



June 2, 2014

United States Senate Committee on the Judiciary

RE: Hearing, “Examining a Constitutional Amendment to Restore Democracy to the American People”

Dear Chairman Leahy and Members of the Committee:

Thank you for holding this hearing and for turning your attention to the critical issue of the outsized influence big money wields in our democracy. We appreciate the opportunity to comment on this urgent problem, as well as on SJ Res. 19, the proposed constitutional amendment which would put the power of regulating elections back in the hands of “We, the People.”

The flow of big money into our political system—and the associated effects on our democratic processes—has reached a crisis level. In the wake of *Citizens United v. FEC*, 558 U.S. 310 (2010), *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014), and other damaging Supreme Court decisions that have left Congress and the states unable to enact commonsense election spending regulations, American elections have grown increasingly expensive, with the 2012 elections the most expensive in our country’s history. Spending in the 2012 federal elections is estimated to have exceeded \$6 billion,ⁱ while the total spending in 2012 local, state and federal elections reached an estimated \$10 billion.ⁱⁱ

Americans have also witnessed an explosion of outside spending in elections since 2008, the last federal election before *Citizens United* was decided. From 2008 to 2012, outside spending increased roughly 245 percent in presidential elections, 662 percent in House elections, and 1,338 percent in Senate elections.ⁱⁱⁱ And as political entities adapt to a post-*Citizens United*, post-*McCutcheon* landscape, these trends are only getting worse, as evidenced by the experience so far in the 2014 midterm congressional elections. As of May 30, 2014, over \$106 million of outside spending has already poured into the 2014 federal midterm elections. Of that, roughly 60 percent has come from Super PACs, and over 20 percent has come from “dark money” social welfare groups and trade associations that do not have to disclose their donors.^{iv}

The torrent of money into our political system has a profound effect on the democratic process for everyday Americans, whose voices and policy preferences are increasingly being drowned out by those of wealthy special interests. The more campaign cash from wealthy special interests can flood our elections, the more policies that favor those interests are reflected in the national political agenda. On policies like unemployment benefits, minimum wage, and health coverage, our nation’s wealthiest tend to have fundamentally different views than do everyday Americans.^v Princeton professor Martin Gilens has noted that these views are not equally reflected in policy outcomes, writing: “[W]hen Americans with different income levels differ in their policy preferences, actual policy outcomes strongly reflect the preferences of the most affluent but bear virtually no relationship to the preferences of poor or middle-income Americans.”^{vi} Unsurprisingly, as they see a system increasingly unresponsive to their needs and preferences, everyday Americans are losing faith in our democratic system. For instance, a November

2013 poll found that seven in 10 American voters think our election system is “biased in favor of the candidate with the most money.”^{vii}

This deluge of spending also takes a toll on the effectiveness of individual lawmakers. To reach the average amount it now takes to win a seat in the Senate, a U.S. senator must raise roughly \$4,600 each day of his or her six-year term, including weekends and holidays; a House member must raise roughly \$2,000 each day of his or her two-year term to reach the winning average.^{viii} With elected officials so focused on raising money, they inevitably have far less time for listening to their constituents, providing constituent services, and crafting effective public policy.

Sen. Tom Udall’s amendment proposal SJ Res. 19 seeks to address the problem of a democracy overwhelmed by big money by restoring to Congress and the states the constitutional authority to regulate the raising and spending of money to influence elections. At present, Congress and the states are constitutionally prohibited from:

- 1) Setting limits on independent expenditures or on contributions to independent election spending entities made by corporations or by individuals;^{ix}
- 2) Barring corporations from spending general treasury funds to independently influence elections;^x
- 3) Setting caps on self-funded campaigns;^{xi}
- 4) Setting aggregate limits on direct contributions by individuals to candidates, PACs and party committees;^{xii}
- 5) Implementing a range of other innovative election reform measures.

