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COMPILATION OF HEARINGS AND MARKUPS

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BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

February 2, 2010; April 15, 2010; May 5, 2010; May 25, 2010; and July 20, 2010

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In addition to this compilation of hearings, the Committee on Rules and Administration also published a hearing compilation entitled, "Examining the Filibuster" (S. Hrg. 111–706). This publication included hearings the Committee held during the Second Session of the 111th Congress that are not included in this compilation. (http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62210/pdf/CHRG-111shrg62210.pdf)

Note: Archived webcasts of all hearings and an electronic version of this report are available at *http://rules.senate.gov*.

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CORPORATE AMERICA VS. THE VOTER: EXAMINING THE SUPREME COURT'S DECISION TO ALLOW UNLIMITED CORPORATE SPENDING IN ELECTIONS

TUESDAY, FEBRUARY 2, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Feinstein, Durbin, Nelson, Murray, Pryor, Udall, and Bennett.

Staff present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Justin Perkins, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; and Michael Merrell, Republican Counsel.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The Rules Committee shall come to order. Good morning.

First, I would like to thank my friend, Ranking Member Bennett, for joining me here at this hearing so quickly after the important Supreme Court decision on January 21st in the case of Citizens United v FEC. Since the decision was handed down, most of us here in this room, including myself, have been carefully examining its implications. And today we are here to further examine its implications and listen to our distinguished panels.

Put bluntly, I believe that the Supreme Court's opinion in Citizens United is corrosive to our democracy. I feel that strongly about it. And I believe that the title of our hearing, "Corporate America vs. the Voter," really accurately describes the immediate ramifications of this decision. Perhaps my colleague would want an addendum to that, I realize, but we will leave that to him. And while this is the first congressional hearing to be held in response to this ruling, it is certainly not going to be the last, as other committees have already announced plans to have their hearings.

Furthermore, concern over this decision is obviously not just limited to Members of Congress. Last week, President Obama voiced his concerns about the impact of the ruling in his State of the Union address. It is rare, in fact, for a Supreme Court opinion to attract so much attention from all parts of the country.

The changes that are likely to result from the Citizens United case have the potential to be disastrous to the health of our democracy, inviting unprecedented spending and influence by wealthy special interests. The ruling encourages them to get involved in races large and small; in primaries and general elections and runoffs; and in Federal, State, and local contests. It goes across the political spectrum.

So get ready. If this ruling is left unchallenged, if Congress fails to act, our country will be faced with big, moneyed interests spending, or threatening to spend, millions on ads against those who dare to stand up to them. The threat alone is enough to chill debate and distort the political process in ways that hurt the voice and influence of the average citizen.

Stopping those big bonuses by bailed-out firms? Forget about it. Pushing back against polluters to protect the health of our children? Maybe no more. Regulating dangerous chemicals in drugs and children's toys? Much less of a chance.

This opinion can allow foreign interests to influence our elections, special interest spending to go unchecked and undisclosed, and corporate America to rule the day. It did not have to be that way.

I believe the Supreme Court took a tortuous path to expand the Citizens United case. It chose to review, and then strike down, the earlier Austin v. Michigan Chamber of Commerce decision, and to overturn more than a century of campaign spending policy stretching back to the Tillman Act of 1907.

The Supreme Court turned its back on previous rulings and went out of its way to broaden its decision in service to a particular policy goal. That should make all of us—regardless of where we are on the political spectrum—deeply concerned and determined to act. The Roberts Court has turned its back on stare decisis—respecting and following the precedents set by earlier Court opinions—simply because five Justices did not like the way previous opinions went.

I look forward to hearing all of our witnesses who have come to share their views at this hearing. I am not going to prejudge the best way going forward. We are not going to issue—we are talking, of course, and thinking seriously about what to do, but we are not going to talk about that today. We are here to listen and get people's suggestions.

I am very interested, of course, in what both Senators Feingold and Kerry, who have had long history here, believe. And while Congressman Van Hollen and I will be introducing a bill shortly, today is a day to listen to ideas and the sharp analysis that will be presented.

And before we get to our distinguished first panel, I know my good friend and colleague, Ranking Member Bennett, would like to say a few words.

OPENING STATEMENT OF SENATOR BENNETT

Senator BENNETT. Thank you very much, Mr. Chairman. I appreciate the opportunity to respond, and I look forward to the information that we will get as a result of this hearing.

As I think everyone knows, I am a First Amendment hawk. I am one of a very small number of conservative Republicans who voted against the flag-burning amendment simply because I felt it intruded on our First Amendment rights. I feel very strongly about protection of the First Amendment, and as you indicated, my interpretation of the Supreme Court's ruling was different than yours. And let me give you this to think about as an example of what I think they did in their decision.

