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Chairman Whitehouse, Ranking Member Graham, and members of the Subcommittee, on behalf of the Center for Competitive Politics, thank you for inviting me to present our analysis of "Current Issues in Campaign Finance Law Enforcement."

The Center for Competitive Politics is a nonpartisan, non-profit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. I founded the Center in 2005, after completing my term as Commissioner at the Federal Election Commission (FEC), because it had become clear to me, both as an academic and then in my time as a Commissioner, that the public is greatly misinformed about campaign finance laws and their enforcement. The Center has worked tirelessly to maintain an honest, nonpartisan approach to issues of campaign finance reform.

I. Introduction

For many reasons, enforcing campaign finance law is a highly complex issue. Most importantly, campaign finance law must be carefully crafted in order to avoid infringing on First Amendment rights. Unfortunately, too often these laws have not been carefully written, and when such laws are combined with criminal penalties, they provide a breathtakingly powerful tool for elected officials and government employees to use against political opponents.

Consider that the very first prosecution brought under the Federal Election Campaign Act of 1971 was against the National Committee for Impeachment, and that it was brought by the Justice Department under then-President Richard Nixon.

On May 31, 1972, a two-page ad appeared in the *New York Times* that featured the headline "A Resolution to Impeach Richard Nixon as President of the United States." The ad, which cost a total of $17,850, was paid for by a group consisting of several lawyers, at least one law professor, a former United States senator, and a number of other citizens of modest prominence, calling themselves the National Committee for Impeachment. In addition to criticizing President Richard Nixon, the ad recognized an "honor roll" of several congressmen who had introduced a resolution that called for the president's impeachment. In response, the United States Department of Justice moved swiftly, getting a federal district court to enjoin the National Committee for Impeachment and its officers from engaging in further political activity. The Committee, argued the government, was violating the Federal Election Campaign Act of

1971 because its efforts had the potential to "affect" the 1972 presidential election, and the Committee had not properly registered with the government to engage in such political activity.

Ira Glasser, who was an Executive Director of the American Civil Liberties Union, noted that the government "wrote a letter to The Times threatening them with criminal prosecution if they published such an ad again.... Soon after, the ACLU itself sought to purchase space in The Times in order to publish an open letter to President Nixon, criticizing him for his position on school desegregation. The letter made no mention of the election and indeed the ACLU has never supported or opposed any candidate for elective office and is strictly nonpartisan. Fearful of government reprisal based on the government's threatening letter from the previous case, the Times refused to publish the ad."

Fortunately, in both cases, these groups' First Amendment rights were eventually vindicated. However, during the time it took to win these cases, much speech about elected officials was thwarted. Further, fighting the prosecutions came at great expense and much anxiety for those who simply sought to speak out about their government.

Indeed, the history of criminal and tax enforcement of campaign finance law is largely one of political prosecutions that should serve as a warning to this body. For example, the first case in which the U.S. Supreme Court clearly accepted the idea of regulation of political speech could be constitutional – which it did over the dissents of Justice William O. Douglas and Earl Warren – was *United States v. Auto Workers*, 352 U.S. 567 (1957). That case, as legal historian Allison Hayward has shown, was brought by the Eisenhower administration to seek to quash union political power after the merger of the AFL and the CIO. Fortunately, while the Supreme Court for the first time upheld such a prosecution against a constitutional challenge, the government was unable to get a conviction. *See* Allison R. Hayward, *Revisiting the Fable of Reform,* 45 Harv. J. Legis. 421 (2008).

The Eisenhower administration was merely following its predecessor, the Truman Administration, which had engaged in a series of political prosecutions aimed at auto dealers in Michigan in the late 1940s. In those cases, the U.S. Attorney prosecuted only reluctantly, viewing the violations as minor (in the case of some defendants) to non-existent (in the case of others), and as raising serious constitutional issues, but politicians in Washington insisted, apparently, like today, for political reasons, on "aggressive enforcement." Like today, the major columnists of the day, most notably Drew Pearson, were enlisted to whip up public fervor, with Pearson apparently benefiting from a stream of leaks from the Attorney General's office in Washington. Nevertheless – perhaps foreshadowing such prosecutions as that of John Edwards (see below), "once in court, prosecutors could not win a conviction, and jurors expressed distaste for enforcing this criminal statute against this kind of activity." And, indeed, the entire series of prosecutions was based on the belief of large scale violations "that, as it turned out, did not exist." But the prosecutions were directed from Washington because "chilling auto dealers and other corporate managers from making contributions to Republicans served the Administration's political agenda." *See* Allison R. Hayward, *The Michigan Auto Dealers Prosecution: Exploring The Department of Justice's Mid-Century Posture Toward Campaign Finance Violations,* 9 Election L. J. 177 (2010).

Today, once again, self-interested politicians are on the warpath, arguing with little evidence or on the basis of minor and exceptional incidents that massive violations are taking place that threaten our democracy, and that the problem could be resolved if only we had more "vigorous" enforcement. In particular, there has been a noted desire to police campaign finance law through regulatory bodies without expertise in campaign finance, including the IRS, the FCC, and the SEC, in addition to the Federal Election Commission. Much of this concern about enforcement stems from a desire to disclose donors to alleged "dark money" groups. Before explaining the numerous issues inherent in the IRS and other regulatory bodies enforcing campaign finance law, I think it is first necessary to consider the nature and extent of this much overblown and sensationalized theme of "dark money" in American politics.

