



**Center for Competitive Politics' Comments on
Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights**

**"Taking Back Our Democracy: Responding to Citizens United and the
Rise of Super PACs"**

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2:30 pm**

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Introduction:

The Center for Competitive Politics (CCP), a non-profit education organization based in Alexandria, Va. is dedicated to promoting and defending the First Amendment rights of speech, assembly, and petition. Our mission is to inform the public of the actual effects of money in politics and the results of a more free and competitive electoral process. We are the only organization dedicated solely to protecting First Amendment political rights. As such, and given our involvement as amici filers in support of Citizens United in the original *Citizens United v. FEC*, we submit these comments into the official record of today's Senate hearing titled "Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs."

Last month, the United State Supreme Court summarily reversed a decision by the Montana Supreme Court that would have upheld a Montana law prohibiting corporate expenditures in political races, despite the clear holding to the contrary in *Citizens United v. Federal Election Commission*. 558 U.S. 50 (2010). This has given renewed vigor to efforts to overturn *Citizens United* via a constitutional amendment, including one recently proposed by Senator Baucus.

Although there are many reasons to support the Supreme Court's decision in *Citizens United* as a correct understanding of the First Amendment, CCP wishes to raise here three points in particular which have been widely overlooked in the post-*Citizens United* discussion.

1. First, while there is no doubt that opinion polls show that the public disagrees with "Citizens United," at least as that decision is described in most polls, such polls fail to account for the nuances of public opinion, ongoing support for the First Amendment, and, in fact, substantial majority support for the actual result in *Citizens United*.
2. Second, prior to *Citizens United*, a majority of states already allowed unlimited corporate spending in state elections, without suffering the negative consequences it is claimed will result from the Supreme Court's ruling.
3. Many proposed constitutional amendments would not only invalidate *Citizens United*, they would also repeal a host of other

important First Amendment precedents going back decades.

The Public is not clamoring for a Constitutional Amendment

Numerous public opinion polls have indicated that the public opposes the Supreme Court's decision in *Citizens United*. Of this there is no doubt. This may lead members to believe that a constitutional amendment to overturn the decision would meet with wide public approval. A fuller reading of polling data, however, casts serious doubt that this is true.

For example, a widely cited 2010 poll for the Washington Post/ABC News asked, "do you support or oppose the recent ruling by the Supreme Court that says corporations and unions can spend as much money as they want to help political candidates win elections?"
<http://abcnews.go.com/images/PollingUnit/1102a6Trend.pdf>.

A 2012 poll by Greenberg Quinlan Rosner Research for Public Campaign asked a series of wildly biased questions to prime the pump against *Citizens United*. For example, respondents were asked if they agreed with the statements, "I am fed up with the big donors and secret money that control which candidates we hear about. It undermines democracy;" "There is too much big money spent on political campaigns and elections today and reasonable limits should be placed on campaign contributions and spending;" and "The middle class won't catch a break unless we start by reducing the influence of big banks, big donors and corporate lobbyists." Even with such pump priming, however, just 62% voiced opposition to *Citizens United*.

<http://campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf>.

In contrast, in 2010, in the immediate aftermath of the CU decision, CCP authorized a poll on public attitudes towards *Citizens United* and campaign finance.¹ Rather than ask people if they agreed with "Citizens United," or describing the case in the terms routinely used in other polls, we asked respondents about the actual issues in the case. The results were quite different. For example, when we asked, "Do you believe that

¹ The poll was conducted by Victory Enterprises, an Iowa polling firm, of 600 likely voters on March 1-2, 2010. The poll's margin of error is +-4%.

the government should have been able to prevent Citizens United, an incorporated nonprofit advocacy group, from airing ads promoting its movie?," respondents agreed with the ruling in the case by nearly a three to one margin (51.2 percent to 17.5 percent, with 27 percent undecided and 4 percent refusing to answer). We then asked about the second issue in the case: "Do you believe that the government should have been able to prevent Citizens United, an incorporated nonprofit advocacy group, from making its movie available through video-on-demand technology?," with a nearly identical result (51.2 percent said no, the government should not; 19.0 percent said yes).

We asked likely voters, "Do you support or oppose giving the federal government the ability to censor the production and distribution of political books and movies that are produced and distributed by corporations, including publishers like HarperCollins and movie studios like Warner Brothers?" Fifty six percent opposed giving government that power, while only 25 percent were in favor. And when we asked, "do you support or oppose allowing the federal government to impose criminal or civil penalties against individual citizens or corporations for spending money to engage in political speech?," only 28 percent supported such power for the government, versus 50 percent opposed.

