Answers to Senator Sessions' Questions

1. **A common objection by critics of the *Citizens United* decision has been that corporations "aren't people" and "can't vote." In your testimony, you argued that corporations have no rights to political expression since "corporations are not citizens, cannot vote or run for office, and have never been considered part of our political community." Is it your view that the First Amendment only protects political expression at election time by natural persons that are eligible to vote?**

It's not my view that the First Amendment only protects political speech at election time by eligible voters. I recognize that there are numerous instances in which courts have allowed corporations to assert constitutional rights, including some First Amendments rights. As I explained in my 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.

2. **In your testimony you suggested that treatment of corporations as legal "persons" protected by the 14th Amendment is intertwined with *Lochner* era rulings that triggered the Progressive movement and provoked President Roosevelt into proposing his court-packing plan. But the *Lochner* era rulings were based on expansive understandings of "freedom of contract," narrow readings of Congress's power under the Commerce Clause, and strict applications of the 10th Amendment. And the legal person-hood of corporations was established, by your own account, no later than 1886, 20 years before the *Lochner* decision heralded the Court's move to closely scrutinize economic regulation by state and federal legislatures.**

    a. **Do you believe that the 14th Amendment's guarantees of Due Process and Equal Protection do not apply to legal persons such as corporations, partnerships, or other types of associations?**

    b. **Do you believe that such associations have free speech rights (in addition to their members' free association rights) protected by the First Amendment?**

    c. **The Supreme Court has repeatedly held that corporations and other types of associations are protected under the 14th Amendment, and that they enjoy free speech protection under the First Amendment. Do you believe those**

decisions were wrongly decided? If so, do you believe that overruling those decisions would be more or less consistent with the principles of *stare decisis*?

The *Lochner* era is most infamous and reviled today for its rulings that read the Due Process Clause of the Fourteenth Amendment to provide broad constitutional protections for liberty of contract. Less well recognized but equally a departure from the Constitution's text and history were a set of cases that wrote into the Fourteenth Amendment the idea of equal rights for corporations. In these cases, discussed in my written testimony, the *Lochner*-era Court held state laws unconstitutional for treating corporations differently from living, breathing persons, reasoning that "a state has no more power to deny corporations the equal protection of the law than it has to individual citizens." *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); *see also Quaker City Cab. Co. v. Pennsylvania*, 277 U.S. 389 (1928)(same). Today, these *Lochner*-era precedents have been repudiated, with the Court unanimously declaring in 1973 that equal rights for corporations was "a relic of a bygone era."

The Court's constitutional error in these *Lochner*-era cases was in supposing that corporations are entitled to the same constitutional rights as living, breathing persons, and that legislatures must treat corporations and living persons equally. Neither is the case. As I explained in my 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, including rights to due process and equal protection secured by the Fourteenth Amendment, but they have never been accorded all the rights individuals have. 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 are entitled to exercise certain constitutional rights, including some First Amendment rights, does not mean that they are entitled to the same set of fundamental rights individuals have or equal treatment with living persons.

Prior to *Citizens United*, the Supreme Court's First Amendment rulings correctly struck this balance. Although the Supreme Court recognized that corporations were protected by the First Amendment, in 1990 in *Austin v. Michigan Chamber of Commerce* and in 2003 in *McConnell v. FEC*, the Supreme Court held that corporations do not have the same constitutional rights as living breathing persons to spend money on elections. *Citizens United* wiped away these precedents, bringing us back full circle to the idea of equal rights for corporations at the heart of the *Lochner* era. Justice Kennedy's opinion in *Citizen United* contains the same fundamental error at the core of *Gulf*: the idea that corporations must be treated identically to individuals when it comes to fundamental constitutional rights. In extending, once again, equal rights to corporations, the *Citizens United* majority swept aside principles dating back to the earliest days of the Republic, principles that have been reaffirmed time and again, and have proven to be wise and durable. Since the Founding, the idea that corporations have the same fundamental rights as "We the People" has been an anathema to our Constitution.