II. The Nature and Extent of the Issue

The decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds) and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits) have brought a renewed focus to the issue of disclosure of political spending. The claim has largely been that the public lacks information on the sources of vast amounts of political independent spending. This concern, while serious if true, has been artificially ramped up by many mistaken comments in the media about "secret" contributions to campaigns, as well as a widely held, but mistaken belief that under *Citizens United*, corporations and unions may now contribute directly to candidate campaigns. In any case, information amount political donors, it is believed, can help guard against officeholders becoming too compliant with the wishes of large spenders, and provide information that might be valuable to voters in deciding for whom to vote and how to evaluate political messages.

In particular, there have been concerns that non-profit organizations formed under Section 501(c)(4) of the Internal Revenue Code have been engaging in extensive political campaigns using "secret money." This issue, however, is not new. Express advocacy in favor of or against candidates was allowed for certain types of 501(c)(4) organizations even before *Citizens United*, as a result of the Supreme Court's ruling in *Federal Election Commission v. Massachusetts Citizens For Life* ("*MCFL*"), 479 U.S. 238 (1986). That decision allowed qualified non-profit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the *Citizens United* decision and included groups such as the League of Conservation Voters and NARAL. In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates.

For example, in 2000, the NAACP Voter Action Fund, a non-profit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

> *Renee Mullins (voice over):* I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged 3 miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it was like my father was killed all

over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election. *See* Bradley A. Smith, *Disclosure in a Post*-Citizens United *Real World*, 6 St. Thomas J. L. & Pol'y __ (forthcoming 2013, available in draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240048.)

This ad was perfectly legal to run at any time prior to 2003, with no donor disclosure, and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*, 551 U.S. 449 (2007).

It should also be noted that neither the *Citizens United* nor *SpeechNow.org* decisions struck down any disclosure laws; nor has Congress or the FEC loosened any disclosure rules in place at the time those two decisions were issued in the spring of 2010. There has been no change in the laws governing disclosure of political spenders and contributors.

Despite heavy media focus in 2012 on "dark money," "secret money," and "undisclosed spending," in fact, the United States currently has more political disclosure than any time in its history. Candidates, political parties, PACs, and Super PACs disclose all of their donors beyond the most *de minimis* amounts. This disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and the amount given. *See* 2 U.S.C. §434(b) and (c). Indeed, these entities also report all of their expenditures.

Current law also requires reporting of all independent expenditures over $250, and of "electioneering communications" under 2 U.S.C. § 434(f). 501(c)(4) social welfare organizations, such as the National Rifle Association and the Sierra Club, must disclose donors who give money earmarked for political activity. All of this information is freely available on the FEC's website.

Furthermore, all broadcast political ads (like, in fact, all broadcast ads, political or not) must include, within the ad, the name of the person or organization paying for the ad. Thus, it is something of a misnomer to speak of "undisclosed spending." Rather, more precisely, some ads are run with less information about the spender, and contributors to the spender, than some might think desirable. This recognition is important to understanding the scope of the issue and the importance of particular measures that seek to require more disclosure.

According to the FEC, approximately $7.3 billion was spent on federal races in 2012. Approximately $2 billion, or less than 30 percent, was spent by "outside groups" (that is, citizens and organizations other than candidate campaign committees and national political parties). Jake Harper, *Total 2012 Election Spending: $7 Billion*, Jan. 31, 2013 (Sunlight Foundation); Jonathan Salant, *2012 Elections Cost Will Hit $7 Billion, FEC Chair Weintraub Says,* Jan. 31, 2013 (Bloomberg Media). According to figures from the Center for Responsive Politics, approximately $383 million was spent by organizations that did not disclose their donors. That is

just over *five percent* of the total. $383 million sounds like a lot – five percent doesn't sound like much of an issue at all.

Moreover, that five percent tends to overstate the issue because many of the largest 501(c) spenders are well-known public groups. Only 28 organizations that did not publicly disclose all donors spent more than $1 million on all independent expenditures in 2012. Most of these were well-known entities, including the U.S. Chamber of Commerce, the League of Conservation Voters, the National Rifle Association, Planned Parenthood, the National Association of Realtors, the National Federation of Independent Business, NARAL Pro-Choice America, and the Humane Society. Several of these groups also spent substantial funds on issue ads or express advocacy under the *MCFL* exemption, even before *Citizens United,* suggesting that the growth in "undisclosed" spending is even less than many believe.

Even many spenders that are not historically well-known organizations on the list are quite familiar to anyone who remotely follows the news, such as Crossroads GPS and Americans for Prosperity. Indeed, many of the funders are well-known, even as the organizations themselves do not formally disclose their names. Does anyone on this panel not know that David Koch provided substantial funding to Americans for Prosperity? If not, *see e.g.* Peter Overby, *Who's Raising Money for Tea Party Movement?* Feb. 19, 2010 (National Public Radio).

Furthermore, according to the Center for Responsive Politics, it appears that the percentage of independent spending by organizations that do not disclose their donors declined substantially (approximately 25 percent) in 2012 from 2010. This is not surprising. Because 501(c) organizations may not have political activity as their primary purpose, they must conduct their activities to stay within the IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is political activity faces the effective equivalent of a over 50 percent tax on his or her political donations by giving to a 501(c) organization rather than to a "Super PAC," which fully discloses its donors. This is because the group must primarily spend its funds on programs other than political activity, as defined in Section 527 of the tax code. As a result of this inefficiency, it is doubtful that spending by 501(c) organizations will increase substantially as a percentage of independent or total spending. Furthermore, if the group does not conduct its activities in a manner consistent with IRS regulations, it could possibly be reclassified as a Section 527 organization by the agency and be forced to publically disclose its donors on nearly the same schedule as a political committee, except that the reports are on IRS Form 8872 and listed on the IRS website.

