigger threshold), in which case the organization's ability to engage in speech will have been curtailed. And in both cases, those whose names are disclosed would be subject to personal, political or commercial impacts.

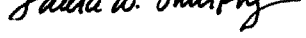
3. Conclusion

The ACLU welcomes reforms that improve our democratic elections by providing for a properly informed electorate. Some elements of the DISCLOSE Act move in that direction. Unfortunately, the most promising proposal in past disclosure reform is missing in S. 3369. The provision offering candidates the television advertising rates equal to the lowest amount charged for the same amount of time in the previous 180 days is the type of solution that would increase speech, rather than stifling speech about elections and issues of public importance.[12]

Our Constitution embraces public discussion of matters that are important to our nation's future, and it respects the right of individuals to support those conversations without being exposed to unnecessary risk of harassment or embarrassment. Only reforms that promote speech will bring positive change to our elections, and overbroad disclosure requirements do the opposite.

Please contact Legislative Counsel/Policy Advisor Gabe Rottman if you should have any questions or comments at 202-675-2325 or grottman@dcaclu.org.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief of Staff/First Amendment Counsel

Gabriel Rottman
Legislative Counsel/Policy Advisor

[12] *See, e.g.*, DISCLOSE Act, S. 3295, 111th Cong. § 401 (2010).

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

July 23, 2014

The Honorable Charles E. Schumer
Chairman
Committee on Rules & Administration
United States Senate
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules & Administration
United States Senate
Washington, DC 20510

To Chairman Schumer and Ranking Member Roberts:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, strongly opposes the "Democracy Is Strengthened by Casting Light On Spending in Elections Act of 2014" or the "DISCLOSE Act of 2014," S. 2516. The Senate should reject this legislation because it would violate critically important First Amendment free speech protections.

S. 2516, like previous iterations from the 111th and 112th Congresses, is designed to effectively exempt labor unions from its reach while chilling the political speech of the business community and others engaged in the political process. In the Chamber's view, DISCLOSE 2014 is blatantly political and ultimately unconstitutional legislation that detracts from much more significant efforts to solve challenges confronting America.

Political speech by corporations is protected by the First Amendment. The Supreme Court recognized that right not only in its *Citizens United v. Federal Elections Commission* decision, but also in several earlier decisions. In addition, First Amendment rights are at their height when the speaker is addressing matters of public policy, politics, and governance. As the Court has emphasized, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). Furthermore, the Supreme Court repeatedly has recognized that voluntary associations are vital participants in the public debate and that government attempts to curb participation in associations in order to stifle their voice in the public debate violate the First Amendment.

The bill's manifest purpose is to impose exceptional burdens on the speech of corporations and business interests based on their identity as corporations and their presumed hostility to the political objectives of the bill's supporters. As the Supreme Court held in *Citizens United*, "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Citizens United v. FEC*, 558 U.S. 310, 350 (2010). The crafting of the bill and many of the statements of DISCLOSE 2014's sponsors and supporters show that the true purpose of the legislation is to squelch the constitutionally protected speech of

the business community and their trade associations – a clearly impermissible intent. For example, in the press release trumpeting the introduction of S. 2516, the sponsors of the legislation acknowledged that the legislation is aimed primarily at *corporate speech*. Similar arguments and statements have been made by other supporters of the legislation, both in and out of Congress.

While the bill purports to be even-handed in its treatment of labor unions, corporations, and business associations, the reality is far different, and the bill would place significantly more burdens on businesses. There are two significant provisions that protect both local unions and large "international" unions from the legislation's required disclosure.

First, DISCLOSE 2014 would require an organization that engages in political conduct to disclose payments to it that exceed $10,000 in a two-year election cycle, which means that local union chapters would not have to disclose the payments of individual union members to the union, even if those funds will be used for political purposes.

Second, the bill exempts from its disclosure requirements transfers from affiliates that do not exceed $50,000 for a two-year election cycle. Therefore, an international union would not have to disclose the transfers made to it by many of its smaller local chapters. The result is that unions would not be greatly impacted by the legislation, while business associations (which almost by definition do not have a ground-up fundraising funneling structure built on the mandatory dues of millions of members) would be subject to the bill's provisions. It is also likely that many business associations' corporate members might provide more than $10,000 over a two-year period to the business association. This would trigger the bill's disclosure provisions – a situation not paralleled in the union world. Similarly, most business associations do not have a vast network of local affiliates from which they can draw up to $50,000 in exempted transfers.

Furthermore, DISCLOSE 2014 is designed to unconstitutionally encourage retaliation against certain speakers who have unpopular or unfavorable political views by requiring groups to disclose the names and addresses of their donors. The First Amendment does not permit the government to require membership disclosure under such circumstances. *See Doe v. Reed*, 561 U.S. 186 (2010) and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Numerous statements by supporters of DISCLOSE 2014 (both in and out of Congress) have made it abundantly clear that they are seeking disclosure as a means to accomplish just that sort of impermissible retaliation against speakers with whom they disagree.

The clear purpose of S. 2516 is to upend irretrievably core First Amendment political speech protections. These rights are too important to the foundation of American democracy to be infringed. Accordingly, the Chamber strongly urges you to oppose S. 2516 and to vote against the legislation as well as any effort to bring it to the Senate floor.

Sincerely,

R. Bruce Josten

United States Senate Committee on Rules & Administration

Statement for the Record at the Hearing:

"The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections"

Miles Rapoport
President
Common Cause

July 23, 2014

Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. Mr. Chairman, on behalf of our 400,000 members and supporters, we appreciate the opportunity to submit this statement for the record.

Common Cause works at the federal, state and local level to advocate for full transparency and disclosure in our elections, including the money spent to influence the outcome of campaigns.

The Money, The Donors, The Secrecy.

The 2014 elections are on pace to shatter all records to become the most expensive midterms in American history. Already, candidates for the House of Representatives and Senate have raised more than $1 billion.[1] Outside spending has topped $125 million, which is more than three times the spending of outside groups at this point in the last midterm election cycle in 2010.[2] Spending by independent expenditure-only committees ("Super PACs") in the 2014 cycle has surpassed the total amount that Super PACs spent during the entire 2010 midterms.[3] This spending comes on the heels of the 2012 presidential election cycle, which was our nation's first federal election cycle to cost more than $6 billion, an amount that does not even count the billions spent in state races.

[1] Center for Responsive Politics, 2014 Election Overview, http://www.opensecrets.org/overview/ (last accessed July 22, 2014).
[2] Center for Responsive Politics, Outside Spending by Cycle Thru July 22nd of Election Year, http://www.opensecrets.org/outsidespending/index.php?type=A (last accessed July 22, 2014); Andrew Mayersohn, "2014 Outside Spending Hits the $100 Million Mark," CENTER FOR RESPONSIVE POLITICS, May 30, 2014, http://www.opensecrets.org/news/2014/05/2014-outside-spending-hits-the-100-million-mark/ (last accessed July 22, 2014).
[3] *Compare* Center for Responsive Politics, 2014 Outside Spending, by Super PAC, http://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=S *with* Center for Responsive Politics, 2010 Outside Spending, by Super PAC, http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S (last accessed July 22, 2014).

The money fueling these 2014 midterms comes from an extraordinarily small and unrepresentative segment of the population. A little over one-tenth of 1% is delivering 64% – over one billion dollars – of the total contributions to federal candidates, PACs and political parties.[4]

A significant amount of the outside spending comes from sources under no obligation to disclose their donors, corporate or otherwise. Thirty percent of the outside money in 2012 – over $310 million – came from undisclosed sources.[5] So far in the current midterm cycle-to-date, over 27% of total outside spending (more than $35 million) has come from dark money groups.[6] One group in particular, the Koch brothers' Americans for Prosperity, plans to spend more than $125 million on an "aggressive ground, air and data operation" which "would be unprecedented for a private political group in a midterm, and would likely rival even the spending of the Republican and Democratic parties' congressional campaign arms."[7] Unlike the political parties' campaign arms, however, Americans for Prosperity is under no legal obligation to disclose the donors funding its "aggressive" campaign to influence voters in any of its targeted races.

Money from Undisclosed Sources Flows Through Multiple Entities, Including Super PACs.

While there has been significant and much-needed attention in recent years to the steep rise in the political spending of 501(c)(4) social welfare organizations, some of the secret money is flowing through Super PACs. Unlike 501(c)(4)s, Super PACs are required to disclose their donors to the Federal Election Commission. However, the names of the "donors" can mean little to nothing, depending on the source. For example, a donor may be the name of a shell corporation or other faceless entity. This does do not shed any light on the actual source of the money.

The number of candidate-specific Super PACs has dramatically increased during this election cycle – and with it, the opportunity for more secret money.[8] For example, the Center for Public Integrity reported earlier this month that two social welfare nonprofit organizations are responsible for donating almost all of the money – over $2 million – to a Super PAC backing the winner of yesterday's U.S. Senate Republican primary in Georgia.[9] Those two nonprofit

---

[4] Center for Responsive Politics, Donor Demographics, http://www.opensecrets.org/overview/donordemographics.php (last accessed July 22, 2014).
[5] Center for Responsive Politics, Outside Spending by Disclosure Excluding Party Committees, http://www.opensecrets.org/outsidespending/disclosure.php?range=tot (last accessed July 22, 2014).
[6] Center for Responsive Politics, Outside Spending by Disclosure Excluding Party Committees Cycle to Date, http://www.opensecrets.org/outsidespending/disclosure.php?range=ytd (last accessed July 22, 2014).
[7] Kenneth P. Vogel, "Koch Brothers' Americans for Prosperity Plans $125 million Spending Spree," POLITICO, May 9, 2014, http://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520.html.
[8] Matea Gold & Tom Hamburger, "Must-have Accessory for House Candidates in 2014: The Personalized Super PAC," WASHINGTON POST, July 18, 2014, http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23_story.html.
[9] Michael Beckel, "Is This Super PAC Subverting Disclosure Rules?," CENTER FOR PUBLIC INTEGRITY, July 11, 2014, http://www.publicintegrity.org/2014/07/11/15061/super-pac-subverting-disclosure-rules.

organizations are under no obligation to disclose the source of the money that they funneled to the Super PAC.

At least 64 of these candidate-specific Super PACs exist so far in this election cycle – more than the 42 that were active in the 2012 federal election and the 21 from 2010.[10] Candidate-specific Super PACs are little more than an extension of a candidate's principle campaign committee, with the added ability to take unlimited contributions from individuals and corporations – including corporations and social welfare nonprofits that do not disclose their donors.

