QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

SENATE JUDICIARY COMMITTEE HEARING ON "EXAMINING A CONSTITUTIONAL AMENDMENT TO RESTORE DEMOCRACY TO THE AMERICAN PEOPLE"

1) Question for Prof. Raskin and Mr. Abrams:

Prof. Raskin cited Ward v. Rock Against Racism in support of the view that there were no First Amendment implications for government to prevent people from drowning out the speech of other people. That case involved a time, place, or manner restriction on the volume of speech through municipal payment for a sound system and a technician to control music at decibels not disturbing to other citizens. The Court upheld the arrangement because it was made "without reference to the content of the regulated speech, [was] narrowly tailored to serve a significant governmental interest, and that [it] le[ft] open ample alternative channels for communication of the information." In the proposed constitutional amendment, speech is being limited precisely because of its content, it is not narrowly tailored to achieve any significant governmental interest, and it vastly curtails alternative channels of communication. Does Ward really have any bearing on S.J. Res. 19?

The notion that a case affirming a community's power to limit the decibel level of rock music played in a park late at night could justify limiting the amount of political speech in an election campaign illustrates the "anything goes" willingness of supporters of S.J. Res. 19 to justify its assault on the First Amendment. For liberals, in particular, to advocate such a sweepingly overbroad reading of *Ward* v. *Rock Against Racism* is especially bizarre; they should reread the dissenting opinion of Justices Marshall, Brennan and Stevens in the case and ponder whether they really mean to interpret an already troubling precedent far more broadly than anything in the opinion could possibly justify. No reasonable reading of Ward could properly lead to its application here: unlike *Ward*'s content-neutral limitation, S.J. Res 19 is a content-based restriction aimed at political speech which significantly curtails—and is meant to curtail--*all* channels of communication. *Ward* simply has no bearing on S.J. Res. 19.

2) Question for Mr. Abrams:

Several senators remarked at the hearing that S.J. Res. 19 is needed to safeguard the electoral process, to deter corruption, to prevent undue influence, and to enable the voices of Americans to be heard rather than drowned out. Do you think that allowing members of Congress to set the rules governing the ability of challengers to become known, as you testified, would advance those four goals?

No. The proposed amendment would undermine the very goals it purports to further. It is worth recalling that as broadly as the First Amendment has been interpreted, its text focuses on the danger that *Congress* will overreach. S.J. Res. 19 raises the very dangers the First Amendment aims to curtail by placing those in power—incumbents—in a position to make it still more difficult for their actual or potential challengers to become better known and thus more credible as their replacements. Chief Justice Roberts put it well in his *McCutcheon* opinion, concluding that "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon* v. *Federal Election Commission*, 134 S. Ct. 1434, 1441-42 (2014) (emphases in original).

3) Question for Mr. Abrams:

What is your response to Senator Reid's testimony that the law currently governing campaign finance poses a threat to democracy and one person, one vote? What about his argument that undue influence is not free speech or that restricting spending on campaigns would restore sanity and lead to greater public confidence in their elected leaders?

The concept of "one person, one vote" was and is a significant democratic reform. The notion of "one person, one speech" or "one person, limited speech" is at war with the very dedication to freedom of expression that is essential to any meaningful concept of democracy. The notion that Congress could or should "set limits" on speech about who to support or oppose in an election by barring the funding of is as inconsistent with democratic principles as would be a limit on the amount of editorials a newspaper might print or a blogger might draft. For Congress to decide how much speech constitutes "undue influence" is itself a serious affront to First Amendment principles. For Congress to take steps aimed at rationing speech out of fear that it may be too effective in persuading people who to vote for is an attack on the concept of free speech itself—especially when, at the end of the day, votes are not dictated by which candidate spoke or spent more. Members may, in this respect, recall that House Majority Leader Eric Cantor recently outspent his opponent 26-to-one, yet lost the Republican Primary in his district. As for Senator Reid's view that restricting speech in campaigns would "lead to greater public confidence in [the public's] elected leaders", I cannot know the answer but would offer my view that the public does not gain confidence in its elected representatives when it senses that they are seeking to limit public speech.

4) Question for Mr. Abrams:

At the hearing, one senator, referencing the Watergate scandal, argued that not all campaign spending should be protected. What is your response to that comment?