Finally, we asked voters directly about the core philosophy guiding the Supreme Court's decision in *Citizens United*: "Do you think that the government should have the power to limit how much some people speak about politics in order to enhance the voices of others?" By a nearly four to one margin, respondents said no.

http://www.campaignfreedom.org/doclib/20100304_CCPpoll03042010.pdf.

These findings are actually consistent with deep public support for the First Amendment and for the Supreme Court's longstanding holding that campaign contributions and expenditures are a form of free speech protected by the First Amendment. For example, a Gallup poll taken on the eve of the *Citizens United* decision, in October 2009, found that by a twenty point margin, adults agreed that "money given to political candidates [is] a form of free speech protected by the First Amendment to the Constitution." Over sixty percent of both Republicans and Democrats agreed. <http://www.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx>.

Of course, public opinion on the issue is complex. For example, the same Gallup poll just cited found that majorities favored limits to candidate campaigns. Polling data on campaign finance is extremely sensitive to wording, and the public is inconsistent in its preferences. In a detailed study of polling data over many years, political scientist David Primo of the University of Rochester concludes that on any close examination, the public's views on the subject are "wishy-washy," and that "Reflected in these views may be a tension between freedom of expression and a desire to prevent corruption." But either way, notes Primo, the issue is relatively unimportant to the public at large: "although campaign finance arouses great passion among governing elites, the general public does not much care about the issue." David M. Primo, *Public Opinion and Campaign Finance*, 12 *Indep. Rev.* 207 (2002).

Further, in looking at public opinion, it is important to note that the public knows very little about the campaign finance laws. For example, a 1997 survey for the Center for Responsive Politics found that only four percent of the public knew that corporations were barred by law from contributing to campaigns. Further, only one percent of respondents could answer correctly five questions about campaign finance law. Princeton Survey Research Associates, *Money And Politics Survey* (Apr. 1-24, 1997). We would imagine that this number on corporate contributions might be even lower in light of the barrage of news articles talking about corporate spending after *Citizens United*, many of which have mistakenly stated that the ruling allows corporate contributions to campaigns. Another example: Last year, in another poll taken for CCP, this time by Pulse Opinion Research, we found that in the midst of heavy reporting about "super PACs," 76 percent of respondents still did not know that "super PACs" must disclose their donors.

Similarly, the aforementioned and oft-cited Washington Post/ABC News poll did not ask respondents what, or even if, they actually knew anything about the *Citizens United* case, before asking their opinion on it (in terms that we consider less than neutral). Our poll, taken approximately five weeks after the decision and just three weeks after the Post/ABC Poll, did ask that question. Specifically, respondents were asked, "Are you aware of or have you followed the recent *Citizens United* case, related to corporate and union spending in elections, decided by the Supreme Court last month?" Only 22 percent answered yes, while 60 percent said no and 18 percent were unsure or refused to answer. This

helps to further explain why, when asked specifically about the issues in the case, support for the result vastly outweighed opposition, even as other polls show strong opposition to something called “*Citizens United*” and to large campaign expenditures.

As Columbia University law professor Nathaniel Persily, one of the few professors who has attempted to learn what Americans really mean when they answer polls on campaign finance, concludes, “The low salience that campaign finance reform has in most Americans’ political calculations and most Americans’ lack of understanding about this complicated topic necessarily create challenges in tapping opinions on these issues.” Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Penn. L. Rev. 119, 132 (2004).

To summarize, the assumption that Americans would welcome a constitutional amendment to amend the First Amendment to overturn *Citizens United* is likely misplaced. A poll taken by the left-leaning Public Policy Polling in November 2010, for the pro-constitutional Amendment Progressive Change Campaign Committee, found that only 46 percent of respondents thought that Congress should even consider – let alone pass – a constitutional amendment to overturn *Citizens United*.

http://www.huffingtonpost.com/2010/11/23/voters-strongly-back-amen_n_787526.html. In probing deep into public opinion on campaign finance, Professor Primo found that the lopsided polls favoring “reform” were, on close inspection, not so clear: “those carrying the mantle of reform,” he summarized, “often claim a groundswell of public support for their positions, which flies in the face of the evidence.” Primo, *supra*.

Unlimited corporate spending was legal in a majority of states before *Citizens United*, without the problems predicted by critics of *Citizens United*.