Although Super PACs are prohibited by law from coordinating with candidates because the coordination would constitute an unlawful contribution, the difference between a candidate-specific Super PAC and a principle campaign committee is becoming a distinction without a difference. During the 2012 presidential election, former Speaker of the House Newt Gingrich made a disturbing yet frank assessment for why his campaign failed. Although he said that running for President is not "a rich man's game," he continued that "[i]t's certainly a game which requires you to have access to a lot of money. We couldn't have matched Romney's Super PAC, but in the end, he had I think sixteen billionaires and we had one, and it made it tough."[11] The billionaire that Mr. Gingrich mentions that he "had" is Las Vegas casino magnate Sheldon Adelson, who spent at least $98 million in the 2012 election cycle, including more than $20 million to a Super PAC backing Mr. Gingrich.[12]

Secret money is also awash in state level campaigns. During the 2012 election, for example, California Common Cause filed a complaint with California's Fair Political Practices Commission (FPPC) after an unknown Arizona nonprofit contributed $11 million to a political action committee active in two ballot proposition campaigns in California.[13] Earlier this year, this Rules Committee heard testimony from former FPPC Chair (and current FEC Commissioner) Ann Ravel about the case. The FPPC investigated and eventually uncovered $15 million from two out-of-state nonprofits that sought to evade California's disclosure regulations.[14] Ultimately, the entities were levied a record $1 million fine for laundering the money to evade disclosure.[15]

As Congress and the Federal Election Commission remain gridlocked, some states have acted to advance transparency in a post-*Citizens United* state and local election landscape. Common Cause chapters led fights to pass and Governors have signed comprehensive DISCLOSE-like

---

[10] *Id.*

[11] Jonathan Karl et al., *Newt Gingrich's Advice for Mitt Romney: Sharpen Your Animal Instincts*, ABC NEWS/YAHOO! NEWS, June 19, 2012, http://news.yahoo.com/blogs/power-players/newt-gingrich-advice-mitt-romney-sharpen-animal-instincts-105728293.html (last accessed July 22, 2014) (emphasis added).

[12] Theodoric Meyer, "How Much Did Sheldon Adelson Really Spend on Campaign 2012?," PROPUBLICA, Dec. 20, 2012, http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012.

[13] Chris Megerian, "Identity of Donors to Conservative Group Sought," LOS ANGELES TIMES, Oct. 19, 2012, http://articles.latimes.com/2012/oct/19/local/la-me-election-money-20121020.

[14] *Dollars and Sense: How Undisclosed Money and Post-*McCutcheon *Campaign Finance Will Affect the 2014 Election and Beyond: Hearing Before the United States Senate Committee on Rules and Administration* 113th Cong. 1 (2014) (Testimony of Ann M. Ravel, Former Chair, California Fair Political Practices Commission).

[15] *Id.*

legislation in California and Rhode Island. A strong Common Cause-supported disclosure bill is being debated this very week in the Massachusetts statehouse.

Congress Should Pass the DISCLOSE Act.

Common Cause strongly supports the DISCLOSE Act (S. 2516). The DISCLOSE Act already enjoys majority support in the United States Senate and should pass as soon as possible. This is common sense legislation in keeping with our core American values of transparency and accountability in a robust and participatory democracy.

Disclosure serves several purposes in campaigns. First, it protects a voter's right to know who is trying to influence their decision on Election Day. Voters are able to evaluate the merits of an appeal for their vote if they know who is speaking to them. Second, disclosure curbs corruption and its appearance, including the specter of undue influence over public policy. Third, disclosure is critical to the enforcement of our campaign finance laws. The DISCLOSE Act is carefully crafted to further all of these purposes.

The DISCLOSE Act would apply uniformly to organizations across the political spectrum. There are no special exemptions or carve-outs for organizations depending on the size of their membership or their political stances. Ultimately, it will require the disclosure of major donors to those entities – donors contributing and spending $10,000 or more to influence elections.

The DISCLOSE Act Comports with the Constitution.

The DISCLOSE Act is also consistent with the Supreme Court's disclosure jurisprudence. In a portion of *Citizens United* that had the support of eight members of the Court, Justice Kennedy wrote that "disclosure … enables the electorate to make informed decisions and give proper weight to different speakers and messages."[16] The same eight justices agreed that disclosure allows "[s]hareholders [to] 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."[17]

In *McCutcheon v. FEC*, the Chief Justice wrote that "[d]isclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election-related spending."[18] He further opined that "[t]oday, given the Internet, disclosure offers much more robust protections against corruption. … Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided."[19]

Unfortunately, reality belies the latter pronouncement about the availability of campaign finance disclosure "at the click of a mouse." There is no adequate disclosure system in place to fully shine a light on the hundreds of millions of dollars flooding our elections in the form of

[16] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).
[17] *Id.* at 370.
[18] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (internal quotations omitted).
[19] *Id.* at 1460.

independent expenditures. The DISLCOSE Act, coupled with the Real Time Transparency Act (S. 2207) and the Senate Campaign Disclosure Parity Act (S. 375), would create a regime more in keeping with the transparency the Court assumed was already in place when it opened up our elections to unlimited corporate and special interest money.

Conclusion.

Congress must act to restore transparency in our elections after the sea change in our campaign finance laws after *Citizens United*. Americans of every political stripe agree that campaign spending ought to be transparent and disclosed.

Citizens are working at various levels of government to make this a reality. For example, at the Securities and Exchange Commission, investors, shareholders, academics and others have filed nearly 900,000 comments in support of a rulemaking petition that would require publicly traded companies to disclose their political spending to shareholders. The Internal Revenue Service is examining reforms to its rules that would end abuse of our tax laws to hide campaign spending. These efforts are squarely within these agencies' authority.

Ultimately, though, the DISCLOSE Act is a critical component of shining a light on the money in our campaigns. It will protect Americans' right to know who is seeking to influence their vote on Election Day and who is attempting to influence their elected officials afterwards.

We urge its swift approval.

Thank you for the opportunity to submit this statement for the record.

June 24, 2014

Senator Whitehouse Re-introduces DISCLOSE Act with 49 Cosponsors, Reform Groups Urge Congress to Enact Bill to Close Gaping Disclosure Loopholes Used to Hide Donors from Voters

Our organizations strongly support the DISCLOSE Act of 2014 introduced today by Senator Whitehouse (D-RI) with 49 cosponosrs.

Our organizations include Americans for Campaign Reform, the Brennan Center for Justice, the Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, Common Cause, Democracy 21, Demos, the League of Women Voters, People For the American Way, Public Citizen and Sunlight Foundation.

The legislation would ensure that voters know the identity of donors who have been secretly financing campaign expenditures in federal elections. Voters have a fundamental right to know this information.

Donors funneled more than $300 million in secret contributions into the 2012 national elections.

National polls have shown that citizens overwhelmingly favor disclosure by outside groups of the donors financing their campaign expenditures. The basic right of citizens to know whose money is being spent to influence their votes has long been recognized by Congress in enacting campaign finance disclosure laws and by the Supreme Court in upholding these laws.

The Supreme Court in the *Citizens United* case, by an overwhelming 8 to 1 vote, upheld the constitutionality of and need for disclosure requirements for outside groups making expenditures to influence federal elections. The Court 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.

Notwithstanding the Supreme Court's overwhelming support for disclosure by outside spending groups, flawed FEC regulations and the impact of the *Citizens United* decision have resulted in massive amounts of secret contributions being spent in federal elections. The DISCLOSE Act would close the gaping disclosure loopholes that have allowed this to happen.

The DISCLOSE Act is effective, fair and constitutional. There are no legitimate policy or constitutional grounds on which to oppose and kill this legislation.

If Senators have specific problems with provisions of the Act, they should negotiate with the bill's sponsors, not stonewall the legislation and continue to keep citizens in the dark about the sources of huge amounts being spent to influence their votes.

Our organizations strongly urge the Senate to pass the DISCLOSE Act.

Statement for the Hearing Record
regarding the July 23, 2014
United States Senate Committee on Rules and Administration

Theda Skocpol
Director of the Scholars Strategy Network
Submitted July 24, 2014

On July 23, 2014, the Senate Committee on Rules and Administration held a hearing entitled "The DISCLOSE ACT (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections." During the hearing, Ranking Member Pat Roberts engaged in an exchange with hearing witness Heather Gerken, the J. Skelly Wright Professor of Law at the Yale Law School regarding her membership in the Scholars Strategy Network.

Professor Gerken admirably answered the Ranking Member's questions and accurately described the Scholars Strategy Network. As the organization's national director, I would like to further respond to the concerns the Ranking Member expressed during the hearing by providing the following facts.

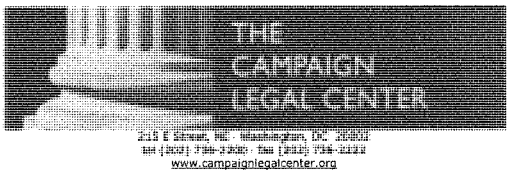
Contrary to the Ranking Member's suggestion, the Scholars Strategy Network is *not* funded by the Democracy Alliance or any other political organization. Our straightforward nonpartisan and nonprofit purpose is to enable our scholar members to share their research with citizen's groups, journalists, and policymakers and their staffs. Our members have worked with groups and policymakers of many persuasions.

As spelled out in the following Mission Statement reproduced from our website [www.scholarsstrategynetwork.org/page/what-scholars-strategy-network], the Scholars Strategy Network as such does not take political positions or endorse any party or candidate:

The Scholars Strategy Network seeks to improve public policy and strengthen democracy by organizing scholars working in America's colleges and universities, and connecting scholars and their research to policymakers, citizens associations, and the media.

SSN members spell out the implications of their research in ways that are broadly accessible. They engage in consultations with policymakers in Washington DC and state capitals. They make regular contributions to the media and share findings and ideas with journalists and bloggers. Many SSN scholars also work with advocates and civic organizations to address pressing public challenges at the national, state, and local levels.

SSN members believe that university scholars should share their work with fellow citizens – and they endeavor to further good public policymaking and responsive democratic government. Beyond these shared values, members hold a variety of views – and SSN as a whole does not endorse any political party, candidate, or specific policy position. Each SSN scholar takes individual responsibility for signed contributions and choices about civic engagement.



July 23, 2014

The Honorable Charles E. Schumer
Chairman
Senate Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Senate Committee on Rules & Administration
305 Russell Senate Office Building
Washington, DC 20510

Re: The DISCLOSE Act (S.2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections

Dear Chairman Schumer, Ranking Member Roberts and Members of the Senate Committee on Rules and Administration:

These remarks are submitted on behalf of the Campaign Legal Center regarding the July 23, 2014 hearing on the Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), S.2516. Now that a revised DISCLOSE Act has once again been introduced, we applaud the Committee for acting quickly to hold a hearing on this important bill. Given the current lack of disclosure of the sources of funds used by outside spenders in political campaigns, we urge the Committee to support and expedite passage of the DISCLOSE Act in order to ensure voters have full information as to the sources of funding that influence federal elections.

The DISCLOSE Act is of particular urgency due to the mushrooming of outside spending in elections combined with the Federal Election Commission's (FEC) ongoing efforts to narrow the coverage of the disclosure rules. The FEC's disclosure regulations—which are clearly contrary to the legislative intent of Congress—and the Commission's failure to enforce the law as intended have largely created this problem. The good news is that this is a problem that can be fixed legislatively, and in fact was addressed by Congress when it passed the Bipartisan Campaign Reform Act (BCRA) in 2002. The "electioneering communications" disclosure provision of BCRA, which the Supreme Court upheld and is still on the books, says that any "person," including corporations and labor unions, that spends more than $10,000 on TV and radio ads mentioning candidates in close proximity to elections must file a report with the FEC disclosing the names and addresses of all contributors who contributed $1,000 or more to the person making the ad buy.