Let us go back just a few weeks ago to the eve of a Federal election. A corporate employee went on the air to describe a candidate in that election as, among other things, and I quote, "an irresponsible, homophobic, racist, reactionary, supporter of violence against women and against politicians with whom he disagrees."

Now, this statement was made in a corporate studio, broadcast with corporate money, directed to the voting public, clearly designed to influence their opinion of the candidate—which it may have done, but perhaps not in the way the employee had intended.

Now, in spite of this clear intent to influence an election with corporate money, the corporate employee responsible for these statements was able to broadcast them without any fear of violating our election laws. He did not have to hire counsel to advise him if the statement could be legally broadcast. And he did not have to check with the FEC to see if they would permit him to make the statement before doing so.

These statements were made before the Citizens United decision was handed down, and they could be made with the full confidence that there would be no legal consequence because the corporation for which this employee worked was a media corporation.

Had any other corporation used their treasury funds to broadcast a similar statement on the eve of an election, they would have been guilty of a crime.

Now, that was on a Monday. But by Friday of that week, things had changed: the Supreme Court said that the First Amendment applies to all Americans, and not just those who own their own TV shows.

And with this decision, all Americans can know they are free to speak their minds on issues of public concern without having to get the permission of the Government.

All Americans can make their views known about Federal elections without having to hire counsel to vet their words and make sure they are abiding by the law.

All Americans can praise or criticize office holders without having to worry about committing a crime.

And if I may, as a comment on this statement I have quoted, all Americans have the right to make fools of themselves by going over the top, if they want to, without worrying about having the Government come in and say, "You cannot do this."

That is the essence of the First Amendment, that everybody should be treated alike, everybody should have the same rights, everybody should be able to speak freely and boldly, and sometimes

foolishly, with respect to an election. That is a good thing. It should not be feared. It should be cheered and celebrated.

So for that reason, I am supportive of the Supreme Court decision and look forward to the testimony of our witnesses.

Chairman SCHUMER. Thank you, Senator Bennett.

Senator Feingold has to chair a hearing very shortly, so we are going to, with Senator Kerry's permission, call on Senator Feingold first, despite seniority. And I know Senator Udall wanted to make a brief statement. We will let members—we will give a little extra time so members can make brief statements before their questioning, if that is okay with you, Senator Udall, Senator Feinstein.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A UNITED STATES SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman, Mr. Ranking Member, and for your courtesy, Senator Kerry, for allowing me to testify at this point.

The Supreme Court's decision in Citizens United was a tragic error. The Court reached out to change the landscape of election law in a drastic and wholly unnecessary way. By acting in such an extreme and unjustified manner, the Court has badly damaged its own integrity. More important, it has harmed our democracy in ways that may not be fully understood today, but will likely become clear over the next few election cycles.

There is, of course, a debate about how much impact the Court's decision will have. The Wisconsin Right to Life decision in 2007 had already significantly undermined the electioneering communications provision of McCain-Feingold. But by completely removing all restraints on political spending from corporate treasuries, Citizens United has unleashed a threat of enormous spending that simply was not possible before. And as we all know, a threat of retaliation at election time may be all that is needed to make a legislator think twice about opposing the already powerful voice of corporate America.

All it takes is one Senator losing a close election because of a last-minute corporate advertising barrage, and everyone will constantly have one eye on what might happen to them. That is why this decision is so dangerous. It will result in legislators being even more responsive to corporations rather than voters.

Now, the underlying rationale for the Court's decision—that corporations must have First Amendment rights in the political process equal to those of citizens—makes no sense. Corporations cannot vote or run for office, they do not have feelings or thoughts. They do not speak or make decisions except through individuals—their corporate officers, their boards of directors, and their lobbyists. What they do have is the ability to make huge amounts of money, thanks in part to laws passed by the people's representatives. So the Court's ruling has, in effect, produced a Frankenstein—the people created corporations, but the Court has denied the people the power to prevent corporations from dominating the entire political system.

Mr. Chairman, I have published several op-eds in the last few weeks concerning what I feared might be the likely effects of the

Citizens United decision. I ask that they be put in the record of the hearing.

Chairman SCHUMER. Without objection.

[The op-eds – Appendix A:]

Senator FEINGOLD. Thank you, Mr. Chairman.

Now, one bright spot in the Court's ruling was its recognition that disclosure requirements do not violate the constitutional rights of corporations. I have long believed that disclosure is a necessary, though not sufficient, ingredient of campaign finance regulation. After all, Americans have much more important things to discuss around the kitchen table than the latest expenditure reports filed at the FEC or the even the latest news story based on those reports. But at the very least, we must make it possible for people who have the right to cast votes to know exactly who is trying to influence their votes.

