Response of Lawrence M. Noble
to
QUESTIONS FOR THE RECORD

Senate Judiciary Committee
"Current Issues in Campaign Finance Law Enforcement"
April 9, 2013

Senator Amy Klobuchar

1. **<u>Executive Branch Role</u> - Given that legislative solutions may be difficult to enact, what the most important steps that executive branch agencies, including the FEC, IRS, and the FCC, should take in providing oversight of the activities of Super PACs and other related groups?**

   The most important step is for executive branch agencies to interpret and enforce the laws that Congress has already enacted in a clear, fair and forceful manner consistent with congressional intent.

   While the FEC has never been an overly aggressive enforcement agency, over the last 10 years it has increasingly become dysfunctional, undermining the very law it is charged with enforcing. The six-member Commission routinely splits 3-3 on important issues regarding the regulation of SuperPACs and other groups. Where the FEC has been able to come to some decisions, the result has usually been to officially weaken previously established prohibitions, limitations and disclosure requirements. For example, through both actions, as well as deadlocks preventing action, it has narrowed and effectively nullified rules that would have required more disclosure of the source of funds for political activity. Likewise, it promulgated and then interpreted coordination rules so that the laws prohibiting coordination between candidates and independent expenditure groups that raise and spend unlimited soft money no longer contain meaningful limitations on candidates working closely with these organizations. The FEC's dysfunction has even prevented it from undertaking a rulemaking regarding the long-standing prohibition on direct corporate and union fundraising for candidates. In addition, the FEC has launched few investigations, let alone actually sought enforcement of the law, in recent years.

   The IRS's function is limited to ensuring that certain groups claiming tax exempt status comply with the tax laws. A lack of clarity in the IRS rules regarding what is appropriate activity for 501(c)(4), and a lack of enforcement of the rules that do exist, has led to many organizations undertaking political activity that is prohibited under the Internal Revenue Code. Unless and until the IRS makes clear the tax exempt organizations will not be permitted to undertake political activity that does not comply with the Internal Revenue Code, these organizations will continue to abuse their tax-exempt status.

2. **<u>Rules on Coordination</u> - Could the IRS or the FEC make stronger rules to curb coordination between outside groups and candidates? What could such rules look like?**

FECA has long required that expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate" or his or her agent," be treated as a contribution, and thus subject to limitations and prohibitions of the law. From the Supreme Court's 1976 ruling in *Buckley v. Valeo*, where the Court held that individuals can make unlimited independent expenditures in elections, to its 2010 ruling in *Citizens United*, holding that corporations can also make such unlimited independent expenditures, the Court has always been clear that those expenditures must be undertaken independently of candidates. In fact, the Supreme Court has consistently envisioned a campaign finance world where there is no coordination of any type between a person or entity making an independent expenditure and the candidate. The reality, however, is quite different.

Despite the requirements of the law and the Supreme Court's assumption that independent expenditures would be truly independent of a candidate, the FEC has defined coordination narrowly. The FEC allows the candidate to appear at events and fundraise for an independent expenditure committee (SuperPAC) whose sole function is to support that candidate, even where the committee was started and is run by former staffers for the candidate. Under the FEC rules, unlimited corporate donations can be solicited at a fundraising event featuring the candidate, as long as the candidate employs the fig-leaf of a statement that he or she is only allowed to ask for money under the federal limits and prohibitions. The result is what is commonly referred to as the candidate's own "independent expenditure committee." The fact that that the FEC allows a candidate to have what appears to be the candidate's own independent expenditure committee shows how far the FEC has moved away from the concepts behind the Supreme Court's distinction between coordinated and independent expenditures.

The FEC could begin to rectify the problem by coming up with stronger coordination rules. Among the more important elements of such a rule would be:

- Application to communications that promote or support the candidate, or attacks or opposes his or her opponent, at any time, or refers to the candidate or an opponent of the candidate in a set time period preceding election.

- Actions triggering coordination would include:

    - The organization making the expenditure is directly or indirectly formed or established by, or at the request or suggestion of, or with the encouragement or approval of, the candidate or his or her agent.

    - A candidate or his or her agent raises funds, assists in the raising of funds, or appears at events for an entity making expenditures supporting that candidate or opposing his or her opponent.

- The person or entity making the expenditure has had communications with the candidate or his or her agent about the candidate's campaign needs, fundraising, projects, plans, activities, strategies or messaging.

- The person or entity making the expenditure utilizes someone who is or has been has been employed or retained as a political, media, or fundraising adviser or consultant for the candidate or has held a formal position with a title for the candidate or who has provided professional services involving advertising, messaging, strategy, policy, polling, allocation of resources or fundraising, to the candidate during the election cycle.

While this is not intended to be an all-inclusive list, using this framework would require the separation between the candidate and independent expenditure committees that the Supreme Court assumes exists and the law requires.

3. <u>Impact of Citizens United</u> - There has been a lot of discussion about what the real world impact of *Citizens United* has been and will be going forward.

- **Can you describe in general terms what trends or major shifts you have seen in campaign finance since the Citizens United ruling?**

While *Citizens United*, for the first time, allowed corporations and labor unions to make independent expenditures in federal elections, its impact has been far greater than the legal holding due to how it is being applied. *Citizens United* is directly responsible for those corporate or union communications that expressly advocate the election or defeat of a federal candidate, where the corporation or union makes the expenditure directly and is identified. The rise of SuperPACs, which are political committees that can use corporate or union money to make independent expenditures, is due to *Speechnow.org v. FEC*, a 2010 decision of the U.S. Court of Appeals for the District of Columbia Circuit. SuperPACs, however, still disclose their donors. Therefore, as a direct result of *Citizens United* and *Speechnow*, we have seen corporate and union money used to directly advocate the election or defeat of federal candidates.

However, the biggest impact from *Citizens United* is the tremendous increase in independent expenditures by 501(c)(4) organizations (and other groups) who can now utilize unlimited corporate and union funds for such ads and are not being required to disclose the source of those funds. The fact that they are not being required to disclose the source of their funding is due to the failure of the FEC to enforce the disclosure rules for independent expenditures. The Supreme Court, in *Citizens United*, assumed that the source of funding for these independent expenditures would be disclosed. But the FEC's application of the law has prevented such disclosure.

Additionally, as discussed above, we have seen the rise of the so-called "candidate independent expenditure" groups, which use unlimited individual and corporate funds, relying on the FEC's very narrow application of the coordination rules. Without Congress or the FEC taking action, we should expect to see an increase in this activity.

- **What, in your view, has this done to the public's perception of our elections and our government?**

The current state of our campaign finance system is undermining the public's trust in our government. Rather than a democracy where the government gets its authority from the consent of the governed, the public sees a government that operates based on the consent of well-funded special interests. Regardless of whether an elected official voted for a bill because he or she truly believed in its merits, the public now assumes that Congress is responsive only to those who spend large sums of money to get candidates elected. This cynicism will continue to grow and undermine the public's trust in, and respect for, our elected leaders. Inevitably, people will question the value of their vote if they believe that who is elected is determined by who has the wealthiest backers and that, once in office, elected officials respond to those who funded their campaigns. This undermines the very foundation of our democracy.