The FEC's initial regulation implementing this disclosure requirement tracked the language of the statute. However, the Commission promulgated a revised, and significantly narrowed, regulation in 2007 after the Supreme Court's decision in *FEC v. Wisconsin Right to Life* (*WRTL*), a case that had nothing to do with disclosure. In its 2007 rule, the FEC provided that a corporation, including a 501(c)(4) social welfare corporation, that spends more than $10,000 on electioneering communication no longer has to disclose the names of all contributors who contributed $1,000 or more but, instead, need only disclose the names of contributors who specifically designated their contributions for the purpose of furthering electioneering communications. Not surprisingly, in the wake of the FEC's 2007 gutting of the electioneering communication donor disclosure requirement, there has been a sharp drop in the disclosure of donors to groups spending money on electioneering communication. Donors simply refrain from specifically designating their contributions for electioneering communications and, as a result, they remain anonymous to the voting public.

To date, the FEC has gotten away with this blatant override of Congressional intent to require donor disclosure for electioneering communications. The lack of disclosure of the true funders of outside spending deprives citizens of critical information regarding who is trying to influence their vote. The Supreme Court has consistently upheld the constitutionality of campaign finance disclosure provisions, supporting Congressional efforts to provide voters with timely and comprehensive information regarding the sources of funding of election spending. The vast amount of money from anonymous sources channeled through various organizations that is being spent in our elections is contrary to the high value the Supreme Court has placed on disclosure within our democratic system of government. Beginning with the Court's foundational campaign finance decision, *Buckley v. Valeo*, the Court has recognized the value of disclosing the sources of campaign spending:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. 1, 66-67 (1976) (internal citations and quotation marks omitted).

In 2003, when the Court upheld BCRA's electioneering communications disclosure requirements, it dismissed attacks on the disclosure requirements and again emphasized the fundamental value of disclosure to the democratic process:

> 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. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

McConnell v. FEC, 540 U.S. 93, 196-97 (2003) (quoting the district court's decision, *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)) (internal citations omitted).

The magnitude of money from undisclosed sources has rapidly increased since the Supreme Court's problematic 2010 ruling in *Citizens United v. FEC*. Although the *Citizens United* decision opened the door for corporations and labor unions to spend money to influence elections, the Supreme Court upheld challenged disclosure provisions 8-1 and wrote strongly in favor of disclosure and the Court's expectation that the funders of outside spending would be disclosed:

> 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 corporations interest 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; 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, 558 U.S. 310, 371 (2010). The lack of disclosure in the current system is contrary to the Court's assumption in *Citizens United* that the real sources of funding of outside spending in elections would be publicly disclosed. In this year's *McCutcheon v. FEC* decision, the Court again extolled the importance of disclosure and noted the utility of modern technology in facilitating public access to donor information:

> [D]isclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election related spending. . . . With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

McCutcheon, 134 S. Ct. 1434, 1459-60 (2014) (internal citations omitted). How can shareholders determine whether election related spending advances the interest of a corporation, or the electorate obtain information about the sources of election related spending, when that spending is funneled through outside groups that do not disclose the source of the funds they are using to influence elections?

The technology currently exists to provide voters with real time information about the true sources of outside spending. However, the reality is that voters simply cannot access this important information. Expenditures on political ads paid for by outside groups that did not disclose the source of the money used for election activity quadrupled between 2008 and 2012, increasing from $69 million to more than $310 million (Figure I). Simultaneously, the portion of outside spending accompanied by full donor disclosure decreased from 65 percent of spending to 41 percent (Figure II).*

Figure I. Outside Spending by Groups Not Disclosing Donors

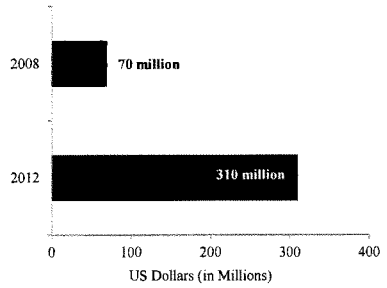
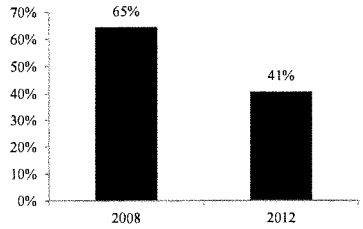


Figure II. Outside Spending Accompanied by Full Donor Disclosure



The DISCLOSE Act addresses this troubling lack of donor disclosure on several fronts. Under the Act, covered organizations (including corporations, all 501(c) organizations except 501(c)(3)s, labor organizations and 527 organizations) spending an aggregate amount of $10,000 or more in an election cycle must disclosure such expenditures to the FEC within 24 hours of spending in excess of the $10,000 threshold. This disclosure filing must identify all sources of

* Numbers courtesy of the Center for Responsive Politics, *available at* http://www.opensecrets.org/outsidespending/disclosure.php.

donations that exceed $10,000. Currently groups paying for political ads may claim that their "major purpose" is something other than participating in federal elections, and therefore not register or report with the FEC as political committees or with the IRS as 527 organizations. Instead, they file as 501(c)(4)s, 501(c)(6)s or other non-profit legal entities. Because they are permitted to keep secret the names of their large donors when they publicly release their tax returns filed with the IRS, and because they claim that they received no funds designated for political advertisements, they do not report their donors to the FEC either.

The Act also expands the amount of time covering electioneering communications. The electioneering communication disclosure provisions will apply to any broadcast, cable, or satellite communication that clearly refers to a House or Senate candidate and airs during the period beginning on January 1 of an election year through the general election. Likewise, the electioneering communication disclosure provisions will apply to such communications that clearly refer to a Presidential or Vice Presidential candidate and air during the period beginning 120 days before the first primary election, caucus, or preference election through the general election. Under current law, "electioneering communication" is defined to include only advertisements aired within 30 days of a primary election and 60 days of a general election. Expanding the periods covered by the electioneering communication disclosure requirements will capture more information about the funders of political ads during the long campaign season.

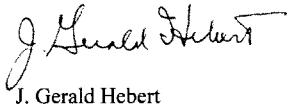
Most critically, the Act requires the disclosure of transfers by covered organizations to other persons or organizations when those funds are intended to be used to make campaign-related disbursements. This provision prevents the laundering of money through shell organizations for the purpose of keeping campaign-related spending anonymous. This goes to the heart of the current problem of vast sums of outside spending in our elections using funds from undisclosed donors. Currently, organizations that are required to disclose their contributors, such as Super PACs, may accept funds from organizations that are not required to disclose their donors, such as 501(c)(4) organizations. This has essentially made disclosure optional. Donors who want to keep their political contributions anonymous may simply give their money to a 501(c)(4) that then funnels the money to a Super PAC. The Super PAC must disclose the contribution from the (c)(4), but does not have to disclose the original source of the funds. The DISCLOSE Act will shed light on these shadowy transactions by requiring the (c)(4) to disclose its donors who gave $10,000 or more—allowing the public to understand the original source of funding of campaign advertising. The Act will provide voters with critical information about who is funding communications supporting or opposing candidates.

The disclosure requirements for outside spending are woefully inadequate and do not provide voters with information they need to make informed decisions about federal candidates. It is time to bring the statutes governing campaign finance disclosure in line with the Supreme Court's repeated emphasis on the importance of disclosure in our system of government. It is time to utilize modern technology and the powerful disclosure tools it provides to give voters timely and meaningful information about the sources of funding in our elections. We urge the Committee to report out this legislation expeditiously and to oppose any efforts to significantly weaken the bill. Disclosure should be the cornerstone of our campaign finance system. We hope

the Committee will take this opportunity to begin the process of restoring this important foundation.

Sincerely,

Trevor Potter
President & General Counsel



J. Gerald Hebert
Executive Director & Director of Litigation

HEARING—NOMINATIONS OF MATTHEW MASTERSON AND CHRISTY McCORMICK TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION

WEDNESDAY, SEPTEMBER 10, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 9:58 a.m., in Room SR–301, Russell Senate Office Building, Hon. Angus S. King, presiding.

Present: Senator King.

Staff Present: Kelly Fado, Staff Director; Stacy Ettinger, Chief Counsel; Ben Hovland, Senior Counsel; Sharon Larimer, Professional Staff; Julia Richardson, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Correspondent; Jeffrey Johnson, Clerk; Annalee Ashley, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Staff Director; and Paul Vinovich, Republican Chief Counsel.

OPENING STATEMENT OF SENATOR KING

Senator KING. This hearing will come to order. Welcome.

On today's agenda is the consideration of the nomination of Mr. Matt Masterson and Ms. Christy McCormick to be members of the Election Assistance Commission. Both of our nominees have strong backgrounds in election law and procedure. Mr. Masterson, recommended by Speaker John Boehner, currently serves as Deputy Chief of Staff and Chief Information Officer at the Ohio Secretary of State's Office. Ms. McCormick, recommended by Senate Minority Leader Mitch McConnell, currently serves as a Department of Justice trial attorney with the Voting Section of the Civil Rights Division.

Mr. Masterson and Ms. McCormick, I would like to welcome both of you here today, and I congratulate you on your nomination to be members of the Election Assistance Commission.

Mr. Masterson, I understand your wife, Joanna, and brother, Justin, are here with you, and we would like to welcome them. And, Ms. McCormick, your daughter, Elizabeth, and sister, Cecily, are here. The committee would like to welcome your family members and are very happy that they could join you here today. We are also pleased to have members of the Election Assistance Commission staff with us today as well.

Following the Presidential Commission on Election Administration's release of its final report in January of this year, the Rules Committee has held five hearings on election administration. These hearings focused on the bipartisan best practice recommendations of the Presidential Commission.

Election officials and experts from around the country have testified before us on many of the most successful efforts to improve how our elections are run. I am particularly enthusiastic about this

project because I believe, particularly as a former governor, that too often, we have good solutions worked out in individual States and nobody knows about them. So, best practices—sharing best practices, I think, is something that we should always strive to do more of.

A frequent topic of concern at the hearings that we have had was the EAC, and it has been operating, as you know, without a quorum of Commissioners since late 2010 and has not had Commissioners sitting since December of 2011. This Commission was established by the Help America Vote Act in 2002, HAVA. The EAC was created to be an independent, bipartisan commission charged with a number of important responsibilities, including developing guidance for State and local election officials to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration.

Without a quorum of Commissioners, however, the EAC has been severely limited in its ability to fully function as Congress intended. Additionally, the advisory boards, composed of State and local election officials and members of the broader elections community, have been unable to convene and do their work.