The Court has tied the hands of Congress and the states, prohibiting them from setting limits on campaign spending and saying that the only legitimate rationale under the First Amendment for such laws is to counter narrowly defined *quid pro quo* corruption (bribery). The Court has ruled illegitimate any attempt to reduce the ability of the nation’s wealthiest and most powerful to buy inappropriate and outsized influence in our elections. This distortion of the Constitution has prevented any meaningful regulation or reform of the way we finance elections in America.

SJ Res. 19 would correct the Court’s misreading of the First Amendment, and would, in fact, strengthen the First Amendment’s core purpose. As Justice Breyer noted in his *McCutcheon* dissent, the interests of the Court in preventing corruption or the appearance of corruption are “rooted in the First Amendment itself ... in the constitutional effort to create a democracy responsive to the people—a government where the laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.”^{xiii} As such, Justice Breyer urges, “[w]e should see [campaign finance laws] as seeking in significant part to strengthen, rather than weaken, the First Amendment.”^{xiv} To restore the First Amendment’s contribution to a government whose laws reflect the people’s “thoughts, views, ideas, and sentiments,”^{xv} short of changing the composition or the jurisprudence of the Court, we have no choice but to amend the Constitution.

While amending the Constitution is unquestionably a weighty matter—only warranted in rare and compelling circumstances—this is one of those moments in our nation’s history. The American people and their elected officials are increasingly speaking out about the need for an amendment. As of May 30, SJ Res. 19 had 41 cosponsors in the Senate, while in the House, similar amendment proposals that seek to overturn *Citizens United* and related cases had, in aggregate, garnered 123 sponsors and cosponsors.^{xvi}

The building momentum in Congress for an amendment mirrors the robust grassroots organizing taking place across the country at the local and state level. Since the landmark *Citizens United* decision, 16 states and over 550 municipalities, including large cities like New York, Los Angeles, Chicago and Philadelphia, have gone on record supporting congressional passage of a constitutional amendment to be sent to the states for ratification.^{xvii} Transcending political leaning and geographic location, voters in states and municipalities that have placed amendment questions on the ballot have routinely supported these initiatives by large margins. The momentum to address the issue of big money in politics grows stronger by the day.

SJ Res. 19 sets a framework for addressing this problem. The resolution provides, in a simple and straightforward way, that Congress and the states have the authority to regulate and limit the raising and spending of money on elections. It gives Congress and the states the power to enact appropriate legislation to implement and enforce the amendment. And it provides the important clarification that nothing in the amendment should be construed to abridge the freedom of the press.

Importantly, the Udall amendment also rejects the current Court's misguided interpretation that the only basis for campaign finance regulation is to address corruption in the form of *quid quo pro* bribery.^{xviii} In fact, in addition to preventing corruption, there are multiple rationales that justify campaign finance regulation, including but not limited to: leveling the electoral playing field; advancing the fundamental principle of equality for all; and protecting the integrity of the governmental and electoral processes. These are concepts incorporated in the Udall proposal, which provide guidance for a new post-amendment campaign finance jurisprudence to be developed by the Court.

There are several ways we believe the Udall amendment could be improved. First, it would be helpful for the amendment to lay out additional governmental interests behind the needed changes in campaign finance reform, including adding "democratic self-government" as a central amendment principal. Second, the amendment should make clear that Congress and the states will have the power to limit the election spending of corporations and other artificial entities, explicitly overturning the holding in *Citizens United v. FEC* that corporations have the same rights regarding spending money to influence elections as do natural people. We believe that these changes will both elucidate and strengthen the proposed amendment language.

The time to amend the Constitution to put our democracy back in the hands of "We, the People" is now. Moneyed interests have overwhelmed the political process, leaving everyday Americans struggling to have their voices heard over the roar of massive political spending. This is not the democracy the American people want, and it is certainly not the democracy envisioned by our founders. People For the American Way looks forward to working with you in advancing this much needed constitutional amendment and restoring our democracy to one that is truly of, by, and for the people.

Marge Baker
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ⁱ *OpenSecrets*, "Big Picture", accessed on May 25, 2014, <http://www.opensecrets.org/bigpicture/>.

ⁱⁱ John Nichols and Robert W. McChesney, *The Nation*, “Dollarocracy,” Sept. 30, 2013. Available here: <http://www.thenation.com/article/176140/dollarocracy>.