You and I have discussed other components of possible legislation: a new definition of "coordination," a prohibition of election spending by Government contractors and recipients of bailout funds, a tightening of the provision in existing law concerning contributions and expenditures by foreign corporations. And I support these kinds of measures. They certainly do not reverse the Court's decision; no legislation can. But they may diminish some of the decision's worst effects.

Let me note one final thing as you begin your work on a bill. When we developed the McCain-Feingold bill, we paid close attention to previous First Amendment and campaign finance decisions of the Supreme Court and tried very hard to ensure that it would be upheld. Major decisions like Shrink Missouri, FEC v. Beaumont, and Colorado Republican II came down during the 7 years we worked on that bill, and we took a hard look at the legislation in light of each new decision. We knew our bill would be challenged, but we felt we had strong and good-faith arguments in support of the constitutionality of each and every provision. And we were right. The Court upheld the bill almost in its entirety. It took a change in membership on the Court to reverse that decision. Even today, of course, the centerpiece of our bill—the prohibition on soft-money contributions to political parties—is still in place. And I am, of course, pleased about that.

As legislators, we have a duty to carefully consider the constitutional questions raised by legislation. But we are not mind readers, nor can we predict the future. So I urge you to do your duty and not be dissuaded from acting by fear of the Court. This terrible decision deserves as robust a response as possible. Nothing less than the future of our democracy is at stake.

I do thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Feingold, and we understand that you have to go chair a hearing, so thank you for being here, and we will follow your orders.

Senator Kerry?

STATEMENT OF HON. JOHN F. KERRY, A UNITED STATES SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KERRY. Mr. Chairman, Ranking Member Bennett, and members of the Committee, I am delighted to be able to be here,

and thank you for the opportunity to share a few thoughts with you. I appreciate your swift attention to this issue.

In my judgment, The Supreme Court has issued a decision—and I would say this particularly to you, Senator Bennett, based on your comments a moment ago, where you talked about how everybody deserves the same rights, everybody deserves the opportunity to speak. "Everybody"—that is a person. That refers to people. That is who rights attach to under our Constitution. A corporation is not a person, and from what I remember in law school, it was never intended to be. It is a fictitious entity under the law created specifically for the purpose of giving it certain protections and rights within the business world, within transactions. Never intended to give it speech rights.

Now, over the course of time, obviously, we have had distinctions of commercial speech and so forth, but no reading that I know of of the Constitution suggested that we should inflate the speech rights of large, faceless corporations to the same level as hard-working average Americans. And that is precisely what this decision has done. In doing so, the Court has struck at the very heart of our democracy, a democracy in which corporations already have too much influence.

I think Justice Stevens' words in dissent really summarize it. This is what he said: "The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution"—referring to the Supreme Court itself. And I strongly hope that the Senator and others will read those dissents and measure them against the far-reaching, extra-legal decisionmaking that the majority has chosen to engage in.

I have seen this system get more broken, Mr. Chairman, over the 25 years that I have in the United States Senate, and I have seen it as the nominee of my party. I think I understand as well as anybody the influence of money in American politics.

In 1998, in our national elections, a cycle of election cost $1,618,000,000 and change. In the year 2004, when I ran, it cost $4,147,000,000. And just this past cycle, it cost $5,285,680,883.

Mr. Chairman, we cannot simply become the prisoners, as we are today, of the perpetual campaign and of constant fundraising. The increased influence of money—big money—in our politics is robbing the average citizen of his or her voice in the setting of our Nation's agenda and the determining of what the Congress will take up or not take up. It distracts from the real business of the Congress, and it requires extraordinary time commitment from Members of Congress who are the prisoners of this perpetual campaign. Worse, it limits access and influence to those who can raise or contribute large sums of money.

Nobody knows this better than Senator Feingold, whose name is synonymous with campaign finance reform. I appreciate his tireless work to rid our democracy of special interests. And I appreciate Senator Durbin's efforts to reinvigorate what is left of our public financing system.

I have testified before this Committee on the influence of special interest money in elections in 1985, after I ran a PAC-free Senate race for the U.S. Senate. I testified again in 1987 and again in

1990. I joined then with Senator Boren and Senator Mitchell in authoring legislation which had public financing as a component in a voluntary system that met constitutional requirements. We passed it in the United States Senate. And President George Herbert Walker Bush vetoed it.

I am back here again today because two decades later, we have yet to successfully attack the problem. And I am here to ask this Committee to take bold action before the system deteriorates even further as a result of the Supreme Court's dangerous decision.

Before the Court stepped in, a corporation encouraged employees to contribute to a political action committee or to make individual donations to favorite candidates. Because of corporate power, that had some effect on donations. But now, thanks to the Supreme Court, Senator Bennett, the system has been tilted inexorably towards those who have the most money. Now a corporation can simply just budget corporate funds—they do not have to request anybody to contribute, just budget the funds as a matter of corporate policy to oppose a candidate and then actively campaign all the way up until the polls close at 7:00 or 8:00 in the evening on election day.