Despite these severe limitations, during the election administration hearing series, this committee repeatedly heard about the value and importance of the EAC's work. Several election experts discussed how important the Election Administration and Voting Survey is to understanding how elections are administered across the country. Beyond the survey, it was evident that many of the State innovations that were held out as best practice recommendations to be replicated were made possible because of EAC grant programs. We also heard about the need for a fully functioning EAC to help address the growing challenges of aging voting systems and the need for adoption of new voting system guidelines.

The Presidential Commission's report and this committee's hearings made it clear that the EAC's role as a clearinghouse of election information and best practices is needed and should be expanded. In short, the EAC has work that needs to be done, and today, we have an opportunity to take the next step in helping this agency function as it was intended under the Help America Vote Act.

I am pleased that we have two very well qualified candidates who have been nominated and are testifying before the committee today. Your experience and background in elections will undoubtedly help the EAC to move forward.

I hope we can move your nominations swiftly and create a fully functioning EAC that our elections and voters deserve. It is a very tight schedule here, as you know, during the next several weeks, but we are hopeful that we will be able to move your nominations before Congress recesses later in September.

Senator Roberts, our Ranking Member, could not be here this morning, but if he has opening remarks, we will certainly see that they are put into the record, without objection.

So, with that as background, we will hear from our nominees in alphabetical order.

I have to stop and tell an amusing story about elections. In Maine, as in most States, the ballot order is determined alphabeti-

cally. Mr. Bailey is always on the ballot ahead of Mr. Mitchell. One year, there was a bill in the Maine legislature—this was many years ago—to change that rule to make it random, to make the order selected at random in terms of how you would appear on the ballot.

In the Maine House of Representatives, we have two large lighted tally boards that tally the votes of the members of the House, yes or no, on each issue that comes before us. And, lo and behold, when this issue came before the House of Representatives to go from the alphabetical system to the random system, all the names in alphabetical order of the members of the House on the left side of the body voted no and all the people on the right side, who were lower down in the alphabet, voted yes. To my knowledge, it is the only time that has ever happened in the history of the Maine legislature.

[Laughter.]

Senator KING. So, thank you, Mr. Masterson, and if you will proceed, I look forward to your testimony.

TESTIMONY OF MATTHEW V. MASTERSON, NOMINATED TO BE A MEMBER OF THE ELECTION ASSISTANCE COMMISSION

Mr. MASTERSON. Well, thank you, Chairman King, and good morning. Thank you for holding this hearing on my nomination to serve on the United States Election Assistance Commission.

I also want to thank Speaker Boehner for submitting my name to President Obama for consideration and to thank the President for nominating me. It is truly an honor.

I am pleased to have the opportunity to testify on my qualifications and interest in becoming an EAC Commissioner. My career in elections started, appropriately, at the U.S. Election Assistance Commission after I graduated from law school. Since that time, I have worked with both State and local election officials to serve voters primarily through the use of technology.

While at the EAC, I worked with election officials, voter advocates, computer scientists, and manufacturers to help create the EAC's voting system testing and certification program. This program was the first of its kind, designed to allow States to voluntarily utilize federally accredited test laboratories to have their systems tested and certified to a robust set of standards.

In 2011, I left the EAC to return home to Ohio and worked for the Ohio Secretary of State, where I currently serve as Deputy Chief of Staff and Chief Information Officer. The opportunity to work in the most important swing State in the country during a Presidential election cycle was a dream come true. In my time in Ohio, I have continued leveraging technology to improve services to election officials and voters. I have helped implement several programs that have modernized elections in Ohio and truly made it a national leader, including an online change of address system, a data sharing program with the Ohio Bureau of Motor Vehicles, and more user-friendly voter information tools. All of these have helped to make the voting process more accessible and more usable for voters.

For the past three years, I have also served on the Executive Board of the National Association of State Election Directors and

as a member of the EAC's Technical Guidelines Development Committee. I also testified in front of the President's Commission on Election Administration regarding the aging voting equipment the States are currently using and the future of voting technology.

State and local election officials across the country are in an incredibly tough position. Most of their systems are a decade or more old, which is ancient by information technology standards, and will need to be replaced in the very near future. Recognizing that voters will lose confidence in a voting process that uses 1990s technology instead of modern technology, election officials are craving innovation in election systems. I am fully invested in trying to bring about these kinds of innovations, and if confirmed, I believe I can continue that work at the EAC.

Finally, I want to thank some of the people who have helped me along the way. First, I want to thank all of the election officials across the country whom I have worked with and learned from. You all do a tremendous service to this country that too often goes unappreciated. I especially want to thank those election officials who have patiently mentored me along the way, teaching me that every detail matters in elections. Thank you to the team at the Ohio Secretary of State's Office, especially Secretary Husted, for welcoming me home and giving me an opportunity to run elections in Ohio.

To my Mom, Pam, my brother, Brian, and my twin brother, Justin, who is here with me today, thanks for helping me get to a place where I am doing something I truly love.

To my wife, Joanna, who is also here with me today, and my two children, Lilah and Nathaniel, thank you for all of your support.

Finally, I want to thank my father, Vince Masterson, who passed away on Sunday, and who I know was very proud of this opportunity.

Chairman King, I thank you for consideration of my nomination and will be happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Masterson was submitted for the record:]

Senator KING. Thank you.

We will hear from Ms. McCormick first, and then we will have questions for both of you. Ms. McCormick.

TESTIMONY OF CHRISTY A. McCORMICK, NOMINATED TO BE A MEMBER OF THE ELECTION ASSISTANCE COMMISSION

Ms. MCCORMICK. Good morning, Chairman King. I am pleased to be here to discuss my nomination to serve on the United States Election Assistance Commission.

I thank Senate Minority Leader Mitch McConnell for submitting my name to the President and to President Obama for nominating me. I am deeply honored that you are considering me for a position of trust in our government.

I appreciate the opportunity to testify on my background and qualifications to become an EAC Commissioner. My interest in elections started as a young adult, when my parents involved our family in working on campaigns and hosting fundraisers for candidates at our family home in Massachusetts. I was excited to be

able to cast my first vote at the age of 18 in New York, and found myself running for office in Michigan by the age of 20. I volunteered to be an Assistant Voter Registrar in Connecticut in the 1980s, and again in Virginia when I moved there in the 1990s. Having been involved in elections and voting in several States early on in my life gives me a unique perspective.

In 2006, I joined the U.S. Department of Justice Voting Section, where I continue to serve as a trial attorney. My work at the Justice Department involves investigating and prosecuting violations of Federal voting statutes, including the Voting Rights Act, the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, also known as UOCAVA, and the MOVE Act, most of which have some nexus with the work of the EAC.

I have been privileged throughout my career at the Justice Department and at the Office of the Virginia Attorney General to contribute to some very important cases and to have had an impact on First Amendment, civil rights, and voting jurisprudence.

In addition to litigation, I also conduct election monitoring for the Justice Department and have observed numerous elections and polling places all across America.

In 2009, the Office of the Deputy Attorney General sent me on a year-long detail to Iraq, where I served as an attorney advisor and Acting Deputy Rule of Law Coordinator. The Office of the Rule of Law Coordinator was embedded in Embassy Baghdad and was responsible for collaborating with the Department of State, the U.S. military, and other Federal agencies, along with our international partners, on rule of law initiatives. We provided advice and support to Iraqi ministries and legal institutions, including the Higher Judicial Council, the General Secretariat for the Council of Ministers, the Ministries of Justice, Interior, Human Rights, and Women's Affairs, among others. I also served as a liaison to parallel ministries in the Kurdish region.

One of my main and most exciting assignments was to serve as the Justice Department's expert on elections in Iraq. Along with our State Department colleagues, I worked with the Iraqis on their 2010 national elections. This included providing assistance and advice to the independent High Electoral Commission during the run-up to the elections, participating in a team observing the elections in the Wasit Province, and witnessing the extensive 12-day election recount. I was deeply impressed to see a large number of women voting on election day and very encouraged by watching families bring their children into the polls to teach them about democracy and to dip their fingers in the electoral ink. It is my deepest hope that the idea of democracy and fair elections will still be possible in Iraq in the future.

As for elections here in the United States, if confirmed, I will do my best at the EAC to assist our 8,000 jurisdictions in fairly and smoothly administering their elections. We have much work to do to assure that all eligible voters are able to cast their votes in elections that are secure and in which the electorate can place its full confidence.

While the EAC is not tasked with rulemaking or running elections, it is in a position to provide information, share best practices, collect data for election analysis, and offer programs that support

modern elections such that the public has full access to the ballot box and trust in our electoral outcomes. I believe this is essential to the health of our Republic and I would like to continue this important work at the EAC.

As with all of us, I did not come to this place without the help of many others. I want to thank the many people I have worked with and for, including Justice Elizabeth McClanahan, Professor Michael I. Krauss, Commissioner Judith Williams Jagdmann, former Solicitor of Virginia William Hurd, many of my current and former colleagues in the United States Department of Justice and in the Virginia Office of the Attorney General who have provided me with amazing opportunities and helped me hone my legal abilities.

Thank you, also, to the election officials I have met and worked with across the country over the past eight years, who work long hours, deal with often complex logistics, and do so many things that go unnoticed in running our elections.

Thank you to my dear friends, some of whom are here today, with whom I am able to debate and discuss the issues of our day and who provide me with love, support me with prayer, and encourage me with many laughs.

Thank you to my family, especially my parents, Keith and Carol Cutbill, who introduced me to campaigns and elections; my sisters, Catherine, Laura and Lynda; my brother, Chaz, and his wife, Corie; my nephew, Parker, and niece, Bentley. Special thanks to my sister, Cecily Cutbill, who is here with me today, and to her husband, Christopher Thorne, my niece, Caroline, and nephew, William, who have sacrificially housed me and fed me. Finally, my deepest love and appreciation go to my beautiful daughter, Elizabeth Mead, who is here today from California. Thank you for your love and for inspiring me daily.

Chairman King, if confirmed, I am prepared to do my best to serve our country as an EAC Commissioner, and in that role, to commit to appear and testify before Congress upon its request, and I am happy to answer any questions you may have.

[The prepared statement of Ms. McCormick was submitted for the record:]

Senator KING. I have two preliminary observations. The first is, I want to be sure the record shows my appreciation to Speaker Boehner and Leader McConnell for finding you two extraordinarily well qualified, thoughtful people, and I want to thank them publicly for putting your names forward to the President and thank the President for making those nominations.

The second observation is that Senators are often in a position of asking questions to people who know more about the subject matter than they do, and that is certainly true today, but I am going to forge ahead anyway and ask a few questions of each of you, not in any spirit of trying to trip you up or embarrass you in any way, but in a genuine pursuit of information and your thinking about this job that you are proposed to embark upon.

Mr. Masterson, you mentioned about technology and how many jurisdictions are upgrading their technology. It seems to me that one of the challenges is to assure people that their vote is going to be counted and that there is no mischief to be had when there is

not a piece of paper. In my hometown, we vote. There is still a piece of paper and we fill in an arrow—I am sure you are familiar with that style—and then it goes into a machine. But, there is a certain confidence that there is something tangible if all else fails that can be reviewed.