3. **In his written testimony, Mr. Smith noted that despite the fact that the state of California allows unlimited corporate political advertisements, no corporation was among the top ten sources of independent expenditures in California from 2001 to**

2006. Instead, the top ten spenders in California consisted of two Indian tribes, two individuals, the trial lawyers' association, and five labor unions.

a. **In your testimony you stated that the government should be allowed to restrict corporate political speech because corporations "are given special privileges such as perpetual life and limited liability" that allow them to "amass great wealth." But labor unions and Indian tribes also clearly enjoy special privileges under the law, and lawyers arguably have special professional rights. And as California's experience shows, all of these groups amass vast campaign coffers. Under your justification for banning speech by corporate associations, would the government also be allowed to ban political speech by labor unions, trial lawyers, and federally recognized Indian tribes?**

The Constitution's text and history give governments broad authority to regulate corporations to ensure that they do not abuse their state-conferred special privileges, including imposing limits on corporate political spending on elections. Governments have this broad authority because of the special privileges corporations alone receive, and which allow them to amass great wealth and play an ever-expanding role in American life. In our Constitution's text and history and our nation's constitutional development, corporations, more so than any other artificial entity, have been treated as uniquely powerful artificial entities that necessarily must be subject to substantial governmental regulation in service of the public good.

Although campaign finance law has long treated labor unions in a manner identical to corporations, it is doubtful that federal and state governments have the same broad authority over all associations. Although any legislation regulating associations would have to be evaluated on its own terms, it is hard to imagine that the government would have any weighty interest in prohibiting outright campaign spending by an association of trial lawyers or, for that matter, an association of defense counsel, since such associations typically do not receive state-conferred special privileges analogous to those corporations receive. State and federal governments, of course, have an interest in regulating associations to ensure that corporations were not using them as a conduit for corporate political spending, but even that regulatory interest would not support an across-the-board prohibition on spending by associations like the trial lawyers group referenced in your question. Indian tribes are a unique case, and tribes are often treated differently under the law than other groups owing to their status as sovereigns and the long disgraceful history of their oppression at the hands of this country, but it is also doubtful that the government would have a compelling justification for legislation prohibiting outright campaign spending by tribes.

b. **Many critics of the *Citizens United* decision argue that corporations could swamp other political speakers, citing certain major multi-national corporations as examples of this threat. Do you have any evidence of such overwhelming corporate expenditures having occurred in state elections?**

It is difficult to come by reliable evidence about whether large multi-national corporations have spent large sums of money in state elections in the twenty-six states in which state law permitted corporations to spend money on elections. (The other twenty-four states sharply limited corporations from spending money on candidate elections, and presumably corporations heeded these restrictions). Reliable evidence is lacking because, nationwide, disclosure laws applicable to independent expenditures on campaigns for elective office are riddled with loopholes. The National Institute on Money in State Politics summed up the state of these laws as follows in a 2007 report: "millions of dollars spent by special interests each year to influence state elections goes essentially unreported to the public. [Independent expenditures] form the single-largest loophole in the laws and administrative procedures implementing transparency in state electoral politics." Linda King, National Institute on Money in State Politics, *Indecent Disclosure: Public Access to Independent Expenditure Information at the State Level* 4 (2007).

c. A common complaint about "special interest" influence in the Federal government objects to the lobbying that is conducted by ideological groups, industry organizations, labor unions, and corporations. Critics point to the cost of such lobbying efforts, and note that ordinary citizens are not generally able to communicate their views to their elected representatives in the same way. Do you believe that the First Amendment's protection of "the people['s]" right to "petition the Government for a redress of grievances" is limited only to natural persons? If not, how do you distinguish the First Amendment's protections of political speech from the protections of the right to petition?

As my answer to question 1, above, reflects, it is not my position that the First Amendment's protection of the right to petition the government is limited to living, breathing persons. I recognize that there are numerous instances in which courts have allowed corporations to assert constitutional rights, including First Amendments rights. As I explained in my 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.