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. 2516) 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.