



Joint Statement of

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Mr. Chairman and members of the Committee, thank you for the opportunity to present our views on the hearing titled, “Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond.” We respectfully request that our statement be entered into the public record.

The recent Supreme Court decision in *McCutcheon v. Federal Election Commission*¹ struck down an aggregate limit on how much an individual could give to all federal political candidates and party committees in an election cycle. For this, the decision has actually been called the “worst decision since Dred Scott.”² Yes, worse than *Buck v. Bell*,³ or *Plessey v. Ferguson*.⁴

Yet, less than forty years ago, there were no limits at all on individual contributions to candidates, except for limited restrictions on government employees and contractors. The Committee should keep in mind that without limits on speech, voters elected FDR, Truman, Eisenhower, Kennedy, and Johnson as president. Was major legislation such as the Voting Rights Act, Medicare, and the Civil Rights Act the product of a corrupt system, given that individual contributions were not only unlimited in the aggregate, but unlimited to any one candidate? Of course not.

¹ 572 U.S. ___, No. 12-536 (Apr. 2, 2014).

² Rebecca Shabad, “McCain predicts ‘major scandal’ on campaign finance,” *The Hill*. Retrieved on April 28, 2014. Available at: <http://thehill.com/blogs/ballot-box/campaign-committees/204228-sen-mccain-on-campaign-finance-rulings-i-predict-a-major> (April 23, 2014). (“[McCain] said the two recent Supreme Court rulings on the issue — one released earlier this month and one from 2010 — were ‘the worst since Dred Scott.’”) (discussing *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that African-Americans, whether they were slaves or free, were not U.S. citizens)).

³ 274 U.S. 200 (1927) (upholding a law providing for forced sterilization of “imbeciles”).

⁴ 163 U.S. 537 (1896) (upholding segregation laws).

Consider the role of this system that allowed unlimited contributions to candidates and its impact on the 1968 Democratic primary and the debate on the Vietnam War. In late November 1967, Minnesota Senator Eugene McCarthy decided to challenge President Lyndon Johnson for the Democratic nomination. At first, people thought McCarthy's campaign would be quixotic. But with no contribution limits, Senator McCarthy assembled a well-funded campaign from a small number of rich donors who shared his opposition to the Vietnam War. McCarthy concentrated on New Hampshire's primary, and the number one issue in his campaign was to end the war.

His rich backers gave the equivalent of almost \$10 million in today's dollars to fund the campaign, an enormous amount at the time. As a result of his showing in New Hampshire, McCarthy forced President Johnson out of the race, a feat not duplicated since the enactment of contribution limits.

Attached is a copy of an article by *Washington Post* columnist Richard Cohen that describes what happened in the McCarthy campaign in more detail.

Today, at least a dozen states, including many of the least corrupt⁵ and best managed⁶ states in the nation, have no limits on individual contributions to candidates or parties. Seen in this light, the attention and the tone of response to *McCutcheon* is rather remarkable. Moreover, even before *McCutcheon*, the substantial majority of U.S. states, including several represented by members of this Committee, placed no aggregate limit on individual giving to political candidates and committees. Yet, this was so uncontroversial that even Americans who closely follow campaign finance would have been hard pressed to name any of these states. There is no evidence that states without aggregate limits are more poorly governed, suffer more political corruption, or that their citizens sense a greater "appearance of corruption," than any of their neighbors. In fact, the evidence seems to indicate that the states without aggregate limits have less corruption and better management.⁷

The Committee has expressed some interest in using this hearing to explore new disclosure requirements for spending on politics and public affairs, and with that in mind, it is worth noting that the *McCutcheon* ruling is disclosure's friend. By freeing donors to contribute more directly to candidates and party committees, one likely effect of *McCutcheon* will be to

⁵ Adriana Cordis and Jeff Milyo, "Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?" Mercatus Center at George Mason University. Retrieved on April 28, 2014. Available at: mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (April 2013); Matt Nese and Luke Wachob, "Do Lower Contribution Limits Decrease Public Corruption?," Center for Competitive Politics' Issue Analysis No. 5. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf (August 2013).

⁶ Matt Nese and Luke Wachob, "Do Lower Contribution Limits Produce 'Good' Government?," Center for Competitive Politics' Issue Analysis No. 6. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (October 2013); Matt Nese, "Do Limits on Corporate and Union Giving to Candidates Lead to 'Good' Government?," Center for Competitive Politics' Issue Analysis 7. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf (November 2013).

⁷ Matt Nese, "Aggregate and Proportional Limits in the States: Have they Reduced Corruption or Promoted Better Government?," Center for Competitive Politics' Issue Analysis No. 9. Retrieved on April 29, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/02/2014-04-24_Issue-Analysis-9_Aggregate-And-Proportional-Limits-In-The-States-Have-They-Reduced-Corruption-Or-Promoted-Better-Government.pdf (April 2014).

encourage donors to give directly to candidates and party committees, where their contributions are subject to the most rigorous compulsory disclosure rules, rather than to organizations that may have fewer disclosure requirements. So, *McCutcheon* is good for disclosure advocates.