Lastly, it bears repeating that, contrary to claims by many, the Supreme Court's ruling in *Citizens United* did not change the prohibition on political activity by non-resident aliens and foreign corporations. Specifically, according to 2 U.S.C. § 441(e), any "partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country" is prohibited from contributing in elections. Indeed, despite the President's expressed fear that the decision would allow "foreign corporations" to make expenditures in elections, not only did *Citizens United* specifically not address that longstanding prohibition, but the Supreme Court has summarily reaffirmed that ban since. *See Bluman v. Federal Election Commission,* 132 S. Ct. 1087 (2012).

Thus, it is against this backdrop of the real nature and extent of the issue that campaign finance law enforcement can be discussed.

III. Problems of Enforcement

A. "Newberryism"

I have already noted some examples of criminal prosecution in the area of campaign finance as abuse of power for political gain. The problem of using campaign finance law to punish political opponents through threats of criminal prosecution is hardly new and points to the need to tread carefully. Indeed, the first campaign finance case ever to reach the Supreme Court illustrates that problem. Ninety-five years ago, Truman Newberry, a well-mannered scion of an old-money Detroit family, suddenly found himself under federal indictment and his very name synonymous with political corruption. Newberry's "crime"? He had run for the United States Senate as a long-shot underdog against the President's handpicked candidate and nation's most famous man, Henry Ford. Thanks to a skillful ad campaign financed by nearly $200,000 in contributions from Newberry's family members and friends (the equivalent of about $3 million in 2013), he had won.

This story is detailed in the fascinating new book, *Curbing Campaign Cash*, by Paula Baker, an Associate Professor of History at The Ohio State University. It is a cautionary story about government regulation of honest money and the political choices of the electorate.

Progressive reformers, seeking to cleanse politics from the "taint" of money, had passed a law limiting a Senate candidate in Michigan to spending $3,750, or less than $60,000 in today's dollars. Defeating a man as well-known as Ford on such a budget was likely impossible.

But the law contained a giant "loophole" – it applied only to spending by the candidate, not to spending undertaken by a committee on the candidate's behalf. Newberry hired Paul King, a young political whiz, to manage a campaign committee, and paid little attention to what King did after that. What transpired was the most expensive Senate campaign in history at that time, as King raised funds from Newberry's friends and family, hired campaign workers across Michigan, and blanketed the state with newspaper ads. King highlighted Newberry's military service as well as that of his two sons, contrasting it with Ford's pacifism and the military deferment granted to his son, the star-crossed Edsel. Newberry's major campaign plank was his opposition to the League of Nations.

When Newberry defeated Ford, Newberry's opponents cried foul. They argued that the large sums spent on his behalf tainted the election and constituted "corruption" and "fraud." President Wilson, who had personally recruited Ford for the race, set his Department of Justice upon Newberry, even before Election Day. Eager to avoid Michigan juries sympathetic to Newberry, the government convened a grand jury in New York on the theory that Newberry had signed papers related to his candidacy there. Nevertheless, the grand jury voted 16-1 against an indictment. Unperturbed, Attorney General Thomas Walsh then ordered the FBI to investigate possible violations of the Federal Corrupt Practices Act.

Meanwhile, Henry Ford deployed his vast fortune to hire investigators to comb the state of Michigan, "[taking] every bit of local bragging and complaining as ... a kernel of fact." Ford fed the information he gathered to the Attorney General, who arranged for a special prosecutor to handle the case. The case was brought in Grand Rapids, rather than the more logical venue of Detroit, Newberry's residence and campaign headquarters, because the government thought it would get a more favorable bench and jury there. At trial, in fact, a wildly partisan Judge Clarence Sessions proclaimed that "the very life of the Nation is threatened" by the "filth and poison" of campaign spending, "infinitely more to be feared than the terrors of the Ku Klux Klan." The judge excluded most of Newberry's evidence, then gave the jury a strained interpretation of the statute, and an instruction that "drew a straight line to a guilty verdict."

Newberry would eventually be vindicated by the U.S. Supreme Court – another prosecution foundering on the shoals of the Constitution – but "Newberryism" would be the standard phrase for political corruption for the next decade.

In these events, Baker sees a warning of the unintended consequences of regulation. Turn-of-the-century progressives sought to get not only money but politics out of politics. In doing so, they got more of each.

To anyone who has followed the campaign finance saga of the last two decades, the story has a remarkable sense of familiarity to it. In the partisan campaign and abuse of prosecutorial power to unseat Newberry ("a political job, from beginning to end," said Michigan's senior Senator, Charles Townsend), newspaper editorials were referenced as fact, self-serving statements by opposition politicians held forth as evidence of wisdom from those who understood the alleged dangers best, and naked abuses of government power praised by sanctimonious advocates of "good government." "Reformers" were themselves prepared to cut most any corner and unfairly smear any reputation if it helped in obtaining the political goal of "good government" reform. And always, the debate was conducted in high dudgeon: "rhetorical ambitions soared far higher than the record before them," notes Professor Baker.

Such rhetoric contributed to and played off of public ignorance. Kathleen Lawler, the Clerk to the Senate Committee on Elections, complained that voters would say, "[W]e must help stamp out this terrible scourge of Newberryism that is destroying our state and our nation." But "[w]hen asked – 'What is Newberryism?'..., they did not know...."

This certainly rings a bell today, when most voters who could not even tell you what a "Super PAC" is believe they are bad and incorrectly believe that they do not disclose their donors. Indeed, one of the most frustrating things about the campaign finance debate today remains the sheer demagoguery of the issue.

Observers of today's debates will also recognize the rank hypocrisy and incumbent self-dealing in the early reform movement. Senators saw Henry Ford as a one off – but if money could elect an empty suit such as Truman Newberry against a better-known opponent (and most incumbents are better known than their challengers), whose seat was safe? So the laws targeted the type of influence that Newberry, but not Ford, might bring to bear.