It is true that not all campaign spending is protected. The current legal framework does not protect, and in some cases criminalizes, campaign spending which risks even the appearance of corruption. Quid pro quo trades of votes for expenditures are criminal; contributions, as opposed to expenditures, are still subject to regulation. But to be consistent with the First Amendment (and to protect the integrity of our democratic process), the rule must be that election-related independent expenditures, akin to speech in a campaign, are rigorously protected.

5) Question for Mr. Abrams:

Prof. Raskin testified, "Reasonableness applies to all of the constitutional amendments," and referenced a prohibition on buying sex. Has any Supreme Court decision in the past 50 years held that Congress can restrict core political speech based on its content so long as the restriction is reasonable?

No. Professor Raskin significantly understates the limits imposed by the First Amendment by asserting that "reasonable" limits on its scope are the norm. Almost all of the major First Amendment victories in the Supreme Court involved a competing interest that could well be viewed as reasonable. A clear majority of the Justices who voted to sustain the right of the New York Times to publish TOP SECRET documents in the Pentagon Papers case, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), expressed their belief that continued publication would harm national security.[1] The privacy interest in *Time Inc.* v. *Hill*, 385 U.S. 374 (1967) was also acknowledged to be substantial.[2] The interest in a assuring that the public heard the view of someone who had was running for office and had been attacked by a newspaper was very real in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The interest in avoiding the torture and killing of animals, recognized by all states and the federal government, was surely substantial in *United States* v. *Stevens*, 559 U.S. 460 (2010). Every one of these cases—and scores more I could cite—involved a serious and arguably "reasonable"

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[1] *See id.* at 724 (Douglas, J. concurring) (In a concurrence joined by Justice Black, Justice Douglas noted that "[t]hese disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press."); *Id.* at 730 (Stewart, J., concurring) (In a concurrence joined by Justice White, Justice Stewart expressed: "I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.")

[2] *See id.* at 384 (permitting play resembling appellee convicts life despite the fact that, "where private actions are involved, the social interest in individual protection may be substantial").

competing interest to that embodied in the First Amendment, yet those interests were in each case deemed insufficient to overcome the force of that provision. This does not mean that the First Amendment always carries the day against all competing interests in all circumstances. But as a case cited by Justice Kennedy in his *Citizens United* opinion makes clear, the First Amendment "has its fullest and most urgent applications to speech uttered during a campaign for political office." *Eu* v. *S.F. Cnty Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). The First Amendment barrier to restrictive legislation is thus at its highest and most limiting in this very area.

6) Question for Mr. Abrams:

What is your reaction to one senator's comparison of restrictions on political spending to restrictions on child pornography, or shouting "fire" falsely in a crowded theater? Is that senator correct in stating, "We have always had balancing tests for every amendment" as applied to the First Amendment's protection of core political speech? What about his statement that "The First Amendment has always, always, always had a balancing test. . ., and if there ever is a balance that is needed, it is to restore some semblance of one person, one vote; some of the equality that the Founders sought in our political system."? And, how do you view his argument that it is false in light of 100 years of history to maintain that Congress cannot regulate political speech when billions of dollars enter the system?

As my earlier responses indicate, I believe all the examples cited in this question are inapt. Child pornography receives no First Amendment protection because of the harm to the children it depicts; falsely crying fire in a crowded theater receives no such protection because it immediately imperils the lives of all in that theater. Neither scenario is in any way analogous to political speech which, as previously set forth, receives the highest level of First Amendment protection. I have previously responded to the "one man, one vote" reference; the First Amendment has *never* permitted the government to limit the amount of editorials, the amount of leaflets, the amount of blogs—I could go on. As for the proposition that a speech on a soapbox is protected, but the 11,427th ad on television is not, that too finds no support at all in First Amendment theory or case law. Such a media-aggressive campaign strategy may be foolhardy or wasteful and might even drive people to vote for others out of irritation, but the First Amendment does not recognize the concept of "too much speech", let alone "too much speech because others have too little." There are constitutionally permissible ways to deal with our nation's very real inequalities. Limiting, not to say criminalizing, speech is not one of them. As my prepared statement observes, quoting language from such First Amendment stalwarts as Supreme Court Justices Brennan, Marshall and Stewart in *Buckley* v. *Valeo*,

the "concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." The amount of money entering the system, whatever it may be, cannot overcome that core principle.