Our Republican colleagues often complain about activist Federal judges. But in this case, this Supreme Court went out of its way to unleash the power of corporations in our politics, way beyond what the decision needed as a matter of strict adherence to the law and to the issue before the Court. Even Ben Ginsberg, a long-time lawyer for Republican conservative causes, has warned of the consequences of this ruling. He says future campaigns are "going to be a wild, wild West."

Indeed, now all CEOs have to do is turn over millions of corporate dollars to lobbyists to run media campaigns to help their friends and defeat their opponents in Congress. The sums of money that we are talking about will mean little to the corporations compared to what they might get in return—maybe a special interest bill or blocking a regulation. And the loser will be the American public and the public interest.

Make no mistake about it. The Supreme Court's ruling also clears the way for the domestic subsidiaries—notwithstanding Justice Alito's shaking of the head and mouthing of the words "Not true," it does clear the way for domestic subsidiaries of a foreign corporation to spend unlimited amounts of money to influence our elections.

Now, yes, foreign nationals and foreign-controlled corporations are barred from contributing directly to Federal and State elections. But nothing in the law bars foreign subsidiaries incorporated in the U.S. from doing so. And those subsidiaries answer not to the American people, but they answer to their corporate parents way off in some other country. That means in no uncertain way that a foreign corporation can indeed play in American elections, and clever people will not have a hard time covering their trail.

We face two challenges: first, to mediate the impact of the Court's decision and stop the bleeding through immediate countermeasures; and, second, to think boldly about the best way to free our democracy from the dominance of big money.

Mr. Chairman, the reform ideas already circulating are promising—mandating shareholder approval of spending since it is, in fact, the shareholders' money; prohibiting spending by domestic subsidiaries of foreign corporations and Government contractors; giving candidates prime-time access to the public airwaves at the lowest rates, which we have been fighting for years.

We must do these things quickly to protect the integrity of the elections this fall. But we may also need to think bigger. I think we need a constitutional amendment to make it clear once and for all that corporations do not have the same free speech rights as individuals.

Amending the Constitution is a serious endeavor. I know it is not this Committee's direct jurisdiction. And some of the sharpest minds in the country are working together right now to construct language for an amendment that would solve the problem and get to the heart of the issue. And I am ready to work with them and with the activists it will take to get an amendment ratified.

Mr. Chairman, there is no bigger step to achieve big change than such an amendment. But the big issues of fairness and justice sometimes demand more immediate action. less.

I think it is time for everyone who wants a Government that works for people to stop tinkering around the edges of a system that is broken beyond repair. Mr. Chairman, I know that ultimately a constitutional amendment will have to begin in the Judiciary Committee, but this Committee now has the opportunity under your leadership to pass many of the proposals in front of it now that can immediately help ensure that in the next election millions of our fellow citizens are not disenfranchised because of the concentration of money and power. I think that is an important responsibility, and I look forward to working with this Committee to try to help enact it.

Chairman SCHUMER. Thank you, Senator Kerry, and we look forward to working with you. That is just what we intend to do.

Okay. We are now going to call our witnesses, our remaining witnesses to the table. Would they please come forward?

Let me just briefly introduce each of our witnesses and ask them to—their entire statements, every one of your entire statements will be read in the record—if you could, limit your testimony to 5 minutes so we will all have some time for questions.

Mr. Steve Bullock is currently the Attorney General for the State of Montana. He was elected to this position November of 2008, served in the Montana Justice Department for over a decade, and was executive assistant attorney general and acting chief deputy legislative director. From 2001 to 2004, he practiced law with the firm of Steptoe & Johnson while serving as an adjunct professor at GW University School of Law.

Allison Hayward is an assistant professor of law at the George Mason University, and she served as chief of staff and counsel in the office of former FEC commissioner Bradley Smith. She has practiced election law in both Washington, D.C., and California.

Mr. Edward Foley is the Robert M. Duncan/Jones Day Designated Professor in Law at Ohio State University's Moritz College of Law. He is the director of Election Law at Moritz, a publication that provides information and analysis of the changes in election

law. He clerked for Justice Blackmun and Chief Judge Patricia Wald of the Court of Appeals. In 1999, he served as the State Solicitor in the office of the Ohio Attorney General's Office.

Stephen Hoersting is vice president and co-founder of the Center for Competitive Politics. Previously he served as General Counsel to the National Republican Senatorial Committee under its Chairman, Senator George Allen, during the 2003–04 election cycle. He was also counsel to FEC Commissioner Bradley A. Smith.

Fred Wertheimer is the president and CEO of Democracy 21 and the Democracy 21 Education Fund, which he founded in 1997. He was previously the president of Common Cause and has also served as a Fellow at the Shorenstein Center on the Press, Politics, and Public Policy at Harvard University and as the J. Skelly Wright Fellow and Visiting Lecturer at Yale Law School.