Of course, whether the public was ill-served by the election of Newberry is a different question altogether. Despite the lack of "disclosure," Michigan voters were fully aware by Election Day of the campaign's record spending. Meanwhile, though his engineering and business achievements are incontestable, in matters of public affairs Ford was more the empty suit than Newberry. He was ignorant of history (he testified to the Senate that the American Revolution happened in 1812, and that Benedict Arnold was a writer) and government (when first approached about running by a Wilson confidante, he asked, "What does a Senator have to do?"). He believed that Newberry's campaign had been financed by "a gang of Jews" as part of "a conspiracy to control the Senate."

The abuse of federal investigatory and prosecutorial power, neglect for the rule of law, innuendo and character assassination, incumbent self-dealing, rank hypocrisy, and unintended consequences of efforts to purify the system, all present in the Newberry case and to one degree or another in reform politics today, should make us glad "campaign finance reform" has gone no further than it has.

B. The Prosecution of John Edwards

Newberryism has not gone away. The dangers of criminal prosecution were again illustrated just last year in the prosecution of John Edwards. Allison Hayward, our former Vice President for Policy, wrote that "We should be grateful that the John Edwards jury has reached its verdict – and found Edwards not guilty on one count of taking an illegal campaign contribution. A guilty verdict could have meant much trouble for all campaign finance regulation. If Edwards had been found guilty on that count, we could have entered an 'Alice in Wonderland' world, where conduct that would not draw the ire of civil law enforcement can lead to prison. Because Edwards could [have been] convicted for taking a contribution that the Federal Election Commission, which regulates campaign finance, wouldn't even regard as a political donation."

Edwards is not a man who deserves any sympathy, and it is certainly possible that his actions, and those of his supporters, might have violated other federal laws or, had Edwards still been in office, Senate ethics rules. But the question here is not sympathy for Edwards, but possible prosecutorial overreach that is itself an abuse of power.

When the case was originally brought, there was much political concern that it was based on a political vendetta by a Republican U.S. attorney. Worse, prosecutors seemed to have relied on the vague language that the payments to Edwards's mistress were intended "to influence" a campaign. In recent years, prosecutors have become increasingly zealous in their efforts to squeeze all kinds of unethical conduct into the rubric of campaign finance and honest service laws. The public is not well-served by the likes of John Edwards – but nor is it well served by ambitious, overly-zealous prosecutors who stretch and abuse vague campaign finance laws in pursuit of high-profile convictions.

C. Criminal Penalties

Vague election laws combined with criminal penalties are a recipe for abusive political prosecutions. It is a threat both to the First Amendment and to honest government. In the case of

the Michigan auto dealers, which I discuss above, prosecutors were unable to gain convictions in cases that went to trial; but the threat of prison time convinced many defendants to plead no contest and pay fines.

Similarly, as the Edwards prosecution proved, much of campaign finance law is vague, complicated, or both. Because of the potential infringement on civil liberties, Congress should avoid creating additional criminal penalties to existing or new campaign finance laws. Arguably, there are already too many provisions that provide for criminal penalties. The Bipartisan Campaign Reform Act of 2002 extended the statute of limitations for many criminal violations of campaign finance laws, made more provisions of the law subject to criminal sanctions, and required the United States Sentencing Commission to issue guidelines for campaign finance law violations. Other recent high profile political prosecutions for vague allegations of campaign finance laws have similarly come apart at the seams, as in the prosecution of Ted Stevens. Unfortunately, far too often the damage is done by the time the law catches up to the hysteria. Stevens was convicted just days before the election, which he lost by less than 1% of the vote, and only vindicated posthumously after a plane crash.

The message we should send to the American people is that political participation is a good thing, not a bad thing. For half a century, the message of those who advocate the increase of strict campaign finance laws has been that political participation is bad, that people who donate are only out for themselves, and that political speech is, quite literally, dangerous. It is no wonder that the confidence in Democratic institutions has declined.

D. The Need for Campaign Finance Law Simplification

We don't measure the effectiveness of police by how many people are shot or how many citizens are convicted. Similarly, there is widespread agreement that the IRS should not be evaluated by how many penalties are collected or properties seized. To evaluate, we look at the crime rate and the tax compliance rate.

The federal election laws and regulations now contain over 376,000 words. But this just scratches the surface of election law. There are nearly 1,900 advisory opinions and nearly 7,000 enforcement actions that provide guidance on what these vague laws might mean. As the Supreme Court noted in *Citizens United*, "Campaign finance regulations now impose 'unique and complex rules' on '71 distinct entities.' These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations." (Citing Brief for Seven Former Chairmen of FEC).

Congress's vague laws often can't be interpreted by the FEC itself. For example, in August 2012, the FEC considered an Advisory Opinion Request for the National Defense Committee filed by our organization asking whether seven proposed ads would trigger FEC regulation. The FEC said three of the ads would not trigger FEC regulations, but the FEC could not render an opinion on the other four ads, and could not decide on whether the group had to register with the FEC. The problem is not the FEC – it is the law.

The most pressing need for Congress is actually to make campaign finance law a lot simpler. How can we expect the FEC or the Department of the Justice to fairly enforce laws that no one can understand? It is literally impossible today to navigate campaign finance laws without a lawyer, and even then, your lawyer might not be able to give you a straight yes or no answer.

As a result, well-meaning citizens often stumble into breaking these laws, in part because the thresholds on regulated speech are absurdly low – for example, current law requires reporting of all independent expenditures over just $250.