How do we build a technological system that the public can have confidence in when we hear about Home Depot or Target being hacked or something like that? Our election process and the integrity is so important to public confidence in our democracy. How do we weigh the desire for technology and efficiency against the risks of technological failure that would impede or impair the confidence of the public in the voting process?

Mr. MASTERSON. Well, thank you for the question, Mr. Chairman. It is a great question, and the answer, not surprisingly, is one that election officials across the country constantly battle with. That is, the convenience of the technology with the assurance that every vote is counted as cast. And, that is the role that I hope to play in going to the Election Assistance Commission, is disseminating best practices that these election officials across the country have worked on and developed to deal with that very struggle of the balance between security and accessibility or usability of the systems in order to provide the best service to voters. Election officials across the country with these systems have found new and innovative ways to provide that assurance that you just talked about, whether it is in the form of a paper ballot or post-election audits, while still providing the level of convenience that voters expect.

Senator KING. Are we moving toward paperless voting systems? Is that the trajectory of the technology?

Mr. MASTERSON. I think that is a really fair question. I think some jurisdictions already have paperless technology and other jurisdictions insist on having the paper ballot. And, so, not surprisingly, like with all things in elections, it is what the voters expect in order to have confidence in the process.

Voters, for instance, in the State of Georgia, embrace their voting system and their touch-screen system for what it is, and that is what the election officials in the State of Georgia have chosen to use and the voters have undertaken and accept. In Maine, for instance, like you said, the expectation is to have that paper ballot. And, so, that choice and the availability of best practices on how to manage either a paper system or another type of voting system is important so that it can be done well and with integrity.

Senator KING. Well, it seems to me that the integrity, the last word you used, is so important, because all it would take would be one disaster that would undermine confidence nationally. In this day and age, with communications being what they are, if there is one district in one State where the vote totals were 10,250 and there were only 8,000 people in the district, it would be a catastrophe for our democracy, I think.

So, I hope, in your work, you will keep in mind these dual goals of efficiency versus verifiability and confidence. There is an intangible that is so important here, I think. So, I hope that is something that you will bear in mind in your work on the Commission.

Mr. MASTERSON. Absolutely.

Senator KING. Ms. McCormick, I am fascinated by your experience in Iraq. I think that probably the two most important elections in the last several years have been Iraq and Ohio, I mean——

[Laughter.]

Senator KING. Share with me your observations from that experience. Do we have anything to learn from the way that those elections were conducted?

Ms. MCCORMICK. Well, it was, obviously—thank you for the question. It was an interesting experience, a dangerous assignment. There are lessons that we can learn from that experience. One of the things that the Iraqis did exceptionally well was transparency. Everybody knew who was able to vote in a particular polling place because they actually listed the names of all voters outside the polling place. And, they had a very good system where they had a center where people could go if their names were not found so that they could be sent to the correct location so that their ballot could be cast and counted. The Iraqis did, I think, a better job, in my view, than some of our own jurisdictions that I have witnessed. So, I do believe that we have some work to do in some places. We should always be striving to improve our elections.

Hopefully, the Iraqis will get back on track. It is very disconcerting, what is happening there right now. Unfortunately, much of the work that we had achieved has—now almost seems for naught, but hopefully not.

We had some very dangerous travels. We had people running after us with AK–47s and we had—we were not allowed to bring security into the polling booth with us, so, fortunately for us, we do not suffer the same security issues that they do in Iraq.

But, for me, it was a great learning experience, to see the enthusiasm of the people there who were finally able to vote, and hopefully, we can encourage our electorate to get out and vote. I think it is kind of sad that we have elections where very few people vote, and it would be my wish to have everyone vote who is eligible in any given election.

Senator KING. Thank you.

One of the—I am not sure of the jurisdiction in the Commission, but one of the issues that we are facing around the country is not necessarily Election Day itself, but issues like early voting and mail voting, and I am sure at some point there is going to be a proposal for online voting. To what extent does your jurisdiction, does your thinking extend to those kinds of issues, or is it strictly what happens on Election Day?

Ms. MCCORMICK. No, I think we are tasked with looking at everything, information and best practices on everything. The States have the authority to run our elections, the State and local jurisdictions, and as Mr. Masterson mentioned, different States in different jurisdictions do things in different ways. Our role at the Commission will be to collect that information, disseminate best practices, share experiences so that, like you said, some State might have a better way of doing something than another State, and for us to facilitate that communication so that we can all improve elections together based on best practices out in the States and the jurisdictions.

Senator KING. Well, you used the right word, and Mr. Masterson, one of the keys to this is data, I think. Data—it is so hard to get the data that will drive good policy. One of my favorite sayings is, the plural of anecdote is a data.

[Laughter.]

Senator KING. And, I hope that that is an area that you can help and pursue, because, for example, questions about early voting and what are the influences and those kind of things, if we know what percentage of people are voting early, and the more of that information we have, the better decisions we can make on these matters, in my view.

Mr. MASTERSON. Yeah, I completely agree. Fortunately, through the EAC's Election Day Survey and other efforts to collect data, election officials more and more—and I see it in Ohio all the time and we do it in the Secretary of State's Office—are leveraging data to not only look at those numbers, like you suggest, but create efficiencies and cost savings. The reality is, that data really helps inform election officials' decisions in an area where resources are extremely tight and service and expectations are extremely high. And, that data is what helps inform them. And, I know there will be election officials across the country thrilled that you are bringing up the need for good data and constant improvement to that data.

Senator KING. Well, one example would be voting patterns by hour so that you knew how to staff and you could staff to the demand. And, if you have a historic record of when people are more likely to show up with some real substantial basis, you can—that, in itself, would improve the efficiency because you would be able to move more people through during those hours when the demand is the highest.

Mr. MASTERSON. Absolutely. We have election officials in Ohio who literally sit with a stopwatch to time how fast it takes their clerks to check in registrations to figure out just that, how much time and staff do we need to do certain tasks. So, that data speaks directly to informing the process and creating both better services for voters and greater efficiency.

Senator KING. Well, let me ask a sort of concluding question of both of you, which is pretty broad. Ms. McCormick, what are your priorities as you go, as you have thought about this job, as you go in? What is it you want to focus on? Where do you think the gaps are? I mean, you are coming to this with huge experience and you must have some view of what—and, you are going to be in charge, I mean, with the other two Commissioners, you are going to be setting the agenda. Where do you see the need for action and work by the Commission?

Ms. MCCORMICK. Thank you, Senator. I think the first thing that we need to do, because the Commission has been without a quorum and Commissioners for so many years, I think the very first thing we need to do is to review the roles and the responsibilities of the agency and its employees and to figure out exactly where the agency stands now, what our statutory duties are, and where we should be going forward. I think that will take some time. There is a lot to be done, but I am excited about it and I think that we can serve our clients once we get up and running again.

It is hard for me to say right now exactly what the first priority would be, other than to figure out what exactly has been going on at the Commission for the last several years and how it matches up with what we are supposed to be doing under the statute.

Senator KING. Good. Thank you.

Mr. Masterson.

Mr. MASTERSON. Yeah. Thank you, Mr. Chairman. And, the first thing I would look to do is begin the process of updating the voting system standards, which is one of the core tenets in HAVA for the role of the EAC. As I mentioned in my opening remarks, election officials are at the end of life for their voting systems and the voting system standards have not been substantially updated in quite some time. And, so, to begin that process and begin the work to update the voting system standards so that election officials can begin to see the innovation that they desire would be the first point I would focus on.

Senator KING. Any additional comments that either of you would like to make for the record before we close the hearing?

Ms. MCCORMICK. No, Senator. I have no more comments. Thank you.

Senator KING. Thank you.

Mr. MASTERSON. No, Mr. Chairman. Thank you for your time.

Senator KING. Well, thank you both, and I sincerely appreciate your willingness to take on this task, particularly given your extraordinary credentials. It is an important one. It is at the heart of our democracy and our system, and public confidence is so important. There is a little bit of a dilemma. Part of public confidence is being sure every vote counts. Part of public confidence is not having to stand in line for three hours and feel that there is some—that voting is a huge chore. So, we have to find the right balance, and I certainly appreciate your willingness to step forward and take on this responsibility.

We will hold the record of this hearing open for, I believe it is 24 hours, the close of business tomorrow, Thursday, September 11, for additional statements and post-hearing questions submitted in writing for the nominees to answer.

There is no further business to come before the committee. I declare this meeting adjourned.

[Whereupon, at 10:29 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Senator Pat Roberts
Ranking Member – Senate Rules and Administration Committee
Statement for Election Assistance Commission Nominees
Confirmation Hearing
September 10, 2014

Thank you Mr. Chairman.

I appreciate your willingness to call this hearing to move these nominees forward.

I want to thank the nominees for being here today and for their willingness to serve.

They are both extremely well qualified and very capable.

Their experience will be a great benefit to the Commission and I am glad they have accepted this challenge.

As you know, there is an ongoing debate about the future of the Election Assistance Commission (EAC). While I expect that debate to continue, we can agree that as long as the EAC exists, it must operate in a bi-partisan fashion.

Confirmation of these two nominees along with the others that have previously been reported by the Committee will maintain the necessary statutory balance at the Commission.

I look forward to the testimony of the witnesses and thank them again for being here today.

Committee on Rules and Administration
Statement by Mr. Matthew Masterson, Nominee for Commissioner
Election Assistance Commission
Wednesday September 10, 2014

Good morning Chairman Schumer, Ranking Member Roberts and members of the committee. Thank you for holding this hearing on my nomination to serve on the United States Election Assistance Commission (EAC). I also want to thank Speaker John Boehner for submitting my name to President Obama for consideration, and to thank the President for nominating me. It is truly an honor.

I am pleased to have the opportunity to testify on my qualifications and interest in becoming an EAC Commissioner. My career in elections started, appropriately, at the U.S. Election Assistance Commission after I graduated from law school in 2006. Since that time, I have worked with both state and local election officials to serve voters primarily through the use of technology. While at the EAC, I worked with election officials, voter advocates, computer scientists and manufacturers to help create the EAC's Voting System Testing and Certification program. This program was the first of its kind—designed to allow states to voluntarily utilize federally accredited test laboratories to have their systems tested and certified to a robust set of standards.

In 2011, I left the EAC to return home to Ohio and work for the Ohio Secretary of State, where I currently serve as Deputy Chief of Staff and Chief Information Officer. The opportunity to work in the most important swing state in the country during a presidential election cycle was a dream come true. In my time in Ohio, I have continued leveraging technology to improve services to election officials and voters. I have helped implement several programs that have modernized elections in Ohio and truly made it a national leader, including an online change of address system, a data sharing program with the Ohio Bureau of Motor Vehicles and more user-friendly voter information tools. All of these have helped to make the voting process more accessible and usable for voters.

For the past three years, I have also served on the executive board of the National Association of State Election Directors (NASED) and as a member of the EAC's Technical Guidelines Development Committee (TGDC). I also testified in front of the President's Commission on Election Administration (PCEA) regarding the aging voting equipment states are currently using and the future of voting technology.

