ANSWERS OF BRADLEY A. SMITH
CHAIRMAN, CENTER FOR COMPETITIVE POLITICS
to
QUESTIONS FOR THE RECORD
Senate Judiciary Committee
"Current Issues in Campaign Finance Law Enforcement"
April 9, 2013

Senator Amy Klobuchar

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1. Executive Branch Role - 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?

ANSWER:

I would begin by taking issue with the idea that there are "solutions" necessary, implying some "problem." The "problem" appears to be the claim that Americans do not know who is funding elections. However, FEC numbers released in the last week show that this is even less of an issue than it appeared on April 9.

Final FEC statistics released on April 19 are that $7.136 billion was raised and $7.005 billion spent on the 2012 federal elections. Of that, less than $300 million, or less than 4.3 percent, was spent by organizations that do not disclose all of their donors to the FEC. *See* Federal Election Commission, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle*, April 19, 2013.

As I noted in my prepared testimony, even this low percentage exaggerates the percentage of "undisclosed" donors, since in fact many of these spenders and their agenda were well known to the public, such as Planned Parenthood or the U.S. Chamber of Commerce.

Chairman Whitehouse has commented at several points in this hearing alleging a "pattern" of "often" using "shell corporations" to hide a donor's identity. But in fact, there is no evidence of any such pattern or that it is used "often." In fact, there have been three reported cases in the 2012 cycle of using "shell" corporations; in the most widely reported case, that of W. Spann LLC, the donor and his attorney who incorporated the "shell" appear to have been under the impression that the use of a shell was legal, undoubtedly because much of the hysteria about "dark money" has implied that such activity was clearly legal. In each case, the identity of the person funding the "shell" was discovered and publicized in the press within 72 hours. Meanwhile, candidate campaigns, party researchers, and various so-called "good government" groups (many of which do not reveal the names of their donors) routinely review campaign finance reports looking for illegal activity, so there is little reason to think that there are frequent instances of such conduct going undetected. In short, this is simply not a great problem, unless one has the unrealistic expectation that no person will ever violate a law.

The second alleged "problem" appears to be the notion that many groups, when filing with the IRS, are not properly defining their anticipated activities. However, that claim

seems to rest on a legal conclusion that is at best in dispute. It is not at all clear that groups are making, as stated by Chairman Whitehouse, false statements to the IRS. We should be careful about pronouncing people guilty before we gather the facts.

The Federal Election Campaign Act states that the Federal Election Commission "shall have exclusive jurisdiction with respect to civil enforcement" of our nation's campaign finance laws (most violations are civil violations, not criminal). The FEC is designed for this in ways that the IRS, the FCC, the SEC, and other federal agencies are not – in particular through its bipartisan structure and conciliation procedures.

It is particularly important that the IRS not be converted into a campaign finance enforcement agency. The IRS is responsible for the tax code, and the history of presidential abuse of the IRS and the tax code to target political opposition, through both Democratic and Republican administrations, make it important that Congress not look to the IRS to address perceived issues in campaign finance.

Conspicuously absent in this hearing is any claim that the IRS is acting in a political manner now, or failing to efficiently collect revenue due the U.S. government. In short, this hearing, to the extent it involves the IRS, is about turning the IRS into a mechanism to police perceived campaign finance issues. This is a serious mistake.

If we are actually concerned that some organizations are reporting under Section 501(c) of the Internal Revenue Code rather than Section 527 – which has no impact on revenue collection – then the IRS could take action to make its definition of political activity more clear. But there is no evidence that, from a perspective of revenue collection and enforcement, its current definition is a problem. If it be insisted that the IRS change this definition, however, the best and most easily done method would be to adopt the definition used by the FEC, based on numerous Supreme Court cases beginning with *Buckley v. Valeo,* 424 U.S. 1. This would bring the IRS definition into line with the FEC definition which, because it is shaped by Supreme Court precedent, cannot be easily changed. It would also keep the IRS out of partisan politics.

Similarly, the FCC has also been abused over the years for partisan purposes, and ought not be dragged into refighting the wisdom of Supreme Court decisions or used to try to regulate political speech.

As I noted in my prepared testimony, recent efforts to use the FCC and the IRS for campaign finance regulation have not gone well. Similarly, as I and my colleague Allen Dickerson demonstrate in our recent paper, *The Non-Expert Agency: Using the SEC to Regulate Partisan Politics*, 3 Harvard Business Law Review __ (forthcoming 2013, available in draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239987, the SEC is a poor vehicle for campaign finance enforcement.