E. Mr. T's Cadillac

A recent example of how citizens can trip over election laws was highlighted in a U.S. News & World Report article on a Mr. T. Augurson. Last year, he customized his Cadillac in stunning chrome and printed on the car's exterior a sign urging citizens to vote for President Barack Obama's reelection. Even though Mr. Augurson spent well over $250 on his rolling billboard, he never reported the independent expenditure to the FEC. His car also failed to carry the required disclaimer indicating who had paid for the message, how that person could be reached, and that the message was not authorized by any candidate or candidate's committee.

How was Mr. Augurson supposed to know about these reporting and disclaimer laws? Even if he had known about the law, deciding to what to report was far from straightforward. What counts toward the independent expenditure? The whole cost of the car? Or just the cost of the customization? Part of the customization, including the chrome body, or just the printing on the car? Then there is the matter of what states with primaries he drove through and when, which is important in deciding when to file the various reports and for what activity? To further complicate this real-life puzzle, consider that some FEC commissioners have publicly stated the cost of gas should count as campaign speech too.

F. Concern over Coordination

There has been a great deal of controversy about the adequacy of the regulations regarding independent expenditures. Unfortunately, much of this discussion has been ill-informed or misleading. I have attached an appendix to my statement with excerpts from the FEC brochure on coordinated communications and independent communications. As you can see, the regulations on this activity are quite extensive. The brochure does not contain the regulations themselves, but offers a commendable attempt to describe them in layman's terms.

It is not surprising that independent campaigns often use similar messages to the campaigns they are trying to support. This does not mean that there is any illegal coordination. In fact, it should hardly be surprising, when you consider how modern political campaigns are designed. The independent organizations pay for their own polling, and they can determine fairly easily what messages will resonate with the public and then design their advertising around such themes. In many cases, these groups will use similar themes to those used by the campaigns they are supporting.

Some critics of enforcement complain that few enforcement actions have resulted in penalties. But the reason for this is likely because the incentive to cheat is low (because it is not difficult to design an effective independent campaign) and the penalty is high.

If there is concern about the amount of money being raised and spent by these independent citizen organizations, the answer is fairly simple. Allow citizens to donate more money directly to candidate committees and political parties. If candidates and political parties are able to raise and spend more money, there will be fewer funds donated to independent organizations.

IV. Enforcement and the Nature of the Federal Election Commission

As part of the 1974 Amendments to the Federal Election Campaign Act, Congress created the Federal Election Commission and provided it with "exclusive jurisdiction with respect to the civil enforcement" of the Act. Almost from the start, the Reform Community has been deeply disappointed with the Federal Election Commission, and from cynicism or honest belief has blamed the agency for many of the failures of regulation. But understanding the FEC and its design is important to understanding the problems of using another agency designed for one thing – say, the smooth functioning of securities markets, regulation of broadcasting, or tax collection – for another purpose, such as regulation of campaign spending.

A. General Principles

Independent agencies are created for several reasons. An independent agency's singularity of purpose can be vital in developing and enforcing a unified government policy. That singularity of purpose can also help the agency to develop expertise. Perhaps most important to early theories of independent commissions was the notion that insulating such bodies from partisan politics would improve public policy.

With these principles in mind, we can see how what some would describe as "bugs" in the FEC structure are, to many, crucial "features."

Perhaps the most important feature of the FEC's design is the one that most bothers many reformers – its bipartisan makeup. Most federal independent agencies are directed by a board or commission with some guaranteed level of bipartisan makeup. Only the FEC and the U.S. International Trade Commission have equal size blocks of commissioners, with 3 from each major party, and only the FEC then requires a four vote majority for action. Nevertheless, it is highly doubtful that this is really the reason for the FEC's perceived failures. See Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 Elec. L. J. 167 (2009); Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority,* 4 Elec. L. J. 82 (2005); Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Over-enforcement at the Federal Election Commission*, 1 Elec. L. J. 145 (2002); *Colloquia: Federal Election Commission Panel Discussion, Problems and Possibilities*, 8 Admin. L. J. Am U. 223 (1994) (comments of former FEC General Counsel Larry Noble). The FEC typically divides on straight partisan lines approximately one to four percent of the time, though that number has risen in recent years and was at ten percent of enforcement matters in 2012. Furthermore, in

enforcement matters, a 3-3 result resolves the issue – the prosecution ends. There is nothing particularly unusual in that result, just as a tie vote in the Senate means a bill does not go forward.

Furthermore, the reason for the FEC's unique design should be obvious. If some measure of guaranteed bipartisanship is viewed as a valuable thing in most independent agencies, it would seem absolutely essential for an agency whose core mission is to regulate the political process, in ways that can determine who wins and who loses elections. This is a question both of preventing actual abuse of the Agency for partisan gain, and preventing the appearance that the Agency's decisions are motivated for partisan gain. In short, there is a strong argument for why the FEC is structured as it is, and it is to prevent one party from changing the regulatory regime for partisan gain.

The FEC also has an enforcement process that aims to resolve matters through conciliation rather than fines or litigation. This, too, has drawn much criticism from those seeking "stronger" enforcement. But this process exists, as well, for a reason. The overwhelming number of complaints and violations at the FEC are not over corruption, but over inadvertent violations of the law. Many are nothing more than administrative violations against the state. The cost to a political candidate of having been found to have "violated the law," however, can be great; the rewards to a zealous prosecutor or even FEC Commissioner or General Counsel who is seen to be crusading for "clean elections" are perhaps even greater in the other direction. Structuring the system around voluntary conciliation agreements is an intentional means to depoliticize the complaint process. Again, placing primary enforcement responsibility with Justice, the IRS, or another agency whose process is geared to leveling direct sanctions dramatically alters the balance, and does so in a way that may reward overly aggressive prosecution by government officials in this sensitive First Amendment area.