State and local election officials across the country are in an incredibly tough position; most of their systems are a decade or more old, which is ancient by information technology standards, and will need to be replaced in the very near future. Recognizing that voters will lose confidence in a voting process that uses 1980s technology instead of modern technology, election officials are craving innovation in election systems. I am fully invested in trying to bring about these kinds of innovations, and if confirmed, I believe I can continue that work at the EAC.

Finally, I want to thank some of the people who have helped me along the way. First, I want to thank all of the election officials across the country whom I have worked with and learned from. You all do a tremendous service to this country that too often goes unappreciated. I especially want to thank those election officials who have patiently mentored me along the way, teaching me that every detail matters

in elections. Thanks to the team at the Ohio Secretary of State's office, especially Secretary Husted, for welcoming me home and giving me an opportunity to help run elections in Ohio. To my family—especially my parents, Vince and Pam, my brother Brian and my brother Justin, who is here with me today—thanks for helping me get to a place where I'm doing something I love. Finally, to my wife Joanna, who is also here today, thank you for all of your support.

Members of the committee, I thank you for your consideration of my nomination, and will be happy to answer any questions you may have.

Matthew Vincent Masterson

Matthew V. Masterson is Deputy Chief of Staff and Chief Information Officer for the Ohio Secretary of State, positions he has held since 2013. He previously served as Deputy Director of Elections from 2011 to 2013. Prior to joining the Ohio Secretary of State's office, Mr. Masterson held multiple roles at the Election Assistance Commission from 2006 to 2011, including Deputy Director for the Testing and Certification Division, Attorney and Advisor, and Special Assistant and Counsel to Chair Paul DeGregorio. Mr. Masterson received a B.S. and a B.A. from Miami University and a J.D. from the University of Dayton School of Law.

Committee on Rules and Administration
Statement by Ms. Christy McCormick
Nominee for Commissioner, Election Assistance Commission
Wednesday September 10, 2014

Good morning Chairman Schumer, Ranking Member Roberts and members of the committee. I am pleased to be here to discuss my nomination to serve on the United States Election Assistance Commission (EAC). Thank you Senate Minority Leader Mitch McConnell for submitting my name to the President, and to President Obama for nominating me. I am deeply honored that you are considering me for a position of trust in our government.

I appreciate the opportunity to testify on my background and qualifications to become an EAC commissioner. My interest in elections started as a young adult when my parents involved our family in working on campaigns and hosting fundraisers for candidates at our family home in Massachusetts. I was excited to be able to cast my first vote at age eighteen in New York, and found myself running for a statewide office in Michigan by the age of 20. I volunteered to be an assistant voter registrar in Connecticut in the 1980s, and also in Virginia, when I moved there in the early 1990s. Having been involved in elections and voting in several states early on in my life gives me a unique perspective.

In 2006, I joined the U.S. Department of Justice Voting Section, where I continue to serve as a Trial Attorney. My work at the Justice Department involves investigating and prosecuting violations of federal voting statutes, including the Voting Rights Act, the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the MOVE Act, most of which have some nexus with the work of the EAC. I have been privileged throughout my career at the Justice Department and at the Office of the Virginia Attorney General to contribute to some very important cases and to have had an impact on First Amendment, civil rights and voting jurisprudence. In addition to litigation, I also conduct election monitoring for the Justice Department and have observed numerous elections in polling places all across America.

In 2009, the Office of the Deputy Attorney General sent me on a year-long detail to Iraq, where I served as an Attorney Advisor and Acting Deputy Rule of Law Coordinator. The Office of the Rule of Law Coordinator was embedded in Embassy Baghdad and was responsible for collaborating with the Department of State, the U.S. Military and other Federal agencies, along with our international partners on rule of law initiatives. We provided advice and support to Iraqi ministries and legal institutions including the Higher Judicial Council, the General Secretariat for the Council of Ministers, the Ministries of Justice, Interior, Human Rights, and Women's Affairs, among others. I also served as a liaison to parallel ministries in the Kurdish Region. One of my main, and most exciting, assignments was to serve as the Justice Department's expert on elections in Iraq. Along with our State Department colleagues, I worked with the Iraqis on their 2010 National Elections. This included providing assistance and advice to the Independent High Electoral Commission during the run up to the elections, participating in a team observing the elections in Wasit Province, and witnessing the extensive 12-day election re-count. I was deeply impressed to see a large number of women voting on Election Day and very encouraged by watching families bring in their children to teach them about democracy and to dip their fingers in the

electoral ink. It is my deepest hope that the idea of democracy and fair elections will still be possible in Iraq in the future.

As for elections here in the United States, if confirmed, I will do my best at the EAC to assist our 8,000 jurisdictions in fairly and smoothly administering their elections. We have much work to do to assure that all eligible voters are able to cast their votes in elections that are secure and in which the electorate can place its full confidence. While the EAC is not tasked with rulemaking or running elections, it is in a position to provide information, share best practices, collect data for election analysis, and offer programs that support modern elections such that the public has full access to the ballot box and trust in our electoral outcomes. I believe this is essential to the health of our republic and I would like to continue this important work at the EAC.

As with all of us, I did not come to this place without the help of many others. I want to thank the many people I have worked with and for, including Justice Elizabeth McClanahan, Professor Michael I. Krauss, Commissioner Judith Williams Jagdmann, former Virginia Solicitor William Hurd, many of my current and former colleagues in the United States Department of Justice and in the Virginia Office of the Attorney General, who have provided me with amazing opportunities and helped me hone my legal abilities. Thank you also to the election officials I have met and worked with across the country over the past eight years, who work long hours, deal with often complex logistics, and do so many things that go unnoticed in running our elections. Thank you to my dear friends, with whom I am able to debate and discuss the issues of our day and who provide me with love, support me with prayer, and encourage me with many laughs. Thank you to my family, especially my parents, Keith and Carol Cutbill, who introduced me to campaigns and elections, my sisters Catherine, Laura, and Lynda, my brother Chaz and his wife Corie, my nephew Parker and niece Bentley. Special thanks to my sister Cecily Cutbill, who is here with me today, and to her husband Christopher Thorne, my niece Caroline, and nephew William, who have sacrificially housed me and fed me. Finally, my deepest love and appreciation go to my beautiful daughter Elizabeth Mead, who is here today from California – thank you for your love and for inspiring me daily.

Members of the committee, if confirmed, I am prepared do my best to serve our country as an EAC commissioner and in that role to commit to appear and testify before Congress upon its request. I am happy to answer any questions you may have.

Christy Ann Cutbill McCormick

Christy McCormick is currently a Senior Trial Attorney at the United States Department of Justice, Civil Rights Division, Voting Section and has served in that position since 2006. She was detailed by the Deputy Attorney General to be Senior Attorney Advisor and Acting Deputy Rule of Law Coordinator in the Office of the Rule of Law Coordinator in Iraq from 2009 to 2010, where she worked on the Iraq national elections and on rule of law matters. From 2003 to 2006, she served as a Judicial Clerk to the Honorable Elizabeth A. McClanahan in the Court of Appeals of Virginia. Ms. McCormick was an Assistant Attorney General and Assistant to the Solicitor General in the Office of the Attorney General of Virginia from 2001 to 2003. She was a Judicial Law Clerk in the Seventh Judicial Circuit Court from 1999 to 2001. Ms. McCormick received her B.A. from the University of Buffalo and a J.D. with honors from the George Mason University School of Law, and the William & Mary School of Law.

Founder
Hon. Edward R. Roybal †

Board of Directors

Hon. Pauline Medrano, **Chair**
Member, Texas State National Advisory Commission on Rural Health and Other Populations (TSRH)

Hon. Stephanie Garcia, **Secretary**
Member, Colorado State Board of Human Services

Hon. Cindy Vasquez, **Treasurer**
Fellow International Southern California Fellows

Mr. Lorraine Cortes-Vazquez
CLEP

Mr. Jose Oscar Fernandez
Walmart

Mr. Mike Fernandez
Cargill

Hon. Pete Gallego
Member of Congress, TX

Hon. Rene Garcia
Florida State Senator

Mr. Jack K. Olivarez, Esq.
Partner, Olivarez Madruga

Hon. Alex Padilla, ***NALEO President***
California State Senator

Hon. Justin Rodriguez
Texas State Representative

Mr. Sergio Santana, Esq.
TDCJ

Ms. Monica Teller
Univision Communications Inc.

Hon. Juan C. Zapata
Commissioner, Hillsborough County, FL

Board of Advisors

Hon. Elizabeth "Liz" Archuleta
Chair, National Association of Hispanic County Officials

Hon. Eduardo Blanco
President, National Hispanic Caucus of State Legislators

Hon. Ben Cardenas
Alderman, City of Chicago, IL

Hon. Adriana Cornejo-Marrero
Member, Citizen's Review Panel-Human Services, Advisory Board, Orange County, FL

Hon. Silvana Cruz-Gonzalez
Board President, Santa Clarita Unified School District, CA

Hon. Mario Diaz-Balart
Chair, Congressional Hispanic Conference

Hon. Carmelisel Domingo
Councilor, City of Santa Fe, NM

Hon. John J. Duran
Councilmember, City of West Hollywood, CA

Hon. Julissa Fermin
Councilmember, City of New York, NY

Hon. Ron Garcia
Councilmember, City of Brea, CA

Hon. Sylvia R. Garcia
Texas State Senator

Hon. Ruben Hinojosa
Chair, Congressional Hispanic Caucus

Hon. Guillermo A. Lopez
Chair, National Hispanic Caucus of School Board Members

Hon. Bill D. Lopez
Commissioner, Yolo County of Davis, CA

Hon. Michele Martinez
Councilmember, City of Santa Ana, CA

Hon. Catherine Miranda
Iowa State Representative

Hon. Robert Peña
Board Member, Edinburg Consolidated Independent School District, TX

Hon. Carmen Pilcher
Trustee, Village of Freeport, NY

Hon. Robert Rivera
Councilmember, City of Arlington, TX

Hon. Justin Rodriguez
Texas State Representative

Hon. Ross Romero
Former Utah State Senator

Hon. Aden Sapien
New Mexico State Senator

Hon. Fernando Shipley
Member, Nike Regional Partnership Council, AZ

Hon. Ana Sol Gutierrez
Maryland State Delegate

Hon. T. Angel Trevino
President, Hispanic Elected Local Officials

Hon. Luis Weinberg
Commissioner, City of Bismarck, ND

Executive Director
Arturo Vargas

† *Deceased*

Partnership Council Members

Chairman's Council Member
State Farm®

Southwest Airlines
Toyota Motor North America, Inc.
Univision Communications Inc.
Walmart

November 5, 2014

The Honorable Charles Schumer
Chair
Committee on Rules and Administration
322 Hart Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules and Administration
109 Hart Office Building
Washington, DC 20510

The Honorable Harry Reid
Majority Leader
221 Capitol Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
230 Capitol Building
Washington, DC 20510

Dear Senators Schumer, Roberts, Reid, and McConnell:

On behalf of the NALEO Educational Fund, I write to strongly urge you to hold votes before the end of the 113th Congress in both the Rules and Administration Committee and the full Senate on the pending nominations to seats on the Election Assistance Commission (EAC). The absence of Commissioners serving on this body since January 2012, and the lack of a quorum of three Commissioners since 2010, have prevented the EAC from fulfilling its critical functions of promoting best practices in election administration and directing programs and services under the Help America Vote Act (HAVA) and the National Voter Registration Act (NVRA), to the detriment of all voters across the nation. Throughout the EAC's history, Commissioners have achieved bipartisan cooperation in pursuit of a higher goal: an inclusive and dynamic democracy. Today our nation sorely needs the kind of pragmatic, principled approach to voting and election administration that a balanced, fully-functioning EAC can and will promote.