Heather Gerken is the J. Skelly Wright Professor of Law—J. Skelly Wright is in the house—at Yale Law School, where she teaches an advanced course on election law. Previously she served as a clerk for Justice David Souter. She was also granted tenure as an assistant professor at Harvard Law School, where she won the Sacks-Freund Teaching Award.

Ladies and gentlemen, your entire statements are now in the record. You may proceed, and we will just move from left to right, starting with the Attorney General.

STATEMENT OF STEVE BULLOCK, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF MONTANA, HELENA, MONTANA

Mr. BULLOCK. Chairman Schumer, Senator Bennett, members of the Committee, thank you for the invitation to appear today to address some of the States' interests in the matters that you are grappling with today.

Last summer, Montana led more than half the States in asking the Court to address the narrow Federal issues presented by Citizens United. Instead the Court reached a broad decision that questions more than a century of law in Montana and across the country. Yet the case and reactions on both sides of the political aisle, have largely overlooked the decision's impact on the vast majority of elections in this country: those that are held at the State and the local levels.

And there is historic meaning in a Montanan's appearance here today. One hundred and ten years ago, a predecessor of this Committee—the Senate Committee on Privileges and Elections—"expressed horror at the amount of money which had been poured into politics in Montana in elections from 1888 onward." The setting was the investigation into the infamous bribery of the Montana Legislature by Senator William A. Clark, which led to its refusal to seat him.

But the corruption of Montana politics was by no means limited to bribery. Senator Clark and his fellow "Copper Kings" dominated political debate in Montana and drowned out Montanans' own voices. This was corruption as it was understood since the framing of the Constitution: not mere theft or bribery, but harnessing government power to benefit a single corporate faction at the expense of the broader and more diverse interests represented by the people

themselves. In an 1884 election establishing Helena as the State capital, for example, Clark and his arch rival, Marcus Daly, combined to spend between $35 and $70 million in today's dollars to influence 52,000 voters. That is about $1,000 per vote.

Mining money reached every campaign—legislators, judges, sheriffs, county commissioners, and assessors. And the result was best described by Clark in his own testimony here before the Senate Committee. He said many people have become so indifferent to voting there by reason of the large sums of money that have been expended in the State heretofore that you have to do a great deal of urging, and it takes a lot of men to do it, to go around and round them up and stir them up and get them out.

Fed up, in 1912 our citizens through the initiative process passed several political reforms. One prohibited corporations that could most benefit from government action from "pay[ing] or contribut[ing] in order to aid, promote or prevent the nomination or election of any person." The law represented nothing less than the voters taking back a government that belongs to them, and only to them.

Montanans know their history as well as they know their political officials and their public officials. Over nearly a century, our limit on corporate campaign spending in candidate elections has served us well and has never been challenged. Corporations are represented in Montana campaigns, but on equal terms alongside other political committees, all of them speaking through voluntary associations of their money, ideas, and voices. It is a system Montanans continue to believe in.

We did not want this fight in Montana, but the Citizens United decision will likely invite a challenge to the people's law of 1912. And we do not want to be set back a century. I am principally concerned about the ways State elections are especially vulnerable to corporate corruption and ask you keep these concerns in mind as you consider reforms.

First, our campaigns are small compared to the corporations that would corrupt them. In 2008, the average Montana State senator won on $17,000 of spending; the average Senator in this body won spending $8.5 million. That is more than the combined amount raised by all 327 candidates running for State office in 2008. With the floodgates opened to corporate spending, it will not take a Copper King to buy a $17,000 election.

Second, the "foreign corporations" that can corrupt our elections are more likely to come from Delaware than offshore. While we can legislate to hold Montana corporations accountable to their shareholders, our State laws may not always reach businesses incorporated elsewhere. As you protect Federal elections from foreign influence, understand that federalism requires room for States to protect their elections from foreign influence too, whether that influence be international or interstate.

Third, Montana's history shows the special damages arising from corporate corruption in judicial elections. Like the majority of States, we hold our judges accountable through elections. Supreme Court justices in Montana campaign on as little as $100,000, far less than the stakes in the cases they are asked to decide. As Caperton recognized, independent expenditures can have a "signifi-

cant and disproportionate influence" in corrupting the administration of justice.

Finally, I am encouraged by the Supreme Court's nearly unanimous affirmation of disclosure and disclaimer laws and hope more can be done. By amplifying disclosure and disclaimer requirements for corporations, voters can know the identity of the wizard behind the curtain. We may not be able to stop Acme, Inc. from using other people's money to campaign, but we can ensure voters know it is Acme speaking in their elections, not "Citizens for Motherhood and Apple Pie" or some other front group. We can also protect the shareholders who are just trying to save for retirement and want nothing to do with some CEO's politics.