Thus, while it is true that almost all government agencies have structural features to insulate them from politics, the FEC has more political safeguards than most agencies and it has them for very compelling reasons.

B. Problems with Dividing Authority for Enforcement

Recently, other federal agencies have been tasked with or have found themselves facing additional responsibilities relating to the enforcement of campaign finance laws.

Dividing the regulatory function confuses the law and makes it difficult to manage a unified government policy. We have already seen the results of this type of division of labor when Congress gave some disclosure police power to the Internal Revenue Service in 2000. The result was and remains substantial public confusion and a complex yet loophole riddled system. Adding a third and even fourth federal disclosure scheme is not likely to be enlightening so much as maddening.

Divided authority also erodes agency familiarity with the law. Campaign finance law has become one of the most complex areas of constitutional law imaginable. For example, the IRS faces far fewer issues regarding elections in its everyday business than does the FEC. Its culture and expertise are therefore quite different from that of the FEC, which regularly faces these

issues. Indeed, one reason for the frustration of the Reform Community with the FEC has been the unwillingness of that Community to accept the Constitutional restraints under which the FEC operates. Those who seek to push regulation onto other agencies often do so precisely because they seek to bypass such constitutional sensitivities that are, and ought to be, a hallmark of the FEC – the agency charged by Congress with "exclusive civil enforcement" of campaign finance laws.

Such efforts can create a host of new problems. Under strong political pressure, for example, the Federal Communications Commission recently required that political ad files, which formerly were available for public inspection at a broadcaster's office, be placed on the Internet. Its effort hasn't worked out that well. Following FCC recommendations on how to comply with the new regulation, many broadcasters simply scanned and placed the contents of their political file online. As a result, a number of media buyers have had funds stolen from their bank accounts by identity thieves who take banking information off the publicly available on-line files. Peter Overby, *Thieves Target Political Ad Consultants on New FCC Site,* March 28, 2013 (National Public Radio). Would the FEC have made such a mistake? We don't know. But we know that the FCC is not a disclosure agency. Operating outside its area of expertise, its rules and advice created major new problems.

Similarly, in the last year alone, the IRS has illegally disclosed confidential tax return information of politically sensitive non-profit groups on at least three occasions involving an unknown number of organizations. As a result, last month a large and bipartisan group of prominent non-profit attorneys sent a strongly worded letter warning of the consequences of such disclosures. As the letter noted:

> We are concerned that these recent reports will have significant negative consequences. Organizations fearful of such disclosures may be less forthcoming and intentionally vague about their activities on applications for exemption, Form 990s, and other filings. Donors may be deterred from giving if they fear their contributions might be improperly disclosed.
>
> Moreover, organizations that espouse particular ideologies may be convinced – and may persuade others – that the IRS or its employees are biased against those ideologies and are engaged in a deliberate effort to undermine the organizations through deliberate improper disclosures. These results are all possible, whether improper disclosures by the IRS are malicious or merely the result of unintentional errors by agency staff.

Few view the FEC as sensitive to the First Amendment. Yet for all its faults, it is better than most other agencies in that sensitivity. The other agencies simply do not have the expertise or agency culture to enforce such laws. Enforcement of such complex law is difficult, and Congress should not attempt to create new enforcement agencies or give existing agencies new powers that would stray from their mission.

C. Problems with IRS Enforcement of Campaign Finance Law

The Internal Revenue Service had also long used, consistent with its culture, mission, and expertise as a tax collection agency, a flexible test for determining the tax exempt status of

groups that do some political work, but that have a non-political "major purpose." But the Courts have consistently required a "bright line" test for the FEC when regulating political speech. For political speakers, operating with very low thresholds to trigger status as regulated political committees, such bright lines are essential – there is little room for error. Charged with a new mission for which it lacks knowledge and expertise, and which is tangential to its core responsibilities, the IRS has yet to produce any type of bright line test similar to that used by the FEC. As a result, politically active groups can be reasonably sure they are complying with the Federal Election Campaign Act, only to be left to guess whether they will be pursued by the IRS in any case.

For social welfare and business associations, there is no clear guidance about the level of permissible political activity as a portion of the organization's budget, much less guidance as to what counts as political activity. The only thing that is clear is that express advocacy counts as political activity, but whether a group can spend 49% or 20% of its budget on such activity remains an unanswered question.

But probably more important, the move into political regulation has embroiled the IRS in political fights the Service should avoid. Given that from the 1930s through the 1970s there was considerable history of presidents of both parties attempting to use the IRS to attack political enemies, the Service has long been particularly prickly, and justifiably so, about being dragged into political wars. In fact, in the 1990s, the Service pressed many groups operating under Section 501(c)(4) of the Code to reorganize under Section 527, or to create an affiliated 527. Neither 501(c)(4) nor 527 organizations pay income tax on contributions for their exempt activities. Thus, as 527s have no IRS limits on their political activities, moving groups from (c)(4) to 527 status had no revenue effects yet helped the IRS avoid decisions about whether a group's activities were political or not, thus keeping it out of political disputes. By attempting to force the IRS back into the regulation of political activity, however, Congress places the IRS in an awkward place it prefers not to be, of having to make audit and tax exemption decisions about politically or public policy oriented entities.

Equally as important, the collection of trillions of dollars in taxes each year is based on what the IRS calls the self-assessment feature of the tax laws, where citizens and businesses calculate and pay their taxes. If the agency develops a reputation as a partisan lapdog of the party in power, that could lead to more citizens cheating on their taxes, with potentially disastrous implications for the budget deficit. If the level of compliance with just the income tax laws alone were to drop just one percentage point due to a decline in the Service's reputation for fairness, that could cost the government over $170 billion in tax collections over a 10 year period.