The NALEO Educational Fund is the leading non-profit organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituency encompasses the more than 6,000 Latino elected and appointed officials nationwide, and includes Republicans, Democrats and Independents. The NALEO Educational Fund is dedicated to ensuring that Latinos have an active presence in our democratic process, and to that end, we engage in a broad range of policy development and voter engagement efforts.

Our organization was at the forefront of efforts to shape the implementation of the Help America Vote Act (HAVA) at the state level and in jurisdictions with large populations of Latino voters. We supported the efforts of the EAC because, in the course of reaching out to and assisting Latino voters with overcoming barriers to casting ballots, we have documented significant confusion and disenfranchisement resulting from inconsistent and inefficient election administration practices across varying jurisdictions. The research-based standards, guidelines and technical assistance promulgated by the EAC are an effective means of guaranteeing equal access to the polls to all qualified voters.

www.naleo.org

National Office
1122 W. Washington Blvd., Third Floor
Los Angeles, CA 90015
Tel. (213) 747-7606
Fax. (213) 747-7664

Houston
1314 Texas Avenue, Suite 410
Houston, TX 77002
Tel. (713) 228-6400
Fax (713) 228-6696

Orlando
8950 Lakehurst Drive, Suite 169
Orlando, FL 32819
Tel. (321) 795-3757

New York
55 Broad Street, Suite 9B
New York, NY 10004
Tel. (212) 480-1918
Fax. (212) 480-1697

Washington, DC
600 Pennsylvania Ave., SE Suite 230
Washington, DC 20003
Tel. (202) 546-2536
Fax. (202) 546-4121

The EAC is vested with many critical responsibilities. Only Commissioners may make decisions about the design of the standard National Voter Registration form mandated by the NVRA. Under HAVA, the EAC is responsible for testing and certification of voting equipment, and for management of a national clearinghouse of election administration resources. This clearinghouse collects fundamentally important information including guidance on topics such as provisional voting and maintenance of computerized statewide voter registration lists, compilations of federal and state laws that affect election administration, and special studies on subjects of Congressional inquiry.

Without any Commissioners in office, the EAC is unable to fulfill its intended role, and the sound functioning of elections throughout the country has suffered as a result. Existing EAC staff do not have authority to write or edit NVRA regulations or respond to states' requests for edits to the National Voter Registration form. In particular, some states have recently pursued and extensively litigated proof of citizenship and voter identification provisions that contravene the intent of the NVRA to extend access to the voter registration process, and go beyond the scope of measures included in HAVA. Changes to the National Voter Registration form to require documentary proof of citizenship would create an unwarranted barrier to Latinos' and other population groups' political participation, as well as additional burdens on election officials and pollworkers.

Although nationwide investigations have revealed that registration and voting by non-citizens almost never occur, tens of thousands of likely legitimate, eligible voters, most of whom report having been born in the United States, have already been prevented from fully participating in elections in states requesting a proof of citizenship requirement, such as Arizona and Kansas. EAC Commissioners are urgently needed to weigh research and evidence from a non-partisan viewpoint, and conclusively settle questions concerning the National Voter Registration form in the manner that most faithfully carries out Congress' intent to promote wider voter engagement.

EAC Commissioners are also urgently needed in place in order to endorse best practices and approve dissemination of advice to election administrators around the country on aspects of election administration that frequently determine whether or not citizens who are English language learners successfully cast ballots, including bilingual pollworker recruitment and training. The NALEO Educational Fund operates a year-round, bilingual hotline (888-VE-Y-VOTA) to assist individuals with registering and voting. Through this medium we receive frequent reports of insufficient and ineffective language assistance in jurisdictions covered by Section 203 of the Voting Rights Act, of pollworkers who do not administer provisional ballots as directed by HAVA, and of other failures to adhere to federal law. Election administrators have an unambiguous need for EAC Commissioners' active leadership around implementation of these laws. Without confirmed Commissioners to formally adopt findings, the EAC is also unable to release election administration research ordered by Congress.

In the wake of significant problems encountered in 2002 with outdated and malfunctioning voting equipment, one of the most critical roles entrusted to EAC Commissioners was the testing and certification of voting systems. Though voting technology has evolved rapidly, and

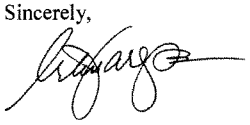
acquisition of new equipment has become increasingly critical as machines purchased with HAVA funding during the George W. Bush Administration age and break, the EAC still evaluates equipment according to 2005 standards that do not reflect the latest upgrades and insights. We are particularly aware of the challenges facing election officials that are upgrading their voting systems, because of our participation in Los Angeles County's Voting System Assessment Project, where we are part of a collaborative assisting the County with designing a system that can meet the needs of one of the largest and most diverse jurisdictions in the nation.

Only EAC Commissioners may approve an updated set of voting system guidelines, and there are no sitting Commissioners to take on this important task. Today's EAC is not only unable to adopt contemporary standards, but also unable to resolve disputes about its voting system certification decisions. Only Commissioners can rule upon any such appeal.

In sum, since 2003 the EAC has played an important role in ensuring that elections evolve with our electorate's needs. The EAC has provided a wide array of successful guidance, such as its Glossary of Key Election Terminology, which has standardized the administration of federal elections to the benefit of voters around the country who today enjoy greater equality of access and treatment regardless of where and when they cast ballots. The EAC translated its election terminology glossary into Spanish and five Asian languages, which has greatly enhanced the ability of local election administrators to provide effective assistance to English language learner citizens. Another instance in which the EAC filled an urgent need was when it published its 2007 materials on best practices for the recruitment and training of pollworkers. These materials have served as an invaluable resource for jurisdictions which serve large numbers of language minority voters, particularly those jurisdictions which do not have extensive experience with such voters and are just starting to develop their language assistance programs. Nonetheless, there is significant work left to do, and the improvements the EAC has brought about are at risk of evaporating the longer the Commission languishes without leadership.

On behalf of Latino officials and the 25 million Latinos eligible to vote, we urge you to advance votes on pending EAC Commissioner nominees. Should you have any questions, or if we can provide any additional information, please contact Doris Parfaite-Claude at dparfaiteclaude@naleo.org or (202) 546-2536. Thank you for your attention to this important matter.

Sincerely,



Arturo Vargas
Executive Director

cc: Congressional Hispanic Caucus
Congressional Hispanic Conference

September 4, 2014

Senator Charles E. Schumer
Chair, Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Senator Pat Roberts
Ranking Member, Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts:

As the Executive Director of the National Disability Rights Network (NDRN), I write to support the nominations of Mr. Matthew Masterson and Ms. Christy McCormick to become members of the U.S. Election Assistance Commission (EAC). NDRN is the national membership association for the 57 Protection & Advocacy (P&A) agencies that advocate on behalf of persons with disabilities in every state, the District of Columbia, and U.S. territories. Through the Protection and Advocacy for Voting Access (PAVA) program, the P&As are charged with helping to ensure the full participation of individuals with disabilities in the entire electoral process, including registering to vote, casting a ballot, and accessing polling places. On behalf of NDRN and the 57 P&A agencies we represent, we believe that a strong EAC is necessary to protect the rights of voters and the electoral process in the United States.

Mr. Masterson and Ms. McCormick would both be strong additions to the EAC. Mr. Masterson currently serves as the Deputy Director for the EAC's Testing and Certification Program, and in this role Mr. Masterson's primary responsibility is the creation of the next iteration of the Voluntary Voting System Guidelines (VVSG). Ms. McCormick is a Senior Trial Attorney in the Voting Section of the Civil Rights Division at the Department of Justice, a position she has held since 2006. Both Mr. Masterson and Ms. McCormick have the understanding of the complex issues of election administration necessary to serve in these important positions.

Voting is a fundamental right, and the Election Assistance Commission has played an important role since its creation to ensure that polling places and the voting process are accessible to people with disabilities. A 2009 Government Accountability Office report found that 28 percent of polling places surveyed on Election Day 2008 did not have impediments that hinder physical access or limit the opportunities for private and independent voting for people with disabilities, an improvement over the 16 percent of polling places without impediments in 2000. Great progress has been made, but there remains much work to be done to improve access to the vote for all Americans.

820 FIRST STREET NE, SUITE 740 • WASHINGTON, DC 20002-4243
TEL: 202.408.9514 • FAX: 202.408.9520 • TTY: 202.408.9521
WEBSITE: WWW.NDRN.ORG • E-MAIL: INFO@NDRN.ORG

For example, a general survey of voters during the 2012 elections found that nearly four times as many voters with disabilities encountered obstacles than did voters without disabilities. As we rapidly approach the 2014 elections and the 2016 Presidential primaries not that far away, the EAC must be allowed to continue to do its important work. The Senate should vote to confirm all the nominations of new Commissioners to strengthen the EAC and allow it to perform its important functions.

I urge the Senate Rules Committee and the full Senate to quickly move to confirm Mr. Matthew Masterson and Ms. Christy McCormick to the Election Assistance Commission. If you have any questions please contact Dara Baldwin, Public Policy Analyst, at (202) 408-9514 ext. 102 or dara.baldwin@ndrn.org.