In Montana we have ensured that the voices of our candidates and those of the natural persons that support and vote for them are not displaced by the treasuries of corporations. The Supreme Court has challenged all of us to find new ways to keep those voices heard. I look forward to working with our legislature and Congress in doing so.

[The prepared statement of Mr. Bullock – Appendix B:]

Chairman SCHUMER. Thank you, Attorney General Bullock.

Professor Hayward.

STATEMENT OF ALLISON HAYWARD, PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW, ARLINGTON, VIRGINIA

Ms. HAYWARD. Thank you, Mr. Chairman, members of the Committee, for having me here today. I would like to just amplify a couple of the points I have made in my submitted testimony, and I welcome any and all questions that you have.

In my view, the holding in Citizens United fits soundly within the Supreme Court's jurisprudence on this question. The independent expenditure ban has been controversial from the beginning. Enacted in 1947 in part of a little debated 11th hour amendment to the Taft-Hartley Act, it has been a source of contention among prosecutors as well as scholars since that time.

When the Court has squarely faced limits on expenditures, it has found them unconstitutional. Austin v. Michigan Chamber of Commerce from 1990 falls outside that trend. But if for no other reason, this Court ought to be applauded in Citizens United for bringing some coherence to the constitutional doctrine in this area.

Going forward, it would seem appropriate—to me, anyhow—that we should observe how corporations—and, by the way, labor organizations, which are equally beneficiaries, if you want to look at it that way, of Citizens United. We should see how they react. It might well be that corporations engage in spending that they would not have before, but I am not sure. I am not sure that the experience in States that allow corporate expenditures would suggest that corporations will go and participate in campaigns in ways differently than they do now.

I can see corporations that have concerns about market goodwill maybe engaging in some soft focus voter education type messages that they might not have before out of fear of violating 441(b). But I am not really sure that is the kind of thing that is something that should trigger concern, at least at this point.

It is the task of Congress, based on experience and sound logic, to see what happens and then regulate appropriately to preserve the integrity of this institution and its members. But until we see some evidence, I think it will be very difficult for any law enacted in Congress to pass the strict scrutiny examination that the Court is serious about applying to restrictions on political speech.

Thank you.

[The prepared statement of Ms. Hayward – Appendix C:]

Chairman SCHUMER. Thank you, Professor Hayward.

Professor Foley?

STATEMENT OF EDWARD B. FOLEY, THE ROBERT M. DUNCAN/JONES DAY DESIGNATED PROFESSOR IN LAW, MORITZ COLLEGE OF LAW, THE OHIO STATE UNIVERSITY, COLUMBUS, OHIO

Mr. FOLEY. Chairman Schumer, Senator Bennett, members of the Committee, thank you for giving me the honor of being here today.

Citizens United was a case about a statute—a statute that prohibited any campaign spending by any corporation. Citizens United, therefore, tells us very little about different statutes that are narrowly targeted at specific categories of corporations or statutes that involve ceilings on the amount of campaign spending rather than an absolute ban.

The concept of narrow tailoring is deeply embedded in First Amendment law, and Citizens United explicitly recognized it as the controlling standard. The Court called the statute there an "asymmetrical" response to the problem of corruption. "Asymmetrical"—that was the Court's word, and it means the opposite of narrow tailoring. Therefore, after Citizens United, the question is what new statutes would pass the narrow tailoring test.

The oral argument confirms this reading of the Court's opinion. During argument, Justice Scalia essentially invited Congress to come back to the Supreme Court with a different statute, a more narrowly tailored one. In other areas of constitutional law, oral argument can show that a new precedent is unlikely to be as far-reaching as might first appear. The well-known Lopez case, concerning Congress's Commerce Clause power, is an example, and Citizens United, in my judgment, fits this pattern, and its scope likely will be circumscribed in future cases just like Lopez was.

Citizens United must be read in relation to other cases concerning the distinction between public sector and private sector corporations as well as, potentially, an intermediate category of corporations that are public-private hybrids. Citizens United itself recognized that entities engaged in "government functions" do not have the First Amendment rights of purely private sector speakers. The Court's concern there was with the private sector as shown by its invocation of the famous Federalist Papers. Accordingly, Citizens United should not be seen as applicable to public sector corporations or even those that may fall into a middle public-private hybrid category.

The 1995 Supreme Court case involving Amtrak called Lebron illustrates this point. That case was an 8–1 decision written by Justice Scalia, and it ruled that Amtrak is part of the Federal Govern-

ment, even though the relevant statute said that Amtrak was a for-profit corporation that was not part of the Government. But in rejecting that statutory classification, the Supreme Court in Lebron adopted a functional, rather than formalistic, approach for identifying when a for-profit corporation properly belongs in the public rather than private sector. Given Lebron, Amtrak may not use its own money for express campaign ads, just like the Government itself may not do so.