The Service has quickly learned that that is not possible to avoid politics once it is given the assignment to regulate overtly political activity. It has been buffeted by politicians from both parties with regularity for its disclosure and enforcement policies regarding non-profits. The IRS may be rapidly hitting the point at which it will be mired in regulatory gridlock – no new regulations or changes in existing regulations will be considered with good faith by members of Congress, each being viewed instead as a partisan scheme.

The IRS gives us a cautionary tale: the agency is not equipped or structured to do the job it was asked to do in overseeing political activities. It is, after all, the tax collection agency. This

dual regulatory scheme has created confusion in the regulated community and among the public, and created a series of seams and loopholes that the least scrupulous and most lawyered could exploit. Further, it has embroiled the Service in political battles in such a way that it now cannot address substantial areas of its core mission because its actions are so suspect on the Hill. It would be a mistake to ask the IRS to play an even greater role in the enforcement of campaign finance laws.

V. Conclusion and Recommendations

Any legislation emanating from Congress should be based on three principles:

1. Moderation;
2. Simplification; and
3. Respect for the First Amendment and a recognition that political participation should be encouraged, not discouraged, and praised, not vilified.

Specifically, Congress must begin by recognizing that the substantial majority of increased political spending in 2012 was unrelated to *Citizens United* or even *SpeechNow.org v. FEC*. These are important cases with meaningful consequences, to be sure. They have helped to open up the political system, level the playing field, and increase competition; the doomsday predictions offered when the decisions were announced in the spring of 2010 have not come true. But note that while total spending increased by approximately 37 percent from 2008 to 2012 elections, it increased by approximately 27 percent from the 2004 to 2008 elections, before these decisions and when McCain-Feingold was in full effect. These decisions probably account for no more than 15 to 20 percent of increased spending.

Second, concerns about "undisclosed" spending must be placed in context. The current disclosure regime is the most extensive in U.S. history. Only a bit more than five percent of spending in 2012 came from groups that do not disclose donors, and even that overstates the issue, since many of these groups, their missions, their general source of support, and often specific supporters are well known from other sources. By contrast, prior to the 1970s virtually no campaign donations or expenditures by candidates or political parties were publicly reported. Yet, no one then complained about dysfunctional government, legislative gridlock, or the imminent end of democracy.

Generally speaking, we as a society believe that moderation in law enforcement is good. Few of us wish to live in the police state necessary to try to prevent all violent crime, for example – and even then, we don't think we could really end *all* violent crime. Even the most ardent proponents of vigorous enforcement of border security understand that there will be some illegal immigration.

The same principle is true in campaign finance – especially since we are dealing with an area of law with sensitive First Amendment implications. Many of the things that some people argue are signs of "ineffective enforcement" are simply signs that we have other values in play. The FEC's bipartisan make-up, the target of so much criticism, exists because, I trust, few members of this Subcommittee or the Senate would be eager to allow a partisan board controlled by the opposing party to regulate campaign speech. The FEC's enforcement process, with its

sometimes cumbersome emphasis on voluntary conciliation, reflects the understanding that most violations are inadvertent, not intentional. We have historically sought to minimize the role of the IRS in politics, not to increase it, because we know that the credibility of the tax system, based largely on voluntary compliance, relies on the perception and reality that the IRS is not and will not be used for partisan purposes.

Second, the law is already too complex. We don't need new disclosure rules and more enforcement agencies – we need to consolidate responsibility for enforcement within the FEC, as originally provided for in the Federal Election Campaign Act Amendments of 1974.

We should look to address perceived problems by simplifying and liberalizing the law, not by suppressing political activity or calling for more aggressive enforcement in an area of core First Amendment freedoms. For example, if we are concerned that Super PACs and 501(c)(4) groups are less regulated than candidates and parties, let's simplify and remove or ease restrictions on candidates and parties. The current limit on giving to candidates is $2,600. If that were merely adjusted for inflation since 1974, when Congress first enacted limits, it would now be $4,700. Adjusted for inflation, the annual limit on giving to national parties would not be $32,400, but $94,200. All of the limits should be adjusted for inflation. We should also dramatically raise, or abolish, the limits on coordinated spending between parties and candidates, and the limits imposed by McCain-Feingold in 2003 on state and local parties. It makes no sense to force an artificial barrier between parties and their own candidates.

Congress should also consider lifting the ban on corporate contributions to candidates. Most corporations cannot afford to operate PACs, so the current system favors large corporations and national unions over small business and union locals that cannot afford to operate PACs. Corporate contributions could be subject to the same limits as individuals – there is no reason why a $4,700 from a corporation is more corrupting than a $4,700 contribution from that corporation's president.

All of these steps would help to place political parties and candidate campaigns on more equal footing with Super PACs and 501(c)(4) organizations, drawing more money into these formal structures and away from the other organizations more effectively than devoting more effort to enforcement and reducing First Amendment protections for politically involved citizens and groups.

As limits are adjusted for inflation, we should also raise disclosure thresholds substantially. There is no reason to disclose every $200 contribution. These amounts are not remotely corrupting, hinder serious analysis of donors by swamping observers with information, and invade the privacy of small donors for little or no gain. We should consider renewing the tax credit for small dollar political donations, both making more money available and singling that political participation is a good thing, not a bad thing.

In short, we should be using carrots, not sticks. Doing so is likely to be more effective and it will not do partisan damage to agencies such as the IRS or encroach on First Amendment freedoms.

Political participation is a good thing, and financial participation is an important component of that. Our nation's founders, remember, pledged not just their "lives" and "sacred honor," but also their "fortunes." So let's look for reform that rewards rather than punishes.

Thank you.