Although it is frequently said that *Citizens United* overturned 100 years of precedent (this statement is itself untrue – *Citizens United* found unconstitutional part of the Taft-Hartley law, at the time a 62 year old statute, and overturned two precedents, the six year old *McConnell v. Federal Election Commission* and the 19 year old *Austin v. Michigan*

Chamber of Commerce), in fact on the eve of *Citizens United*, twenty-eight states allowed corporate spending in elections, and twenty-six states allowed *unlimited* corporate spending in elections. One member of this Committee described the threat *Citizens United* allegedly posed to his state by saying, “Vermont is a small state. It would not take more than a tiny fraction of the corporate money being spent in other states to outspend all of our local candidates combined.” (Statement of the Hon. Senator Leahy.) Yet prior to *Citizens United*, Vermont already allowed corporate spending in elections. See National Conference of State Legislators, *State Laws Affected by Citizens United*, at <http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx>.

There is no sign that these states were uniquely poorly governed. In fact, in a rating of state governments by the Pew Charitable Trust and *Governing Magazine*, the six best graded states all allowed unlimited corporate spending in state elections prior to *Citizens United*. Katherine Barrett & Richard Green, *Governing: Measuring Performance* (2008).²

Research shows that there is no meaningful linkage between campaign finance laws and public trust and confidence in government. See Primo, *supra*; Persily & Lammie, *supra*.

In fact, the public is highly skeptical that more regulation will improve government. *Id.* See also CCP Poll, asking, “In 2002 Congress passed the Bipartisan Campaign Reform Act, also known as ‘McCain-Feingold.’ The law placed new restrictions on corporate and union political spending and contributions to political parties, with the goal of reducing special interest influence. Do you believe that McCain-Feingold has been successful in reducing special interest influence?” Only fourteen percent said yes; forty four percent said no and the remainder were uncertain or declined to answer. All of this is a further reason to believe that the public would not be supportive of a constitutional amendment, but also that an amendment would not have the desirable effects claimed for it.

Despite much loose language to the contrary, in the 2010 and now 2012 elections, the vast majority of campaign money continues to come from individuals; the elections have been highly competitive; and voter

² Those states were Utah, Virginia, Delaware, Missouri, Georgia, and Washington.

turnout has been up, not down,

The Proposed Baucus Amendment would overturn far more than *Citizens United*

The proposed amendment to the First Amendment would do much more than overturn *Citizens United*. In its present form, it would invalidate *Buckley v. Valeo*, 424 U.S. 1 (1976), a landmark of First Amendment jurisprudence. While we will not review all of these cases here, this committee needs to consider that the Amendment would appear to overturn numerous free speech precedents, including but not limited to *United States v. C.I.O.*, 335 U.S. 106 (1948); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Wisconsin Right to Life v. Federal Election Commission* 551 U.S. 449 (2007); *FEC v. AFL-CIO*, 628 F.2d 97 (D.C. Cir.), *cert. denied*, 449 U.S. 982 (1980); *Emily's List v. Federal Election Commission*, 531 F. 3d 1 (D.C. Cir. 2010); *Federal Election Commission v. Christian Action Network* 110 F. 3d 249 (4th Cir. 1997); *FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979), and *FEC v. Machinists Non-Partisan Political Action Committee*, 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981). .

In addition to overturning cases protecting the rights of politically active groups from across the political spectrum, its broad language would give the government power to regulate the public discussion of issues, and limit or ban speech that might be uncomfortable for incumbents or particular political actors. At its core, the proposed amendment creates an exception to the First Amendment, and does so in the area of political speech, where the courts have consistently noted that the First Amendment is most vital. Congress should move extremely cautiously in this realm, lest core and treasured rights to political participation be affected in unanticipated ways.

CONCLUSION:

As noted, many of our nation's best governed states, and a majority of all states, allowed unlimited corporate contributions in state elections even before *Citizens United*. These states did not suffer from the ill consequences advocates of a constitutional amendment have said will occur under *Citizens United*. The nation has yet to conduct a single presidential election since the decision in *Citizens United*; however, in the congressional elections of 2010 turnout was up and there were more competitive races than at any time since the Federal Election Campaign Act was passed prior to the 1976 election. It is far too early to begin talking about amending the First Amendment, and a careful reading of public opinion shows that such efforts will not likely be popular once the public actually sees the likely consequences of such an amendment.