The alleged disclosure problem itself, as we will outline below, is routinely overstated. Data from the Federal Election Commission and the Center for Responsive Politics show that just four percent of political expenditures in 2012 were financed by groups that did not itemize their donors. And in all cases, the name of the group making the expenditures was disclosed (at least if they were operating legally).

Any legislative response to *McCutcheon*, and new laws regulating the discussion of public affairs generally, must be grounded in a realistic understanding of what the law actually is; it must be based on a realistic assessment of the effects it has in practice; and it must take into account the actual costs and benefits of added compulsory disclosure, eschewing loaded terms like “dark money” that do little to enlighten and much to obscure those costs and benefits.

McCutcheon v. FEC

I. Understanding the rationale behind the Court’s plurality opinion in McCutcheon is crucial to understanding the implications of the decision.

McCutcheon invalidated the federal aggregate limit on contributions by individuals to candidate campaigns and political committees. In his controlling opinion, Chief Justice Roberts summarized: “we conclude that the aggregate limits on contributions...intrude without justification on a citizen’s ability to exercise ‘the most fundamental First Amendment activities.’”⁸

McCutcheon is just the most recent in a long line of cases holding that contribution limits implicate fundamental First Amendment interests.⁹ When Congress first created substantial regulation of campaign finance in the 1970s, the unanimous Supreme Court in *Buckley v. Valeo* identified campaign contributions as a component of the “right to associate,” and therefore determined that limits must be subject “to the closest scrutiny.”¹⁰ In *McCutcheon*, the Chief Justice simply noted that these “rights are important regardless whether the individual is, on the one hand, a ‘lone pamphleteer[] or street corner orator[] in the Tom Paine mold,’ or is, on the other, someone who spends ‘substantial amounts of money in order to communicate [his] political ideas through sophisticated’ means.”¹¹

Aggregate contribution limits are a substantial restraint on the rights of speech and association. The opinion explains: “An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a ‘modest restraint’ at all. The Government may no more restrict how many candidates or causes a donor may support than it

⁸ *McCutcheon*, slip op. at 39-40 (Roberts, C.J. for the plurality) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).

⁹ *Id.* at 7 (Roberts, C.J. for the plurality); see also *Buckley*, 424 U.S. at 14.

¹⁰ *Buckley*, 424 U.S. at 25 (1976) (citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)).

¹¹ *McCutcheon*, slip op. at 14-15 (Roberts, C.J. for the plurality) (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)) (brackets in *McCutcheon*).

may tell a newspaper how many candidates it may endorse.”¹² The Chief Justice continues: “To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for ‘robustly exercis[ing]’ his First Amendment rights.”¹³

Let’s take a hypothetical close to home. There are nine members from the Democratic Party, and one member who caucuses with the Democrats on the Senate Rules Committee: Senator Schumer from the Empire State (NY), Senator Feinstein from sunny California, Senator Durbin from Illinois (the Land of Lincoln), Senator Pryor from the Land of Opportunity and Hope (AR), Senator Tom Udall from the Land of Enchantment (NM), Senator Warner from the Commonwealth of Virginia, Senator Leahy from the Green Mountain State (VT), Senator Klobuchar from the Land of Ten Thousand Lakes (MN), Senator Angus King from the Pine Tree State (ME), and Senator Walsh from Big Sky Country (MT). A contributor may think all ten are doing a fantastic job on the Senate Rules Committee – overseeing elections and insuring the integrity of the Upper House. Therefore, this person may wish to give the maximum they can by law to those re-election campaigns.

But what if this contributor also likes Senator Mary Landrieu’s work on energy issues? Why must this contributor choose supporting good governance of the Senate over energy? Giving to Senator Landrieu in the same manner as giving to Senator King will not corrupt either. Yet the law used to make such a contributor choose which was more important to our contributor. The Supreme Court in *McCutcheon* recognized the absurdity of this limitation and held that it could not withstand “the closest scrutiny.”

Some have attempted to dismiss the First Amendment interests at stake by arguing that relatively few Americans can afford to contribute the legal maximum to more than a handful of candidates. Leaving aside that constitutional rights may not be abrogated simply because they have an immediate application to a minority of citizens, it seems fair to say that far more Americans have the financial wherewithal to make political contributions than own newspapers or broadcast outlets. Would any member of this committee support the hypothetical law suggested by the *McCutcheon* Court – a limit on the number of candidates a newspaper or broadcast station could endorse – on the grounds that very few Americans own newspapers or broadcast stations?

II. For those who worry about political contributions to 501(c) groups, the McCutcheon decision will actually result in increased contributions to primarily political organizations including candidates and political parties.