APPENDIX

EXCERPTS FROM FEDERAL ELECTION COMMISSION BROCHURE ON COORIDINATED COMMUNCIATIONS AND INDEPENDENT EXPENDITURES

Key Terms

Before discussing the distinctions between coordinated and independent communications, it is helpful to define a few key terms: public communication, express advocacy, and clearly identified candidate.

A public communication is "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising." Communications over the Internet are not public communications unless the communications are placed for a fee on another person's web site. 11 CFR 100.26.

A communication "expressly advocates" if it includes a message that unmistakably urges the election or defeat of a clearly identified candidate. See 11 CFR 100.22.

A "clearly identified candidate" is one whose name, nickname, photograph or drawing appears, or whose identity is apparent through unambiguous reference, such as "your Congressman," or through an unambiguous reference to his or her status as a candidate, such as "the Democratic presidential nominee" or "Republican candidate for Senate in this state." 11 CFR 100.17.

Coordinated Communications

When an individual or political committee pays for a communication that is coordinated with a candidate or party committee, the communication is considered an in-kind contribution to that candidate or party committee and is subject to the limits, prohibitions, and reporting requirements of the federal campaign finance law.

In general, a payment for a communication is "coordinated" if it is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee or their agents, or a political party committee or its agents. 11 CFR 109.21. To be an "agent" of a candidate, candidate's committee, or political party committee for the purposes of determining whether a communication is coordinated, a person must have actual authorization, either express or implied, from a specific principal to engage in specific activities, and then engage in those activities on behalf of that specific principal. Such activities would also result in a coordinated communication if carried out directly by the candidate, authorized committee staff, or a political party official. 11 CFR 109.3(a) and (b).

Candidate-Prepared Material

Generally, an expenditure made to distribute or republish campaign material produced or prepared by a candidate's campaign is an in-kind contribution to that candidate, and not an independent expenditure. 11 CFR 109.23. However, exceptions related to volunteer activity for

party committees and candidates may apply. For more information, consult the "Volunteer Activity" brochure.

Three-Prong Coordination Test

FEC regulations establish a three-prong test to determine whether a communication is coordinated. All three prongs of the test—payment, content and conduct—must be met for a communication to be deemed coordinated and thus an in-kind contribution.

Payment Prong

In order to satisfy the payment prong, the communication need only be paid for, in whole or in part, by someone other than a candidate, a candidate's authorized committee, a political party committee, or an agent of the above.

Content Prong

The content prong relates to the subject matter and timing of the communication. A communication that meets **any one** of these four standards satisfies this part of the test:

1. A public communication that expressly advocates the election or defeat of a clearly identified candidate;
2. A communication that is an **"electioneering communication"** as defined in 11 CFR 100.29 (i.e. a broadcast communication that mentions a federal candidate and is distributed to the relevant electorate 30 days before the primary election or 60 days before the general election);
3. A public communication that republishes, disseminates or distributes in whole or in part **campaign materials** prepared by a candidate or a candidate's campaign committee; or
4. A public communication that is:

    a. Made **within 90 days before an election** and:

    - Refers to a clearly identified House or Senate candidate and is publicly distributed in that candidate's jurisdiction; or
    - Refers to a political party, is coordinated with a House or Senate candidate, and is publicly distributed in that candidate's jurisdiction; or
    - Refers to a political party, is coordinated with a political party, and is publicly distributed during a midterm election cycle

    b. Made **120 days before a Presidential primary election through the general election** and:

    - Refers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed in a jurisdiction before the clearly identified federal candidate's election in that jurisdiction; or
    - Refers to a party, is coordinated with a Presidential or Vice Presidential candidate, and is publicly distributed in that candidate's jurisdiction; or
    - Refers to a political party, is coordinated with a political party, and is publicly distributed during the Presidential election cycle.

For communications that refer to both a party and a clearly identified federal candidate see 109.21(c)(4)(i)-(iv).

Conduct Prong

The conduct prong examines the interactions between the person paying for the communication and the candidate, authorized committee or political party committee, or their agents. A communication satisfies this part of the test if it meets **any one** of the **five standards** regarding the conduct of the person paying for the communication and the candidate, the candidate's committee, a political party committee or agents of the above:

1. If the communication is created, produced or distributed at the **request or suggestion** of the candidate, candidate's committee, a party committee or agents of the above; or the communication is created, produced or distributed at the suggestion of the person paying for the communication and the candidate, authorized committee, political party committee or agent of any of the foregoing **assents** to the suggestion. 11 CFR 109.21(d)(1).
2. If the candidate, the candidate's authorized committee or party committee is **materially involved** in decisions regarding the content, intended audience, means, or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication. 11 CFR 109.21(d)(2).
3. If the communication is created, produced or distributed after one or more **substantial discussions** about the communication between the person paying for the communication or the employees or agents of that person and the candidate, the candidate's committee, the candidate's opponent or opponent's committee, a political party committee or agents of the above. 11 CFR 109.21(d)(3).
4. If the person paying for the communication **employs a common vendor** to create, produce or distribute the communication, and that vendor:
    - Is currently providing services or provided services within the previous 120 days with the candidate or party committee that puts the vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee; and
    - Uses or conveys information about the plans or needs of the candidate or political party, or information previously used by the vendor in serving the candidate or party, and that information is material to the creation, production or distribution of the communication. 11 CFR 109.21(d)(4).
5. If a person who has previously been an **employee or independent contractor** of a candidate's campaign committee or a party committee during the previous 120 days uses or conveys information about the plans or needs of the candidate or political party committee to the person paying for the communication, and that information is material to the creation, production or distribution of the communication. 11 CFR 109.21(d)(5).

Formal agreement or collaboration between the person paying for the communication and the candidate, authorized committee or political party committee, or their agents, is not required. 11 CFR 109.21(e).