Sincerely,

Curtis L. Decker, JD
Executive Director

The Leadership Conference on Civil and Human Rights

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

Officers
Chair
Judith L. Lichtman
National Partnership for Women & Families
Vice Chairs
Jacqueline Pata
National Congress of American Indians
Thomas A. Saenz
Mexican American Legal Defense and Educational Fund
Hilary Shelton
NAACP
Secretary
Barry Rand
AARP
Treasurer
Lee A. Saunders
American Federation of State, County & Municipal Employees

Board of Directors
Barbara Arnwine
Lawyers Committee for Civil Rights Under Law
Marcia D. Greenberger
National Women's Law Center
Chad Griffin
Human Rights Campaign
Laura D. Hallman
American Association of University Women
Mary Kay Henry
Service Employees International Union
Sherrilyn Ifill
NAACP Legal Defense and Educational Fund, Inc.
Michael B. Keegan
People for the American Way
Ben Kirby
International Union UAW
Elizabeth MacNamara
League of Women Voters of the United States
Marc Morial
National Urban League
Mee Moua
Asian Americans Advancing Justice | AAJC
Janet Murguia
National Council of La Raza
Debra Ness
National Partnership for Women & Families
Mary Rose Oakar
American-Arab Anti-Discrimination Committee
Terry O'Neill
National Organization for Women
Priscilla Ouchida
Japanese American Citizens League
Marc Pentelle
American Association of People with Disabilities
Anthony Romero
American Civil Liberties Union
David Saperstein
Religious Action Center of Reform Judaism
Shanna Smith
National Fair Housing Alliance
Richard L. Trumka
AFL-CIO
Dennis Van Roekel
National Education Association
Randi Weingarten
American Federation of Teachers

Policy and Enforcement Committee Chair
Michael Lieberman
Anti-Defamation League
President & CEO
Wade J. Henderson
Executive Vice President & COO
Karen McGill Lawson

September 9, 2014

Support a Fully Functioning Election Assistance Commission

The Honorable Charles E. Schumer, Chairman
Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Pat Roberts, Ranking Member
Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Schumer and Ranking Member Roberts:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we urge you to expedite consideration of the Election Assistance Commission ("EAC" or "Commission") nominees before the Committee. The Leadership Conference is committed to supporting and expanding the civil and voting rights of all Americans, and believes a fully functioning EAC is essential to the American voting process.

The EAC does valuable work to ensure the reliability and trustworthiness of our nation's election systems. The Commission plays a major role in collecting accurate and comparable election data. Given our nation's complex and diversified elections administration system, central data collection is critical if we are going to improve our citizens' trust and confidence in election results. In addition, the Commission develops and fosters the training and organization of our nation's more than 8,000 election administrators. Through its many working committees and the work it does to foster robust dialogue among advocates, manufacturers, and administrators, the Commission is improving the administration of elections.

A fully functioning EAC is fundamental to ensuring that the right to vote for all eligible Americans is not compromised and that elections are run efficiently and fairly. By confirming all four nominees, you will begin to revitalize this agency. Without the Commissioners, the state services and election research provided by the EAC will be compromised. The recent Presidential Commission on Election Administration highlighted the importance of a functioning EAC in its report, explaining, "Without a fully functioning EAC to adopt the new standards, many new technologies that might better serve local election administrators are not being brought to the marketplace."

The EAC has also played a central role in improving the accessibility of voting for the country's more than 37 million voters with disabilities. We still have a long way to go to

achieve the Help America Vote Act's (HAVA's) mandate to make voting accessible. The EAC's leadership is essential to continuing the effort to offer all Americans the right to vote privately and independently.

At a time when voters in many jurisdictions must spend hours in line waiting to vote due to broken machines and undertrained workers, we need a full complement of commissioners on the EAC who will ensure that elections are run as effectively as possible, in keeping with HAVA standards. After the upcoming Senate Rules and Administration Committee hearing on the two Republican nominees, we urge you to move quickly to vote the nominees out of Committee and then quickly confirm all four EAC nominees on the Senate floor.

Thank you for your consideration of our position. If you have any questions, please contact Legal Director and Senior Legal Advisor Lisa Bornstein at (202) 263-2856 or Bornstein@civilrights.org.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

verifiedvoting.org

September 9, 2014

The Honorable Charles Schumer
Chairman
U.S. Senate Rules and Administration Committee
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
U.S. Senate Rules and Administration Committee
109 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts;

As you prepare for the Senate Rules Committee meeting on September 10 to consider the nomination of Matt Masterson to serve as Commissioner on the U.S. Election Assistance Commission (EAC), we write to urge your support for his confirmation. As you may know, Verified Voting is a non-partisan, nonprofit organization, and is the nation's leading advocate for secure, reliable and accessible voting systems and election administration practices.

Verified Voting strongly supports the nomination of Matt Masterson to serve as Commissioner on the EAC. Matt's substantial experience working with the EAC where he was previously employed as deputy director of the testing and certification program gives him valuable perspective on needs and priorities of the Commission and the election administration community it serves.

Matt's further experience as a member of the election administration community itself in Ohio has also given him key insights, as he served in the office of the Secretary of State there, in the Elections division. While at the Ohio Secretary's office, he performed valuable research about uniformity of election practices among the counties. Verified Voting has worked with the Secretary's office and with Matt on developing improved protocols for post-election audits to ensure more verifiable elections in Ohio.

We have also found Matt to be a strong communicator and all of his presentations to be extremely informative. Because of his experience and his skill we invited him to speak at a program about the use of the Internet in elections and the cyber security risks involved, as part of a panel presentation we prepared in conjunction with the George Washington University Cyber security and Policy Research Institute (CSPRI). Matt has extensive knowledge of elections law, but more importantly he has built relationships with people involved in all aspects of elections, at local, state and national levels. We believe he would make an excellent and knowledgeable commissioner, who will continue working to ensure integrity in our elections process.

We urge you to support his confirmation during the confirmation hearing and on the Senate floor.

Sincerely,

Pamela W Smith

Pamela Smith
President

BUSINESS MEETING—TO CONSIDER THE NOMINATIONS OF MATTHEW MASTERSON AND CHRISTY McCORMICK TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION

WEDNESDAY, DECEMBER 3, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The committee met, pursuant to notice, at 5:40 p.m., in Room 216, United States Capitol, Hon. Charles E. Schumer, presiding.

Present: Senators Schumer, Durbin, Pryor, Udall, Warner, Leahy, King, Walsh, Roberts, Shelby, Blunt, Cruz.

Staff Present: Kelly Fado, Staff Director; Stacy Ettinger, Chief Counsel; Jay McCarthy, Director of Operations Oversight; Veronica Gillespie, Counsel; Ben Hovland, Counsel; Abbie Sorrendino, Legislative Assistant; Phillip Rumsey, Legislative Assistant; Jeff Johnson, Clerk; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Paul Vinovich, Republican Chief Counsel; Rachel Creviston, Republican Senior Professional Staff; Trish Kent, Republican Senior Professional Staff

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Thank you for coming. We have a quorum of 10 Members so we can proceed. Under consideration are the nominations of Matthew Masterson and Christy McCormick to be Commissioners of the EAC. Is there any further debate on the nominees? No. Then we will now consider the nominations individually. As usual, we will make these voice votes. However, if the Ranking member requests a recorded vote, I will ask the clerk to call the roll. The question is on reporting the nominations favorably to the Senate.

Chairman SCHUMER. First, Mr. Matthew Masterson. Is there a second?

Senator ROBERTS. Second.

Chairman SCHUMER. All those in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. All those opposed, say no.

Chairman SCHUMER. The ayes have it. The nomination of Matthew Masterson is ordered favorably reported to the Senate with recommendation the nomination be confirmed.

Next up, is Ms. Christy McCormick. Is there a second?

Senator UDALL. Second.

Chairman SCHUMER. All those in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. All those opposed, say no.

Chairman SCHUMER. The ayes have it. The nomination of Ms. Christy McCormick is ordered favorably reported to the Senate with recommendation the nominee be confirmed.

Chairman SCHUMER. I'd like to thank everybody for coming and I am going to ask our Ranking Member, who will no longer be the

Ranking Member of anything, if he'd like to make some concluding remarks.

Senator ROBERTS. No, sir.

Chairman SCHUMER. Then the meeting is adjourned.

[Whereupon, at 6:30 p .m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

The Leadership Conference on Civil and Human Rights

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

Officers
Chair
Judith L. Lichtman
National Partnership for Women & Families
Vice Chairs
Jacqueline Pata
National Congress of American Indians
Thomas A. Saenz
Mexican American Legal Defense and Educational Fund
Hilary Shelton
NAACP
Treasurer
Lee A. Saunders
American Federation of State, County, & Municipal Employees

Board of Directors
Barbara Arnwine
Lawyers' Committee for Civil Rights Under Law
Cornell William Brooks
NAACP
Lily Eskelsen García
National Education Association
Marcia D. Greenberger
National Women's Law Center
Chad Griffin
Human Rights Campaign
Linda D. Hallman
AAUW
Mary Kay Henry
Service Employees International Union
Sherrilyn Ifill
NAACP Legal Defense and Educational Fund, Inc.
Jo Ann Jenkins
AARP
Michael B. Keegan
People for the American Way
Elizabeth MacNamara
League of Women Voters of the United States
Marc Morial
National Urban League
Mee Moua
Asian Americans Advancing Justice | AAJC
Janet Murguía
National Council of La Raza
Debra Ness
National Partnership for Women & Families
Mary Rose Oakar
American-Arab Anti-Discrimination Committee
Terry O'Neill
National Organization for Women
Priscilla Ouchida
Japanese American Citizens League
Mark Pernotto
American Association of People with Disabilities
Anthony Romero
American Civil Liberties Union
David Saperstein
Religious Action Center of Reform Judaism
Shanna Smith
National Fair Housing Alliance
Richard L. Trumka
AFL-CIO
Randi Weingarten
American Federation of Teachers
Dennis Williams
International Union, UAW

Policy and Enforcement Committee Chair
Michael Lieberman
Anti-Defamation League
President & CEO
Wade J. Henderson
Executive Vice President & COO
Karen McGill Lawson

November 19, 2014

The Honorable Harry Reid, Majority Leader
The Honorable Charles Schumer, Rules Committee Chairman
United States Senate
Washington, DC 20510

Dear Leader Reid and Chairman Schumer:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations charged with the promotion and protection of the rights of all persons in the United States, we urge you to move now to complete Senate consideration of the three currently nominated members of the Election Assistance Commission (EAC) before the end of the year. As you know, the EAC has been an embattled agency that has faced attempts to abolish it and that has lacked the needed number of commissioners for several years. With a group of bipartisan nominees, the Senate now has the opportunity to put the EAC on a firm footing and to demonstrate the importance of fair elections in our democracy.

The Commission is charged with developing standards for voting systems, and its certification program helps state and local governments save money by using its oversight role to coordinate with manufacturers and local election officials to ensure that the existing equipment meets its durability and longevity potential. Much of our nation's voting equipment is nearing the end of its useful life, so it is critically important for the EAC to update system standards soon. In addition, the EAC is charged with developing and maintaining the mail voter registration application form for federal elections, which ensures that every citizen has a convenient means to register to vote.

The Commission collects accurate and comparable election data, which has proved invaluable in our efforts to improve election administration nationwide. The Commission develops and fosters the training and organization of our nation's more than 8,000 election administrators, who often look to the EAC's studies for information and guidance. And the EAC has played a central role in improving the accessibility of voting for the country's more than 37 million voters with disabilities.

Our nation still has a way to go to make voting fully accessible to all eligible citizens. The EAC has done valuable work to ensure the reliability and trustworthiness of our nation's election systems, and can do so again. To further that goal, we urge you to complete the confirmation process for the EAC nominees before the end of the year.

Thank you for your consideration. For questions or more information, please contact Lisa Bornstein, Legal Director and Senior Legal Advisor, Bornstein@civilrights.org or (202) 263-2856.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

○