ⁱⁱⁱ Richard Hasen, Daniel Lowenstein and Daniel Tokaji, “Election Law Cases and Materials” Fifth Edition, 2013 supplement, <http://electionlawblog.org/wp-content/uploads/2013-supp-final.pdf>.

^{iv} *Center For Responsive Politics*, “Outside spending,” accessed May 30, 2014, https://www.opensecrets.org/outsidespending/fes_summ.php. Spending by these outside groups, as of May 30th in this election cycle, has approximately tripled from the amount outside groups spent in the same time period leading up to the 2010 midterms (leaping from \$27.6 million in 2010 to \$97.7 million in 2014). In 2006, this number was \$3.5 million – that’s a twenty-eight-fold increase in just two midterm cycles. *Center For Responsive Politics*, “Total Outside Spending by Election Cycle, Excluding Party Committees” accessed May 30, 2014, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=A&chart=N#summ.

52% of the money spent so far on national cable and broadcast television advertisements in 2014 Senate races has been purchased by outside groups; of those television advertisements, over half have come from groups that do not have to disclose their donors. 90% of all television advertisements in North Carolina’s U.S. Senate race have come from outside spenders. *Wesleyan Media Project*, “Interest Group Advertising Pours Into Senate Races,” <http://mediaproject.wesleyan.edu/2014/04/29/interest-group-advertising-pours-into-senate-races/>.

^v *Demos*, “Stacked Deck”: <http://www.demos.org/stacked-deck-how-dominance-politics-affluent-business-undermines-economic-mobility-america>.

^{vi} Martin Gilens, *Public Opinion Quarterly*, “Inequality and Democratic Responsiveness”: <http://qipsr.as.uky.edu/sites/default/files/Gilens-Inequality%20and%20Democratic%20Responsiveness-POQ.pdf>.

^{vii} Jeff Harrelson and Ben Tulchin, MFour Research and Tulchin Research, “National Voter Survey Findings,” http://mfour.com/wp-content/uploads/2013/12/representus.mediarelease.FINAL_.pdf.

^{viii} Russ Choma, *Open Secrets*, “Election 2012: The Big Picture Shows Record Cost of Winning a Seat in Congress”: <http://www.opensecrets.org/news/2013/06/2012-overview/>.

^{ix} *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). Available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/4B824DD5C7D7C4EF85257807005A9A46/\\$file/08-5223-1236837.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4B824DD5C7D7C4EF85257807005A9A46/$file/08-5223-1236837.pdf). See also <http://www.scotusblog.com/case-files/cases/speechnow-org-v-fcc/> for case history and media analysis.

^x *Citizens United v. FEC*, 588 U.S. 310 (2010). Available at <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>. See also <http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/> for case history and media analysis.

^{xi} *Buckley v. Valeo*, 424 U.S. 1, 51-54 (1976). Available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0424_0001_ZO.html#424_US_1n65ref.

^{xii} *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014). Available at http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf See also <http://www.scotusblog.com/case-files/cases/mccutcheon-v-federal-election-commission/> for case history and media analysis.

^{xiii} *McCutcheon v. FEC*, 134 S.Ct. 1434, 1468 (2014).

^{xiv} *Id.*

^{xv} *Id.*

^{xvi} For SJRES 19 cosponsors, see *Library of Congress THOMAS*, “S.J.RES.19,” <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:S.J.RES.19:@@P>. For amendment proposals in the 113th Congress and their cosponsors, see *United For the People*, “Amendments,” <http://www.united4thepeople.org/amendments.html>. For the views of senators and representatives in 113th Congress on the amendment strategy, see *United For the People*, “113th Congress,” <http://www.united4thepeople.org/113/>.

^{xvii} *United For the People*, “Local and State Resolutions,” <http://www.united4thepeople.org/local.html>.

^{xviii} See *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014). See also Richard Hasen, *Reuters*, “Opening the political money chutes,” <http://blogs.reuters.com/great-debate/2014/04/07/opening-the-political-money-chutes/>.