So the question is: What other for-profit corporations are like Amtrak? Or, in other words, using the functional approach of Lebron, what other corporations are sufficiently engaged in Government functions that Congress is entitled to say that they, too, should be ineligible for the private sector First Amendment right to engage in express campaign advocacy.

Consider the banking industry. Obviously, the Federal Reserve itself cannot engage in express campaign speech. The same should be true for major banks that are deeply entwined with the Federal Reserve System or which received TARP funds. The essential role of these banks in our Nation's economy means that Congress should be able to say that they are public sector entities or at least public-private hybrids, to which the Citizens United ruling simply does not apply. They are not restaurants or clothing stores or other kinds of small business corporations, which is what Citizens United had in mind. On the contrary, these major banks that undergird our financial infrastructure are much closer to the Amtrak end of the spectrum.

Thus, to wrap up, Citizens United, together with Lebron and other precedents, showed that Congress has considerable latitude to regulate the campaign spending of corporations that have a public sector character. Besides the banking industry, other examples may include public utilities, defense contractors, or corporations deemed "too big to fail," like General Motors, whatever line of industry they may be in. Congress again has even greater latitude if it uses ceilings on large-scale expenditures, rather than absolute bans.

Finally, the concern expressed in Citizens United for the private sector in the United States does not apply to foreign entities.

Thank you.

[The prepared statement of Mr. Foley – Appendix D:]

Chairman SCHUMER. Thank you.

Next we have Mr. Hoersting.

STATEMENT OF STEPHEN M. HOERSTING, CENTER FOR COMPETITIVE POLITICS, ALEXANDRIA, VIRGINIA

Mr. HOERSTING. Thank you, Mr. Chairman, members of the Committee. Thank you for the opportunity to testify today on behalf of the Center for Competitive Politics. The Citizens United opinion is a landmark in First Amendment jurisprudence. Nonetheless, there is some consternation over the opinion that has resulted in mischaracterizations that need correcting.

First, corporations are not mere creatures of the State that lack First Amendment rights. The Trustees of Dartmouth College case, cited erroneously for this proposition, discusses clear distinctions between private corporations established by individuals and munic-

ipal corporations established by governments. Indeed, Professor Foley rightly acknowledged this distinction, this private-public distinction, in his testimony moments ago.

Second, foreign participation in our elections is a crime, whether done directly or indirectly. Even the giving or receiving of foreign advice is a crime.

Now, domestic subsidiaries with a majority of foreign directors may establish PACs, so long as the decisions are delegated to U.S. nationals. PACs, after all, allow American employees to participate in politics no matter their employer. But domestic subsidiaries with a majority of foreign directors will not make corporate political expenditures going forward, even as they continue to allow their U.S. employees to fund a PAC. The reason is that doing so would be a crime under existing law.

Therefore, any tightening of the existing ban can only prevent U.S. nationals from participating in U.S. elections with funds earned within the United States. This would violate the rights of U.S. nationals. Likewise, any belt-and-suspenders approach that merely restates existing law and achieves little or nothing would be a statute unworthy of U.S. Senators.

Proposals to silence corporations with 5 percent foreign ownership are likely unconstitutional, as Professor Gerken acknowledges in her testimony, not least because it is burdensome for corporations to know just who owns 5 percent of shares at any particular point in time.

Corporations with a majority of foreign shareholders are already covered by existing law, and legislation that would clarify the point must apply equally to non-profits with a majority of foreign membership and to labor unions.

The Supreme Court just said in Citizens United that any association of Americans may speak about politics no matter their associational form. And it is possible that a majority of the D.C. Circuit in just a few weeks may permit multiple organizations to pool funds for these purposes. This would mean that the Children's Defense Fund may team with the teachers' unions, and that the right-to-life organizations may team with right-to-work groups and small businesses. This ultimately will be healthy for our democracy, and in any event, there is little you can do now but adapt to it.

Some wish to slow the effects of the opinion with legislative measures. Professor Laurence Tribe wants all corporate political ads to feature the name of the corporation's CEO and the percentage of the treasury funds spent on the ad. But what benefit would that provide the public? The apparent goal is simply to deter speech.

Others propose shareholder votes for corporate expenditures, but these raise First Amendment and federalism concerns and may suppress corporate speech. Instead of delaying the inevitable, Congress could mitigate these concerns by freeing the political parties of the few remaining McCain-Feingold provisions that have not been struck down by the courts.

Most of the organizations I am aware of, after all, would rather give some of their resources to the political party committees than go it alone under the Citizens United opinion. And you should per-

mit them to do so. Lift some restrictions or I fear you will face second-tier budgets that garner second-tier operatives, resulting in second-tier campaigns.