Those who have expressed concern about disclosure of political spending should be pleased with the *McCutcheon* decision. The likely effect of *McCutcheon* will be to place more money into the compulsory disclosure system. By allowing for more limited contributions to candidate campaigns and political parties, *McCutcheon* will direct money away from organizations with fewer disclosure obligations than those imposed on candidate committees and

¹² *Id.* at 15 (Roberts, C.J. for the plurality).

¹³ *Id.* at 16 (Roberts, C.J. for the plurality) (citing *Davis v. Federal Election Comm’n*, 554 U. S. 724, 739 (2008)).

political parties.¹⁴ While the *McCutcheon* Court acknowledged that “disclosure requirements burden speech,” a proper disclosure regime is less burdensome than limits on contributions.¹⁵ *McCutcheon*’s effect will be to drive money previously going to independent spenders to campaigns and parties, where “modern technology” provides “massive quantities of information [that] can be accessed at the click of a mouse.”¹⁶

Websites like OpenSecrets.org and FollowTheMoney.org amass the data from candidate contribution reports and make it searchable, and thereby easily accessible.¹⁷ By pushing political spending back towards direct contributions, *McCutcheon* will encourage more disclosure as contributors give directly to candidates, parties, and PACs, rather than using alternative avenues such as 501(c) organizations.¹⁸ America will know exactly who supports each of you, should you seek re-election.

III. Worries over campaign contributions in the absence of an aggregate limit are misguided given existing law and historical trends.

It is important to remember that the ban on corporate and union contributions to candidates remains in place after *McCutcheon*.¹⁹ Likewise, the limits on how much a contributor may give to a PAC, candidate, or party committee remain in place.²⁰ Nor can someone create multiple PACs to serve as conduits for their political spending.²¹ Anti-earmarking laws and regulations still have full effect.²² The *McCutcheon* Court saw all of these as protections that made the aggregate limits obsolete.²³ Indeed, the Chief Justice agreed with Acting Assistant Attorney General Mythili Raman that we should “anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted.”²⁴

Before proclaiming the doom of American democracy, it must again be emphasized that historically the United States has placed no limits at all – aggregate or otherwise – on individual contributions to candidates and parties. Broad federal limits on individual contributions to candidates were not imposed until 1974.²⁵ The specific aggregate limits struck down in *McCutcheon* were a creation of *this* millennium.²⁶ A person born in the year those aggregate

¹⁴ As the Chief Justice explained, “disclosure of contributions minimizes the potential for abuse of the campaign finance system...by exposing large contributions and expenditures to the light of publicity.” *McCutcheon*, slip op. at 35 (Roberts, C.J. for the plurality).

¹⁵ *Id.* at 35-36.

¹⁶ *Id.* at 36.

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ 2 U.S.C. § 441b.

²⁰ 2 U.S.C. § 441a(a)(1)(C).

²¹ 2 U.S.C. § 441a(a)(5); *see also* 11 C.F.R. § 100.5(g)(4).

²² 2 U.S.C. § 441a(a)(8); *see also* 11 C.F.R. §§ 110.6(b)(1) (broadly defining earmarking) and 100.1(h) (regulating earmarking).

²³ *McCutcheon*, slip op. at 12-13 (Roberts, C.J. for the plurality).

²⁴ *McCutcheon*, slip op. at 26 n. 9 (Roberts, C.J. for the plurality) (quoting Statement of Mythili Raman, Hearing on Current Issues in Campaign Finance Law Enforcement before the Subcommittee on Crime and Terrorism of the Senate Committee on the Judiciary, 113th Cong., 1st Sess., 3 (2013)).

²⁵ Federal Election Campaign Act of 1974 Pub. L. 93-443 § 101, 88 Stat. 1263 (1974).

²⁶ Bipartisan Campaign Reform Act Pub. L. 107-155 § 307(b), 116 Stat. 93, 102-103 (2002) (codified at 2 U.S.C. § 441a(a)(3)).

contribution limits were enacted is not even old enough to drive a car.²⁷ Aggregate limits are a recent, radical addition to our election laws, and the Court found they could not be justified under the closest scrutiny.