7) Question for Mr. Abrams:

What is your response to the same senator's statement at the hearing that, "I don't believe it is the same exact part of the Constitution . . . in free speech to get up on a soapbox and make a speech or to publish a broadside or a newspaper as it is to put up the 11,427th ad on the air"?

My response to Question 6 encompasses my response to this question.

8) Question for Mr. Abrams:

One senator claimed that "five conservative activists sitting on the Supreme Court for the first time decided that unlimited spending on elections is a-ok." Is this correct?

No. "Unlimited spending"—i.e. unlimited independent expenditures—was first addressed by the Supreme Court in *Buckley* v. *Valeo,* in which the Court held the First Amendment protected such spending. *Citizens United* addressed whether that 1976 holding applied to corporations as well. The *Citizens United* Court—correctly, in my view—held that it did. More broadly, the notion that the *Citizens United* decision can simply be dismissed as the product of "five conservative activists" ignores the reality, referred to in my written submission to the Committee, that the thrust of the ruling was not dissimilar to what liberal jurists in the past had urged. Consider the language in a 1958 dissenting opinion of Justices Douglas, Black and Chief Justice Earl Warren, that "[s]ome may think that one group or another should not express its views in an election because it is too powerful…but these are justifications for withholding First Amendment rights from any group—labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country." *United States* v. *Auto. Workers,* 352 U.S. 567, 597 (1958). These three liberal jurists were hardly "conservative activists". If their views had simply been waved away on the grounds that they were "liberal activists," that cursory dismissal should have been rejected just as the attacks on the *Citizens United* majority should be.

9) Question for Mr. Abrams:

The same senator reflected a commonly expressed view that unlimited corporate spending "obviously" creates a risk of corruption, and another agreed. What is your response?

There is obviously a risk that any money, let alone substantial sums of it, spent endorsing or criticizing candidate for public office could unduly influence those who benefit from it. But our current legal framework addresses this risk: bribery remains a crime,[3] as does gratuity (which does not even require the quid pro quo showing that the proposed amendment's advocates decry as too demanding).[4] But as the Supreme Court has made plain, too broad a definition of corruption would interfere with the First Amendment right to active and meaningful participation in the political process. As a result, the Court's definition of corruption is deliberately (and, in my view, wisely) limited to quid pro quo trades of money for votes.

10) Question for Mr. Abrams:

Two of my colleagues argued that unlimited corporate spending on elections permits corporations to intimidate elected officials by threatening to run, or actually running, ads criticizing the politician if the corporation is displeased by the politician's vote. I have no reason to think that either of these senators would ever be dissuaded from voting as they believe the public interest requires. But shouldn't politicians be made of sterner stuff? Shouldn't they be courageous enough to stand up for their votes and have the financial ability to explain their votes and outline the threats and that were made against them if they failed to vote in the public interest? From your experience representing media corporations, how newsworthy would it be if an elected official informed the press about such a threat and what position do you think an editorialist would take on the subject?

Undoubtedly, such threats would not only be newsworthy and those who write editorials would be on the lookout for and no doubt leap to the chance to attack any company, union or individual on whose behalf such statements were made. In saying this, I am not minimizing the need for candidates to raise significant sums of money to run credible campaigns or the potential import of ads supporting or criticizing candidates for public office. In fact, one reason I believe *Citizens United* was correctly decided is that permitting unlimited expenditures from virtually all parties leads to more speech from more candidates for longer time periods, and ultimately to more competitive elections. That was true when Senator Eugene McCarthy

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[3] *See* 18 U.S.C. § 201(b).

[4] *See* 18 U.S.C. § 201(c); *but see United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999) (establishing gratuity requires showing of a nexus to an official act, but does not require a showing of quid pro quo).

sought the Democratic nomination for President in 1968 and it was just as true when former Speaker Newt Gingrich was only able to continue his effort to seek the Republican nomination in 2012 because of the outside expenditures spent in his support. Is there a level of risk that some candidates might abandon their principles in order to facilitate their possible election? Of course. But we cannot create a system which chills speech or bars it because of the possibility that "bad" or insincere speech will be uttered. Nothing guarantees that the voting public will like what they hear or base their votes on it. It is for the public to decide who is persuasive and who not and who is worthy of election. We should trust the public to make those decisions and avoid limiting the speech designed to persuade it.