As for the FEC itself, that agency should move to revise its advice on member solicitations for political action committees, which were written prior to the U.S. Court of Appeal's 9-0 decision authorizing so-called "Super PACs" in *SpeechNow.org v. FEC.* Revising member solicitation rules for Super PACs that support only or predominantly one candidate would largely solve the concerns that have sometimes been voiced about "coordination" between candidates and "Super PACs."

At the present time, there is more disclosure of campaign sources than ever before in our history. We know that disclosure discourages political participation: that is why groups that themselves call for others to disclose their donors, such as the Center for Reform and Ethics in Washington ("CREW") and Public Citizen do not disclose their own donors. (CREW, for example, is currently resisting in federal court a subpoena for the names of its donors, *see* Reply Brief of Non-Party CREW to Quash Subpoena*, Castro v. Sanofi Pasteur Inc., No. 1:12-mc-00629 (D.D.C.)* (arguing that compelled disclosure of donors would have "a potential for chilling the free exercise of political speech and association guarded by the First Amendment.")) The Supreme Court has recognized that danger repeatedly, *see e.g. Buckley v. Valeo,* 424 U.S. at 64 ("We long have recognized that 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."), *Gibson v. Florida Legislative Comm.,* 372 U. S. 539 (1963); *NAACP v. Button,* 371 U. S. 415 (1963); *Shelton v. Tucker,* 364 U. S. 479 (1960); *Bates v. Little Rock,* 361 U. S. 516 (1960);

NAACP v. Alabama, 357 U. S. 449 (1958). Modern research shows that that concern is well founded. *See* Alexandre Couture Gagnon & Filip Palda, *The Price of Transparency: Do Campaign Finance Disclosure Laws Discourage Political Participation by Citizens' Groups?,* 146 Public Choice, 353 (2011); Jeffrey Milyo, *Campaign finance red tape: strangling free speech and political debate*, Institute for Justice (2007).

At this point, I think one would be hard pressed to make a case that non-disclosure of political donors is more of a problem than non-disclosure of journalist sources or Members' private conversations and meetings. There are costs inherent in pressing for still more compulsory disclosure and threatening criminal investigations, tax audits, and denial of otherwise proper broadcast or other licenses, and little benefit to be gained.

Chairman Whitehouse seems to presume in his comments that there is some regularly occurring underlying conduct, such as the alleged false speech mentioned frequently in the hearing, that is illegal and not constitutionally protected. Even if true, it does not mean that the government has carte blanche to investigate and regulate the speech of innocent Americans however it chooses, in the name of preventing an underlying crime. For example, mail fraud is illegal and not constitutionally protected per se, but no one would seriously suggest that we should require all Americans to disclose all items put in the mail to help fight alleged mail fraud.

The failure to consider the actual dimensions of disclosure and the amount of disclosure already required by law; the inability to tie it to corruption of the political process; the

unsupported assertions of large scale use of shell corporations; and the tone of hostility toward the speech and in particular the speakers, noted in several asides about the *Citizens United* case, makes this enterprise begin to look like a partisan witch hunt. This partisan approach and open hostility to dissenting voices will damage, not enhance, public confidence in the integrity of officeholders.

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

ANSWER

Investigations of alleged "coordination" are among the most intrusive that occur in the campaign finance realm. Such investigations typically require review of internal political strategy memoranda, confidential conversations, private polling data, and extensive review of documentary and other evidence.

Thus, it is not surprising that no definition of "coordination" has been devised that satisfies anything close to a majority. Recall that even as so-called "reform" organizations complained that the FEC's coordination criteria were too lax in the 1990s, the Supreme Court struck down the FEC's interpretation of its own coordination rules as unconstitutional, *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604 (1996), and a lower federal court struck down another FEC interpretation three years later in *FEC v. Christian Coalition,* 52 F. Supp. 2d 45 (1999).

Congress attempted to re-write the rules itself as part of the Bipartisan Campaign Reform Act of 2002, only to finally give up when it could not reach agreement, and simply order the FEC to write new rules.

The purpose of anti-coordination rules is widely misunderstood. For example, it is frequently held up as evidence of "coordination" that independent spenders are run by persons known to have previously supported the candidate supported by the group, or by known political partisans. But that merely states the obvious – independent campaigns are not going to be run by persons who do not have a) political experience, and b) views in support of those the group supports. The purpose of regulations preventing "coordination" is to prevent express conversations between parties that would provide opportunities for direct quid pro quo exchanges. As analyses of the 2012 election come out, it becomes clear that in fact there is no evidence of substantial illegal coordination, and that independent expenditures are indeed not as effective as direct candidate expenditures.