IV. *Contribution limits have lagged inflation and should be increased.*

On an inflation-adjusted basis, current contribution limits to campaigns, parties, and PACs are substantially lower than the first caps on individual giving imposed in 1974. The Federal Election Campaign Act Amendments of 1974 limited what an individual could contribute to a candidate to \$1,000 per election.²⁸ Using the Department of Labor's Bureau of Labor Statistics inflation calculator, \$1,000 in 1974 is equal to \$4,792.96 today.²⁹ Yet, today the individual base contribution limit sits at *barely half* (54 percent) its value in 1974 – just \$2,600.³⁰ Likewise, in 1974, an individual could contribute \$5,000 to a PAC, and PACs could contribute \$5,000 to a candidate.³¹ Neither number has ever been adjusted for inflation. Were they adjusted for inflation, an individual could contribute \$23,964.81 to a PAC, and a PAC could contribute that same amount to a political party.³² Also unadjusted for inflation is the 1974 limit of \$15,000 on PAC contributions to political parties. Adjusted for inflation, this number now ought to be \$71,894.42.³³ In other words, at every level, the amount that may be contributed directly to a candidate or campaign is today substantially lower than the original limits imposed in 1974.³⁴ The substantial effective decline in the ability of individuals to contribute to parties and candidates has not alleviated either the reality or the appearance of corruption, but it undoubtedly has required officeholders and candidates to spend more time fundraising, and driven more money into channels with less onerous disclosure requirements. Limits on individual giving are, in fact, disclosure's enemy. Despite this substantial decline in the ability of a contributor to associate with a candidate, the *McCutcheon* Court upheld the base individual contribution limits.³⁵

²⁷ An earlier system of aggregate limits was first imposed in the 1974 FECA Amendments. That limit was \$25,000 in total political contributions per year, but contributions made in connection with an election were considered made in the year of the election. Adjusted for inflation, \$25,000 would have allowed annual contributions of \$119,824 in 2014, roughly double the total cap imposed in the Bipartisan Campaign Reform Act of 2002, although some of that amount would have to go to party activities not directly in connection with an election.

²⁸ Federal Election Campaign Act of 1974 Pub. L. 93-443 § 101, 88 Stat. 1263 (1974).

²⁹ "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1000&year1=1974&year2=2014> (2014).

³⁰ 2 U.S.C. § 441a(a)(1)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, Federal Election Commission, 78 Fed. Reg. 8530, 8532 (Feb. 16, 2013)).

³¹ Federal Election Campaign Act of 1974 § 101, 88 Stat. at 1263.

³² "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5000&year1=1974&year2=2014> (2014).

³³ "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=15000&year1=1974&year2=2014> (2014).

³⁴ There is a scenario where the post-McCutcheon contribution limits increased over what was available in 1974. A joint fundraising committee made up of the three principle components of the Democratic Party – the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee – can now jointly raise \$97,200. If we were under the 1974 limits, adjusted for inflation, it would be \$95,859.23. That's a difference of \$1,340.77. In the large sums spent on elections, \$1,341 spread over three arms (\$446.92) of the national party is hardly corrupting.

³⁵ *McCutcheon*, slip op. 4-5 (describing with approval the limits); slip op. at 37 (referring to the anticorruption interest of the base limits) (Roberts, C.J. for the plurality). At some point, excessively low contribution limits will invite litigation to strike those limits down. *See also Randall v. Sorrell*, 548 U.S. 230 (2006) (holding that Vermont's state limits were unconstitutionally low, in that they prevented candidates and parties from raising funds needed to effectively spread their messages). A Congress that seeks to preserve contribution limits in some form would do well to note the warning of *Randall v. Sorrell*.

Campaign Finance Disclosure and the Hyperbolic Rhetoric of “Dark Money”

- I. *An understanding of existing campaign finance disclosure regulations highlights an already over-regulated area of the law and downplays the need for additional disclosure.*

In the wake of the *McCutcheon* decision, those who wish to further regulate political speech have renewed calls for even more mandatory disclosure, continuing a pattern established after the decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*,³⁶ and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission*.³⁷ However, to assess these demands, it's crucial to examine current campaign finance disclosure regulations as well as the recent opinions of the High Court on the issue.

The claim by those demanding more regulation has 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 about 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 “dark 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”)*.³⁸ 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 miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it

³⁶ 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds).

³⁷ 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits).

³⁸ 479 U.S. 238 (1986).

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.³⁹

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*.⁴⁰ In short, political spending by 501(c) organizations is nothing new, and those organizations have never been required to disclose the names of their donors and members unless donors gave specifically to support a particular independent expenditure.

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.⁴¹ Indeed, these entities also report all of their expenditures.

Current federal 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.

II. *Current law requires disclosure of the spender on all campaign advertising.*

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.

³⁹ See Bradley A. Smith, “Disclosure in a Post-*Citizens United* Real World,” 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

⁴⁰ 551 U.S. 449 (2007).

⁴¹ See 2 U.S.C. §434(b) and (c).

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).⁴² According to figures from the Center for Responsive Politics, approximately \$311 million was spent by organizations that did not disclose their donors.⁴³ That is just under 4.3 percent of the total. \$311 million sounds like a lot of money – four percent of total spending on federal races doesn't sound like much money at all.

