Answers to Senator Hatch's Questions

1. **Critics of the *Citizens United* decision have claimed that the decision has opened the door for foreign corporations to influence American politics. The President has made this claim and it is the basis for some of the legislative proposals we have seen to "correct" what some see as problems with *Citizens United*. Yet, the majority's opinion in *Citizen United* explicitly and unambiguously stated that the current legal restrictions on foreign companies – which are broad--remain untouched by the decision.**

   Isn't the argument that this decision will somehow encourage foreign influence on our elections disingenuous? Aren't our current laws dealing with foreign spending on U.S. elections – which are, once again, unaffected by *Citizen United* – sufficient? If you do not believe this is the case, could you state specifically how, despite the clear statements of the Court's majority, *Citizens United* can be read to "open the floodgates," to use the President's words, for campaign spending by foreign entities?

President Obama's carefully phrased comments highlight two critical aspects of the majority's 5-4 ruling, both of which constitute dangerous and revolutionary shifts in well-settled law, and open the door to foreign spending on U.S. elections. First, the Court ruled that the First Amendment makes no distinction among speakers – that the identity of a speaker makes *no difference* for purposes of government regulation of speech. As Justice Stevens correctly observed, the majority's logic "would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans." *Citizens United v. FEC*, 130 S. Ct. 1876, 947-48 (2010) (Stevens, J., concurring in part and dissenting in part). Second, the Court dramatically redefined the meaning and standard of "corruption," ruling that only the strictest and most direct forms of corruption – e.g., bribery – is prohibited, and not, as was previously the standard, any "appearance of undue influence." This critical component of the *Citizens United* ruling redefined the boundaries of what constitutes corruption and made influence by special interests significantly more difficult to prove.

These two holdings, taken together, appear to sweep away vital barriers that were keeping foreign special interests from manipulating American elections. If all speakers are treated equally under the First Amendment, and the only corruption Congress can prohibit is direct vote trading for money, then there is no reason why foreign companies with a U.S.-presence couldn't spend endless amounts of money to influence U.S. elections. While the Court did not invalidate provisions of federal law specifically dealing with contributions by foreign corporations, under the logic of the Supreme Court's decision, just as Exxon can now spend millions to oppose a candidate who, for example, supports the climate bill, so, too, could Toyota or other foreign companies.

2. **There are numerous instances in which courts have allowed corporations to assert constitutional rights on behalf of shareholders. You said as much in your written testimony. For example, it would be difficult to argue that the Constitution would allow the government could deny a corporation due process or take a corporation's property without just compensation.**

What is so different about freedom of speech that separates it from these other constitutional protections that corporations are allowed to assert? Are there other constitutional protections that are regularly asserted by Corporations that you believe should be denied to them?

I agree that there are numerous instances in which courts have allowed corporations to assert constitutional rights. As I explained in written testimony, the Supreme Court's answer to the question whether corporations have constitutional rights has long been a nuanced one: corporations can sue and be sued in federal courts and they can assert certain constitutional rights, but they have never been accorded all the rights individuals have, and have never been considered part of the political community or given rights of political participation. The Court under Chief Justice John Marshall, and many times since, has emphasized that because corporations are artificial entities that receive state-conferred special privileges, they are subject to greater regulation by the state. So, the fact that corporations have been given some constitutional rights, including some First Amendment rights, does not mean that they have the same set of fundamental rights individuals have. It's always been the case that the constitutional differences between corporations and living, breathing persons are sharpest when it comes to elections since corporations are not citizens, cannot vote, and cannot run for office.

3. **Those that oppose the Court's decision in *Citizens United* have argued that it opens the floodgates for corporations to spend untold billions on campaigns, most of them citing ExxonMobil as a particularly demonic example of a corporation that could hold our nation hostage simply by running independent campaign commercials. Yet, I hear few concerns expressed about the ability of labor unions to make independent expenditures, even though they too are allowed to do so after this decision. I'm surprised this hasn't gotten more attention as labor unions have demonstrated far more desire to organize for political purposes than most corporations. Also, they are, by comparison, far less accountable to their members than corporations are to shareholders, who, if they don't like what a corporation does, can usually just sell their shares.**

   A cynic would argue that the reason we don't hear about the degrading influence of unions on elections is that the opponents of corporate campaign spending tend to be beneficiaries of union involvement in political campaigns. We don't need to address that here, but I want to ask whether our panel believes there should be a distinction between the two. Should unions enjoy different protections than for-profit corporations under the Constitution? Constitutional questions aside, should our policies on political involvement differ at all between corporations and labor unions?

The *Citizens United* ruling invalidated long-standing restrictions on political spending by corporations and unions, and Congress should consider whether new legislation aimed at political spending by both corporation and unions is warranted. However, in considering legislation in the wake of *Citizens United*, Congress should be sensitive to the fact that corporations and unions are not identical in all respects. Two specific differences between unions and corporations are particularly relevant. First, unions, more so than corporations, are composed of citizens banding together for a common cause. Members of unions often play an active role; by contrast, as my written testimony spells out, the vast majority of a corporation's so-called members do nothing more than invest their money in the corporation in the hopes of sharing in the company's profits. Because so many "members" of a corporation play a passive role, concerns that shareholders may lack notice of or opportunity to object to corporate political spending they disagree with may take on added force. Second, a well-developed body of law recognizes the constitutional rights of dissenting union members to refuse to pay for political spending they oppose; no similar body of law exists for shareholders. Beginning with the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), it has been settled law that union members have a constitutional right to object when unions use compulsory dues to pay for political or ideological spending with which union members may disagree. *Abood* dealt with the rights of public-sector employees, and later cases have extended its reasoning to include employees in private-sector unions as well. Thus, while union members have a right to insist that the union pay for political advertisements solely out of dues from members who support that spending, no similar protections currently exist for shareholders of a corporation.