As noted above, the IRS should play no role in enforcement of campaign laws. However, also as noted, the FEC could largely address the claims of improper coordination by changing its solicitation rules, which were written before *SpeechNow.org v. FEC,* which allowed "Super PACs." Currently, the rules allow a candidate to appear at a fundraiser for a PAC and solicit funds up to the limits up to the amounts permitted in the Act. This made sense at the time adopted but with the advent of single-candidate independent expenditure committees (Super PACs) may no longer be appropriate. This

is a relatively simple regulatory fix that so far has been blocked by Commissioners on the FEC who insist that reform of disclosure regulation must include the types of measures that Congress has so far resisted in the form of the various failed versions of the "DISCLOSE Act." The Center for Competitive Politics would provide detailed recommendations to the FEC if it were to undertake a properly limited rulemaking to revise the regulations at 11 CFR 300.

3. Impact of Citizens United - 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?

ANSWER

The biggest effect of *Citizens United* and *SpeechNow.org v. FEC* has been to help bring more seats into play and level the playing field for challengers. In both 2010 and 2012 we have seen far more competition for seats, especially in the House. Moreover, "Super PACs" have spent more heavily for challengers than traditional donors and spenders. In 2010, for example, Super PACs leveled the partisan playing field both on an overall basis, and in numerous specific races. For a few specific examples, including overall spending equalization between the two major parties, *see* Bradley A. Smith, *Super PACs Level the Playing Field,* U.S. News & World Report, Jan. 13, 2012, available at http://www.usnews.com/debate-club/are-

super-pacs-harming-us-politics/super-pacs-level-the-playing-field. Again in 2012, Super PACs provided new opportunities for challengers and helped to equalize spending in the presidential race between the President, who was able to spend all of his primary money attacking his Republican challenger, and the challenger, who had to use his primary funds in a primary election. Substantial Democratic spending margins in the elections of 2004 and 2008 gave way to a more equal distribution of spending in 2012.

Total Super PAC and 501(c) spending, which existed before 2010 in the form of "issue advocacy," and which are not of *Citizens United* but of *Buckley v. Valeo* and *SpeechNow.org*, appear to have accounted for approximately 15 percent of all spending in 2012. Since much of this existed prior to *SpeechNow.org,* we can safely assume that *SpeechNow.org* has accounted for some growth in expenditures (a good thing, as higher campaign spending has been shown to create a better informed electorate), but it has not created an "explosion" (or any of the other colorful terms we hear) in spending – perhaps as much as 10 percent of total spending can be attributed to *SpeechNow.org* and *Citizens United.* Spending by for-profit corporations, the primary result of *Citizens United,* appears to have been well under five percent of total spending. Thus these two decisions are important decisions in increasing political spending (as noted, empirically a good thing for those who care about an informed electorate) and enforcing First Amendment rights, but they are not the earth-shattering decisions they are sometimes portrayed as being. As noted, they also appear to have helped to level the playing field between incumbents and challengers, and between political parties, and to have made

more races competitive.

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

ANSWER

At this point, the question cannot be answered with any certainty. There has been little analysis and too little time to make serious judgments, given the numerous factors that affect public confidence in government. The members of this panel, myself included, and the Members of this Committee and the entire Senate will, I think, see what they want to see.

Historically, however, we know that public perception of elections and government has declined in the aftermath of major campaign "reform" efforts aimed at restricting spending and contributions and reducing participation. Public trust in government dropped sharply after passage of FECA in 1971, after the FECA Amendments in 1974, and after passage of the Bipartisan Campaign Reform Act in 2002. *See* John Samples, The Fallacy of Campaign Finance Reform 114-15 (2006). Conversely, public trust and confidence in government has typically gone up during periods of rapid increases in political spending, such as during the "soft money" heyday of the 1990s.

In my view, *Citizens United* has had little effect on public perception of government. I have yet to meet more than the barest handful of people whose opinions have changed. Democrats tend to believe that Republicans are corrupt, but not that Democrats are. Republicans think the opposite. Some people believe that *Citizens United* is corrupting politics. Others

believe that efforts to "fix" *Citizens United,* such as the so-called DISCLOSE Act, or these hearings themselves, are evidence of corrupt government being used for partisan advantage.

What we do know is that voter turnout has been high in both the 2010 and 2012 elections; and that the elections have presented more of a clear choice to Americans than most elections, and especially in 2010, a more serious discussion of the role of government in the United States than we have seen in many election cycles.

Partisan efforts to suppress political speech will not increase trust in government or the people's perception of government.