Moreover, that four 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 of their 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 Humane Society, the League of Conservation Voters, NARAL Pro-Choice America, the National Association of Realtors, the National Federation of Independent Business, the National Rifle Association, and Planned Parenthood. 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 who favor more regulation lead the public to 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 these organizations’ funders are well-known, even as the organizations themselves do not formally disclose their names. Does anyone on this Committee not know that Tom Steyer provided substantial funding to NextGen Climate Action, a 501(c)(4)? If not, a Google search of the organization’s name will provide that information in a matter of seconds.⁴⁴

Furthermore, data from the Center for Responsive Politics shows that the percentage of independent spending by organizations that do not disclose their donors appears to have declined substantially (by 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 an 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

⁴² Jake Harper, “Total 2012 election spending: \$7 Billion,” Sunlight Foundation. Retrieved on April 28, 2014. Available at: <http://sunlightfoundation.com/blog/2013/01/31/total-2012-election-spending-7-billion/> (January 31, 2013); Jonathan Salant, 2012 Elections Cost Will Hit \$7 Billion, FEC Chair Weintraub Says,” *Bloomberg*. Retrieved on April 28, 2014. Available at: <http://go.bloomberg.com/political-capital/2013-01-31/fec-head-weintraub-says-2012-elections-cost-will-hit-7-billion/> (January 31, 2013).

⁴³ “Outside Spending by Disclosure, Excluding Party Committees,” Center for Responsive Politics. Retrieved on April 29, 2014. Available at: <http://www.opensecrets.org/outsidespending/disclosure.php>.

⁴⁴ Nicholas Confessore, “Financier Plans Big Ad Campaign on Climate Change,” *The New York Times*. Retrieved on April 29, 2014. Available at: http://www.nytimes.com/2014/02/18/us/politics/financier-plans-big-ad-campaign-on-environment.html?_r=0 (February 17, 2014).

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”⁴⁵ 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.⁴⁶

III. *According to Justice John Paul Stevens in McIntyre, “[a]nonymity is a shield from the tyranny of the majority.”*

The 1995 decision in the case *McIntyre v. Ohio Elections Commission*, where the U.S. Supreme Court upheld the claim of a right to anonymously publish and distribute pamphlets opposing a school tax that was on the ballot, illustrates how disclosure can impact First Amendment freedoms.⁴⁷ Justice John Paul Stevens wrote the majority opinion in *McIntyre*, including this statement: “Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular.”⁴⁸

This opinion explains several of the many benefits to free speech from anonymity:

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S., at 64. Great works of literature have frequently been produced by authors writing under assumed names. [footnote omitted] Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. [footnote omitted] Accordingly, an author's decision to

⁴⁵ President Barack Obama, “Remarks by the President in State of the Union Address,” The White House, Office of the Press Secretary. Retrieved on April 28, 2014. Available at: <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (January 27, 2010).

⁴⁶ See *Bluman v. Federal Election Commission*, 132 S. Ct. 1087 (2012).

⁴⁷ *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

⁴⁸ *Id.* at 357.

remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.⁴⁹

The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.*, at 64. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. *Id.*, at 64-65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. [footnote omitted] This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.⁵⁰

IV. *Added disclosure rules will have significant costs and would often lead to junk disclosure.*

Given that non-itemized donor expenditures are such a small part of the whole, why not require disclosure of that four percent of spending? The answer is that disclosure does impose costs, and such disclosure will also mislead the public. Any public policy finds its costs increasing and its benefits decreasing as it aims for 100 percent achievement of its goal. To take one example, some increase in spending on police, prisons, and courts is likely to reduce crime, but eliminating all crime – with police on every corner and prisons stuffed with petty offenders – is not worth the cost.

When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, unions, and trade associations. As a result, if a group decides to make

⁴⁹ *Id.* at 341-342.

⁵⁰ *Id.* at 342-343.

political expenditures as a small part of the organization's multiple activities, many of its donors could potentially be made public, regardless of whether their donations were earmarked for a political expenditure. People give to membership organizations and trade associations not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their views. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleads the public. It is "junk disclosure" – disclosure that serves little purpose other than to provide a basis for official or private harassment, and that may actually misinform the public.

There are also serious practical problems. As one of us has explained in an academic publication:

Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a \$100,000 dues payment to the National Business Chamber ("NBC") in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises \$350,000 specifically for political activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers \$1 million – the \$350,000 it raised specifically for political activity, the \$350,000 from the NBC, and another \$300,000 from general dues – to the Committee for a Better State ("CBS"), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves \$200,000 for its own direct spending, and then transfers \$800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends \$3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?

What should be immediately obvious to any observer is that the question of "disclosure" is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme's initial payment to NBC?... By the time we reach Acme Industries, is the information useful – or even truthful? Would it be truthful to say that Acme Industries is "responsible" or "endorses" messages on a state ballot initiative made by the State Jobs Alliance far down the road?⁵¹

⁵¹ Bradley A. Smith, "Disclosure in a Post-Citizens United Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

V. *The Supreme Court minority's views on campaign finance law pose a significant threat to the First Amendment.*

Having commented on the Supreme Court majority opinions in recent campaign finance cases, a few words are in order as regards the dissenting opinion in *Citizens United*. While this brief discussion only scratches the surface, it serves as a warning as to what might occur were the current minority view emerge as a majority view.