11) Question for Mr. Abrams:

It was contended at the hearing that in Citizens United, Chief Justice Roberts failed to keep his promise to be committed to judicial minimalism and that he "destroyed the canon of constitutional avoidance" to enable all corporations to make independent expenditures at all times. Do you agree?

No. The Court's decision in *Citizens United* and Chief Justice Roberts's concurring opinion in that case dealt extensively with these issues and I will not repeat here what was said at length in those opinions about this topic (except to note that I do not recall any criticism of the Warren Court by liberal Democratic Senators for its failure to adhere to principles of "judicial minimalism"). I do, additionally, want to add a few words of my own which are similar in nature to what I urged upon the Supreme Court in my oral argument in *Citizens United* on behalf of Senator Mitch McConnell. There are cases which call for broader rather than narrower opinions precisely because of the importance of the constitutional issues raised and the need for judicial clarity in preserving constitutionally protected interests. In my argument, I cited as an example the great case of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), one in which the Supreme Court all but federalized much of the law of libel by establishing the "actual malice" test in cases involving public official (and later public figure) plaintiffs and in otherwise broadly assuring that libel law would not too easily trump First Amendment principles. The *Sullivan* Court had other alternatives. It could have avoided writing so broad a ruling by concluding that the Alabama court had no jurisdiction over the New York Times. It could, as well, have protected the press by limiting or banning punitive damages in libel cases. And it could have reversed the ruling based on a series of racist events that occurred in and out of court in the trial of the case. Instead, the *Sullivan* Court decided to walk down none of those paths because it was important to write an opinion that dealt directly with the protections afforded by

the First Amendment in the area of libel. I think the Court acted wisely and prudently in doing so just as I think that the Court did the same in *Citizens United*.

12) Question for Mr. Abrams:

At the hearing, the point that restrictions on corporate speech on elections affected media corporations as well as others was dismissed. The claim was made that the freedom of media corporations is already protected by the Free Press Clause of the First Amendment. Therefore, it was argued, there is no need to be concerned that denying other corporations the right to engage in independent expenditures would have any effect on media corporations. Do you agree?

The proposition that media corporations receive more protection than other corporations (or individuals) in the freedom of expression realm do is one with which I am indeed familiar. I made just such an argument in an article I wrote some years ago. But such a position has never been adopted by the Supreme Court and, if anything, the law seems headed in quite the opposite direction, one rooted in the notion that the press clause is no broader or more protective than that relating to freedom of speech. In more recent years, I have come to the same conclusion. As my written testimony sets forth, "why should the press, however defined, receive more protection than others to engage in the identical advocacy of or condemnation of candidates for public office?" Far more significantly, Justice Brennan (together with Justices Marshall, Blackmun and Stevens), dissenting in *Dun & Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749 (1985), put it this way: "We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve less First Amendment protection". The notion that only the press should have full First Amendment protection and non-press entities should have watered down protection is indefensible.

13) Question for Mr. Abrams:

One senator at the hearing contended that Citizens United and Super PACs have so changed the political landscape that S.J. Res. 19 is now necessary. Do you believe that any changes effected by Citizens United justify enactment of S.J. Res. 19?

No. In fact, many of *Citizens United*'s claimed ill-effects, to the extent that they are true (which they are generally not), are not the result of *Citizens United* at all. Wealthy individuals such as Sheldon Adelson and George Soros have been able to spend their money, in unlimited amounts, to support candidates of their choice since at least the Supreme Court's 1976 ruling in *Buckley v. Valeo.* And, to cite only one additional example, *Citizens United*

had no impact on corporations' long-standing ability to make unlimited donations to 501(c)(4) non-profits, which are often accused of buying elections with "dark," non-disclosed money (despite the fact that no more than half of their spending can be politically-related). What *Citizens United* did do, however, is permit corporations to also contribute to PACs that are required to disclose all donors *and* engage only in independent expenditures. If anything, *Citizens United* is a pro-disclosure ruling which brought corporate money further into the light.

14) Question for Mr. Abrams:

One senator at the hearing compared Citizens United to the Supreme Court's earlier decisions in Dred Scott and in denying women the right to vote, which were overturned by constitutional amendments that expanded the rights of ordinary people. Do you think that is an apt analogy?

