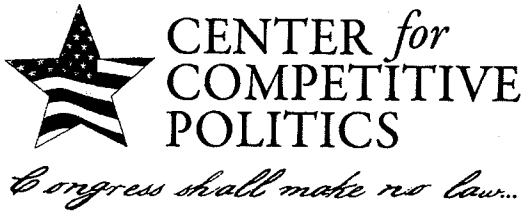

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
(SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES)

The First Amendment and Campaign Finance Reform After Citizens United

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

Testimony of:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

ATTACHMENTS FOLLOW

CENTER for COMPETITIVE POLITICS

BLOG

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

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

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

Really? No, not really.

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

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

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

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

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

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

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

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

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

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latimes.com/news/opinion/la-oe-weissman28-2010jan28,0,1513152.story

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Opinion

Campaign finance ruling's likely impact overblown

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

By Stephen R. Weissman

January 28, 2010

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DAILY KOS

Citizens United: Don't Panic

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

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

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

Before *Citizens United*:

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

After *Citizens United*:

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

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

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

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

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

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

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

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

CENTER *for*
COMPETITIVE
POLITICS

Congress shall make no law...

After Citizens United

A Moderate, Modern Agenda for Campaign Finance Reform

Prepared by the

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Introduction

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

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

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

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

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

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

Brad Smith, Chairman

Sean Parnell, President

1. Remove Limits on Coordinated Party Spending

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

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

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

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

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

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

2. Restore Tax Credits for Small Contributions

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

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

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

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

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

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

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

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

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

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

4. Permit Independent Solicitation and Facilitation of Contribution to PACs

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

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

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

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

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

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

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

5. Adjust Disclosure Thresholds for Inflation

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

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

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

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

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

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

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

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

6. Abolish the Prohibition on Corporate and Union Contributions

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

Summary for Policymakers

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

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

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

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

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

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

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

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