The primary dissent in *Citizens United*, authored by Justice John Paul Stevens, said it was “profoundly misguided”⁵² to consider the cases under the First Amendment because corporations do not retain First Amendment rights and interests. This is remarkable in light of how the case came before the Court. Initially, the case was centered on a ban on speech by corporations, as part of the Bipartisan Campaign Reform Act (BCRA).⁵³ At the original oral argument, a hypothetical arose that asked whether one line of express advocacy in a book published by a corporation could trigger regulation and possible censorship as an electioneering communication.⁵⁴ When the answer from the United States government came back as “yes,” the concerned Court ordered new briefing and argument.⁵⁵

Even with that admission, after re-hearing, four members of the Court dissented from the judgment. It is important to note that they did not concur in the judgment on more narrow grounds, or on the basis of an as-applied exception on the particular facts of the case. Rather, four justices of the United States Supreme Court explicitly held that the federal government may ban the production, airing, and distribution of a documentary film about a major political figure during an election year, when a corporation is involved in the financing, production, or distribution of the film – even when the corporation is a non-profit organization. This is surely one of the most radical interpretations of the First Amendment ever endorsed by any Justice of the Court.

VI. *The IRS Harassment Scandal and subsequent proposed rulemaking governing the permissible activities of 501(c)(4) organizations illustrates the dangers of calls for increased disclosure.*

This concern over so-called “dark money” and push for increased disclosure requirements comes at a time when Americans’ confidence in government has been rocked by information that the IRS systematically targeted groups based on their political beliefs. A number of Senators, including some on this Committee, specifically urged the IRS to investigate conservative non-profit groups.⁵⁶ Such pressure on the Agency appears to have been a major

⁵² *Citizens United v. FEC*, 558 U.S. 310, 393-94 (2010) (Stevens, J. dissenting). (“All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided”).

⁵³ Bipartisan Campaign Reform Act, Pub. L. 107-155 § 203, 116 Stat. 81, 91 (2002).

⁵⁴ Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 10 (2012).

⁵⁵ *Id.*

⁵⁶ On October 11, 2010, Senator Durbin writes the IRS, asking the Agency to “quickly examine the tax status of Crossroads GPS and other (c)(4) organizations that are directing millions of dollars into political advertising.” (U.S. Senator Richard J. Durbin, “DURBIN URGES IRS TO INVESTIGATE SPENDING BY CROSSROADS GPS,” Office of Senator Richard J. Durbin. Retrieved on April 29, 2014. Available at: <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99> (October 12, 2010).) Several months later, on February 16, 2012, Senators Schumer and Udall (NM), along with Senators Bennet, Franken, Merkley, Shaheen, and Whitehouse write the IRS, asking the Agency to investigate tax-

factor in creating the current IRS scandal, which will have longstanding repercussions for the Agency's reputation and the voluntary compliance of citizens with the tax system.

These demands of the IRS by members of Congress are reminiscent of the rejected "DISCLOSE Act," which would have mandated disclosure of donations not related to the election or defeat of political candidates. The bill was about politics and silence as much as "disclosure." As Chairman Schumer said when the first bill was introduced, "the deterrent effect [on citizens' speaking out] should not be underestimated."⁵⁷ It appears the ultimate aim of such proposals is to force trade associations and non-profits to publicly list all their members along with their dues and contributions. Such lists can be used by competing groups to poach members and, more ominously, to gin up boycotts and threats to the individuals and corporate members of the groups – indeed, this has already occurred. Further in the background lies the thinly veiled threat of official government retaliation.

VII. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

The purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. We recognize that this distinction can dissolve in practice. For example, if we demand public disclosure of who gave money to a public official, in order to monitor that official, we will necessarily give the government the tools to monitor us. But as a first principle for thinking about what type of disclosure is proper, it provides a good starting point.

Indeed, the Supreme Court has recognized the careful balance between allowing citizens the tools to monitor the government and balancing that consideration with the realization this publicly available personal information can be used by individuals and organizations to threaten and intimidate those that they disagree with.

This evidence is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.⁵⁸ In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of

exempt organizations' political activities. In an accompanying press release by Senator Bennet, he opines that "operations such as Mr. [Karl] Rove's [Crossroads GPS] should not be allowed to masquerade as charities." (U.S. Senator Michael Bennet, "Senators Call for IRS Investigations into Potential Abuse of Tax-Exempt Status by Groups Engaged in Campaign Activity," Office of Senator Michael F. Bennet. Retrieved on April 29, 2014. Available at: <http://www.bennet.senate.gov/newsroom/press/release/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity> (February 16, 2012).) Nearly two years later, on February 13, 2014, echoing the prior calls of Democratic Senators before the IRS scandal revelations in May 2013, Senator Pryor publicly prods the IRS to regulate 501(c)(4) organizations more aggressively: "That whole 501(c)(3), 501(c)(4) [issue], those are IRS numbers. It is inherently an internal revenue matter. There are two things you don't want in political money, in the fundraising world and expenditure world. You don't want secret money, and you don't want unlimited money, and that's what we have now." (Alexander Bolton, "Vulnerable Dems want IRS to step up," *The Hill*. Retrieved on April 29, 2014. Available at: <http://thehill.com/homenews/senate/198298-vulnerable-dems-want-irs-to-step-up> (February 13, 2014).)