The notion that a Supreme Court opinion protecting First Amendment rights should be viewed as comparable to ones *depriving* slaves or women of their rights is both intellectually flawed and morally repugnant. How can constitutional amendments assuring freedom to slaves and equality for women possibly be viewed as analogous to one *taking away* citizens' First Amendment rights? I understand that critics of *Citizens United* do not believe it correctly interprets the First Amendment and that it reads it too expansively. But there is simply no comparison between amending the Constitution to limit the scope of the freedoms the Supreme Court has held it provides (which is what S.J. Res. 19 would do) and amending it to expand those freedoms.

15) Question for Mr. Abrams:

You testified that S.J. Res. 19 would "reverse[] a slew of constitutionally rooted cases. . . ." Could you please identify the cases that would be overturned and provide brief descriptions of the points of First Amendment free speech law that S.J. Res. 19 would reverse?

S,J. Res. 19 would overturn the following cases, more specifically the points of law listed, which are crucial to protecting citizens' First Amendment right to political speech:

- ***Buckley* v. *Valeo*, 424 U.S. 1 (1976) -**
  - **Striking down limits on spending by candidates and their committees (with the exception of Presidential candidates participating in the public funding program).**
  - **Striking down limits on independent expenditures by all individuals.**

- **Striking down limits on candidates' spending of their own personal funds.**

- ***First National Bank* v. *Bellotti*, 435 US 765 (1978) –**
  - **Protecting a corporation's First Amendment right to contribute to a ballot initiative campaign.**
  - **Finding that the value of particular speech "does not depend upon the identity of its source, whether corporation, association, union, or individual."**

- ***Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 US 290 (1981)**
  - **Striking down ordinance placing $250 limit on contributions to groups supporting or opposing referendums.**

- ***Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) -**
  - **Striking down limits on independent expenditures by political committees.**
  - **Finding that contributions to political committees did not pose risk of corruption.**

- ***Federal Election Commission* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)**
  - **Protecting nonprofit, nonstock corporation's right to use general treasury funds to engage in express advocacy.**

- ***Colorado Republican Federal Campaign Committee* v. *Federal Election Commission*, 518 U.S. 604 (1996)**
  - **Striking down limits on independent expenditures made by political party committees.**
  - **Rejecting notion that all party expenditures should be treated as "coordinated" as a matter of law.**

- ***Randall* v. *Sorrell*, 548 U.S. 230 (2006)**
  - **Striking down state law limiting contributions on the grounds that such low limits interfere with a candidate's right to raise funds necessary to run a competitive election and disproportionately burden the rights of citizens and political parties to help candidates get elected.**

- ***Federal Election Commission* v. *Wisconsin Right to Life, Inc.*, 551 US 449 (2007)**
  - **Striking down restrictions on issue ads (ads that do not engage in "express advocacy") during the 30/60 day primary/general pre-election window.**

- ***Davis* v. *Federal Election Commission*, 554 U.S. 724 (2008)**
  - **Striking down BCRA's "Millionaires' Amendment" on the grounds that leveling electoral opportunities for candidates of**

different personal wealth is not a legitimate government objective.

- **Finding that the strength of the governmental interest in campaign finance disclosure requirements must reflect the seriousness of the actual burden on First Amendment rights.**

- ***Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010)**
  - **Striking down BCRA's prohibition on independent expenditures by corporations and labor unions, including electioneering communications.**
  - **Permitting corporate and labor union contributions to groups which engage only in independent expenditures (and do not give directly to candidates).**
  - **Announcing that political speech cannot be suppressed on the basis of the speaker's corporate identity.**
  - **Finding that independent expenditures made in support of candidates by corporations do not give rise to corruption or the appearance of corruption.**

- ***Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806 (2011)**
  - **Finding that public financing provisions cannot be drawn so as to burden the speech of privately-financed candidates and independent expenditure groups absent a compelling state interest.**

- ***McCutcheon* v. *Federal Election Commission*, 134 S. Ct. 1434 (2014)**
  - **Striking down aggregate limits on how much a donor may contribute to federal candidates, political parties and PACs over a two-year election cycle.**
  - **"Contributing money to a candidate is an exercise of an individual's right to participate in the electoral process through both political expression and political association."**
  - **Finding that "[t]he First Amendment does not protect the government, even when the government purports to act through legislation reflecting 'collective speech.'"**