⁵⁷ Jess Bravin and Brody Mullins, "New Rules Proposed On Campaign Donors," *The Wall Street Journal*. Retrieved on April 29, 2014. Available at: <http://online.wsj.com/article/SB10001424052748703382904575059941933737002.html> (February 12, 2010).

⁵⁸ *NAACP v. Alabama*, 357 U.S. 449 (1958).

affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.”⁵⁹

Much as the Supreme Court sought to protect those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular candidates and causes still need protection today. Events in the state of California over the past few years lend credence to this phenomenon. Many supporters of Proposition 8 faced harassment from gay-rights activists, simply because these donors’ information was made publicly available through government-mandated disclosure. Indeed, in Justice Thomas’ opinion in *Citizens United*, he dissented in part, noting harassment issues stemming from the disclosure of political information. In his dissent, Justice Thomas made specific reference to the experience of Proposition 8 supporters: “Some opponents of Proposition 8 compiled this [disclosure] information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result.”⁶⁰ Similarly, it is hardly impossible to imagine a scenario in 2014 in which donors to controversial candidates and causes that make independent expenditures – for or against another same-sex marriage initiative; for or against abortion rights; or even persons associated with others who have been publicly vilified, such as the Koch family, Sheldon Adelson, or George Soros, might be subjected to similar threats.

Indeed, very recently, Mozilla CEO Brendan Eich was ousted from his position due to a pressure campaign orchestrated by those who support same-sex marriage over a \$1,000 donation by Eich to the campaign for California Proposition 8 in 2008. As Eich’s longtime business partner and defender of the need for his resignation, Mozilla Executive Chairwoman Mitchell Baker, noted when discovering that he gave money to the Proposition 8 campaign: “That was shocking to me, because I never saw any kind of behavior or attitude from him that was not in line with Mozilla’s values of inclusiveness.”⁶¹ Ultimately, Eich was forced to resign.⁶²

Worse still, as the Eich example shows, little can be done once individual contributor information – a donor’s full name, street address, occupation, and employer – is made public under government compulsion. It can immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. This problem is best addressed by limiting the opportunities for harassment by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates*, and those who give to organizations whose *major purpose* is political advocacy – and not to organizations engaging in issue advocacy about a particular issue relevant to the voters, especially when that advocacy is but a part of the organization’s overall mission.

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens,⁶³ who receive

⁵⁹ *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.

⁶⁰ *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).

⁶¹ Conor Friedersdorf, “Mozilla’s Gay-Marriage Litmus Test Violates Liberal Values,” *The Atlantic*. Retrieved on April 28, 2014. Available at: <http://www.theatlantic.com/politics/archive/2014/04/mozillas-gay-marriage-litmus-test-violates-liberal-values/360156/> (April 4, 2014).

⁶² *Id.*

⁶³ *Brown v. Socialist Workers’ ’74 Campaign Comm.*, 458 U.S. 87 (1982).

their information because of the forced disclosure. In short, mandatory disclosure of political activity should require a strong justification and must be carefully tailored to address issues of public corruption and to provide information of particular importance to voters.

* * *

The *McCutcheon* ruling could not be clearer: “Campaign finance restrictions that pursue other objectives [than preventing *quid pro quo* corruption]... impermissibly inject the Government ‘into the debate over who should govern.’ And those who govern should be the *last* people to help decide who *should* govern.”⁶⁴ In doing so, the Court relied upon a long line of cases going back to *Buckley* in 1976.

At the time of the *McCutcheon* ruling, 32 states (of all political persuasions) already recognized the soundness of the Court’s reasoning by not imposing aggregate limits on the overall political giving of their residents. Nothing suggests that these 32 states were more poorly governed, or more prone to political corruption, or that their citizens perceived government to be more corrupt, than in the minority of states that did impose some type of aggregate caps. Even before the *McCutcheon* decision, Arizona raised existing state contribution limits on the amount individuals and PACs may give to candidate campaigns, and eliminated Arizona’s aggregate limits on contributions from individuals and PACs to statewide and legislative candidates.⁶⁵

The First Amendment grants Americans the right to speak about politics without fear of official retribution from the government or elected officials. Although the *McCutcheon* ruling had little to do with campaign finance disclosure regulations, any attempt by Members of this Committee and others outside of Congress to connect the Court’s ruling with calls for increased disclosure should be strongly considered in light of the complex and extensive disclosure already required by the federal government. In consideration of the seriousness of the potential for harassment and threats stemming from personal information made public by compulsory government disclosure, members of this Committee should think twice before advocating policies that will further stifle civic engagement and subject citizens to political intimidation and harassment for exercising their First Amendment rights.

We hope that this Committee recognizes the sound reasoning of the Supreme Court in *McCutcheon* and has gained greater clarity about the overblown rhetoric of “dark money” in light of the our current, heavily regulated campaign finance disclosure regime. Thank you for considering our comments.

⁶⁴ *Id.* at 3 (Roberts, C.J. for the plurality) (citing and quoting *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U. S. ___, No. 10-238 slip op. at 25 (2011)).

⁶⁵ Cristina Silva, “Brewer increases Arizona campaign finance limits” *Arizona Capitol Times*. Retrieved on April 28, 2014. Available at: <http://azcapitoltimes.com/news/2013/04/12/jan-brewer-increases-arizona-campaign-finance-limits/> (April 12, 2013).

The Washington Post

A defense of big money in politics

By [Richard Cohen](#), Published: January 16, 2012

Sheldon Adelson is supposedly a bad man. The gambling mogul gave [\\$5 million to a Newt Gingrich-loving super PAC](#) and this enabled Gingrich to maul Mitt Romney — a touch of opinion here — who had it coming anyway. Adelson is a good friend of Gingrich and a major player in Israeli politics. He owns a newspaper in Israel and supports politicians so far to the right I have to wonder if they are even Jewish. This is Sheldon Adelson, supposedly a bad man. But what about Howard Stein?

The late chairman of the Dreyfus Corp. was a wealthy man but, unlike Adelson, a liberal Democrat. Stein joined with some other rich men — including Martin Peretz, the one-time publisher of the New Republic; Stewart Mott, a GM heir; and Arnold Hiatt of Stride Rite Shoes — to provide about \$1.5 million for Eugene McCarthy's 1968 challenge to Lyndon Johnson. Stein and his colleagues did not raise this money in itsy-bitsy donations but by chipping in large amounts themselves. Peretz told me he kicked in \$30,000. That was a huge amount of money at the time.

That sort of donation would now be illegal — unless it was given to [a super PAC that swore not to coordinate with the candidate](#). And until quite recently, even that would have been illegal — the limit being something like \$2,400. Many people bemoan that [the limit is no more](#), asserting that elections are now up for sale, as if this was something new. They point to the Adelson contribution and unload invective on the poor right-wing gambling tycoon. I understand, but I do not agree.

Back in 1967, a small group of men gave McCarthy the wherewithal to challenge a sitting president of the United States. The money enabled McCarthy to swiftly set up a New Hampshire operation and — lo and behold — he got 42 percent of the popular vote, an astounding figure. Johnson was rocked. Four days later, Robert F. Kennedy, who at first had declined to do what McCarthy did, jumped in himself. By the end of March 1968, Johnson was on TV, announcing he would not seek a second term.

My guess is that a lot of the people who decry what Adelson has done loved what Stein, Peretz and the others did. My guess is that they cheered Johnson's defeat because they loathed the Vietnam War and wanted it ended. My guess is that while they pooh-pooh the argument that money is speech, they cannot deny that when McCarthy talked — when he had the cash for TV time or to set up storefront headquarters — that was political speech at the highest decibel.

In the end, the 1968 campaign was won by Richard Nixon — and so was the next. Nixon was always awash in cash, huge donations from the scrupulous, the unscrupulous and the just plain weird. (Google W. Clement Stone to see what I mean.) Some of this money came from abroad and some of it funded the Watergate burglary and the cover-up. Too much money chased too

little morality. Reform was demanded and reform is what we got. It limited money and it limited speech.

History was changed by the sort of political donations that are now derided. Lyndon Johnson stepped down. The Democratic Party was ripped right up the middle. Bobby Kennedy joined the race (and was assassinated in June), and nothing — but nothing — was the same afterward. McCarthy's quixotic campaign became so real that Paul Newman came up to New Hampshire, and so did throngs of kids with long hair and incredible energy. I was there, a graduate student-cum-cub reporter, eating off the expense accounts of soon-to-be Washington Post colleagues (My God, what a life!). So when the Supreme Court says that [money is speech](#) and ought to be protected, I nod because I was in New Hampshire in 1968 and I know.

Sheldon Adelson is not my type of guy. I don't like his politics. But he has no less right to try his own hand at history than did that band of rich men who were convinced the war was a travesty-tragedy — and they were right. Since 1968, my views have changed on many matters. But my bottom line remains a fervent belief in the beauty and utility of free speech and of the widest exchange of ideas. I am comfortable with dirty politics. I fear living with less free speech.

The above article, "A defense of big money in politics," can be accessed at: http://www.washingtonpost.com/opinions/how-political-donations-changed-history/2012/01/16/gIQA6oH63P_story.html.