If this trend persists, it is possible even that the people may go elsewhere, not because they disagree with your message, but because current law makes it comparatively impossible to affiliate with anything that has Democrat or Republican in the title and almost effortless to engage now with outside organizations.

Mr. Wertheimer, respectfully, would exacerbate your problem by tightening existing restrictions on coordination, keeping flat the amounts the party committees can accept, even as he recognizes that outside organizations will likely spend relatively more resources with this opinion.

My overall point to you is this: If it is really your position that accepting the support of your political allies somehow corrupts you, well, then, the Supreme Court will always take you at your word. What the Court will no longer take, correctly and for the foreseeable future, is any variation of the argument that outside groups can be silenced because they speak more effectively than some might prefer.

Your choice, then, is to awaken to this new reality or not to do so. I, for one hope that you do.

Thank you.

[The prepared statement of Mr. Hoersting – Appendix E:]

Chairman SCHUMER. Before we move on to Mr. Wertheimer, Senator Udall has to leave by 11:00 and had asked to make a short statement.

OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you, Chairman Schumer, and I need to preside at 11:00, so I appreciate you doing that. And I would like to thank you for holding this hearing.

Campaign finance reform is an issue you and I both care about deeply, and I know we share strong concerns about financing elections in the wake of the recent Supreme Court decision. Fifty years ago, when my father, Stewart Udall, and my uncle, Mo, were in office, money had a minimal impact on the electoral and political system. It was about connecting with people and about the marketplace of ideas. Right now, it is just as much about the biggest checkbooks, if not more so, than it is about the best ideas.

Unfortunately, we are about to see a lot more big checkbooks in the election process. Last month's Supreme Court decision in Citizens United v. FEC was a victory for special interests at the expense of the average American. We have seen firsthand the impact special interests like big oil and big banks and health insurance companies have had on the legislative process. Now with this decision, already powerful corporations and unions will be able to further open their bank accounts, further drowning out the voices of everyday Americans in the political process.

Members of both chambers and the administration are working on legislation to address the Citizens United decision. I commend their efforts, but I believe that a comprehensive overhaul of the campaign finance system is necessary in order to restore public faith in our elections. The Supreme Court has shown its willing-

ness to rule broadly and ignore longstanding precedent when it is reviewing the constitutionality of campaign finance laws. The best long-term solution is a constitutional amendment that would prevent the Court from overturning sensible campaign finance regulations. I would welcome the opportunity to join my colleagues in introducing such an amendment.

While I believe that a constitutional amendment is the ideal solution, I also think that comprehensive reform legislation is a step in the right direction. As a Member in the House for 10 years, I joined Representative Dave Obey as an original cosponsor of the Let the People Decide Clean Campaign Act, a bill that would fundamentally change how House elections are conducted. Mr. Obey reintroduced his bill in this Congress, and I intend to introduce a companion bill in the Senate in the coming weeks.

The act does not attempt to fine-tune the existing congressional campaign finance system or tweak the edges; rather, it makes fundamental, wholesale changes to fundraising by candidates, regulations of outside groups, and the role of political parties. It contains a finding that America's faith in the election system has been fundamentally corrupted by big money from outside interest groups. It establishes a system of voluntary contributions to provide public financing of campaigns for Senate candidates in general elections. It provides more funds than the current system for the vast majority of challengers to mount their campaigns. It empowers voters with the knowledge that their vote affects the outcome of the current election and also affects the amount of funds distributed to nominees in future elections.

It bans all independent expenditures so that only the candidate is responsible for his or her message. It provides for expedited consideration of a constitutional amendment allowing these changes if the Supreme Court rejects the plan. It provides a process by which third-party candidates can also participate in the system.

Money can have a corrosive effect on the political process. We have seen evidence of that in campaigns at all levels of Government. We have long needed substantive campaign finance reform, and it is my hope that the high Court's disappointing decision will provide the push we need to put elections back in the hands of average Americans and not the special interests who can use their unlimited bank accounts to railroad the process to their preferred conclusion.

With that, Mr. Chairman, I would yield back, and I thank you very much for the opportunity to give my statement before heading out to preside.

Chairman SCHUMER. Thank you. Thank you for your excellent statement.

Senator UDALL. I look forward to working with you very closely.

Chairman SCHUMER. Thank you.

Mr. Wertheimer?

STATEMENT OF FRED WERTHEIMER, PRESIDENT, DEMOCRACY 21, WASHINGTON, D.C.

Mr. WERTHEIMER. Thank you, Mr. Chairman, Senator Bennett, and members of the Committee, for the opportunity to testify.

The 5–4 Supreme Court decision in Citizens United is the most radical and destructive campaign finance decision in the history of the Court. The decision threw out a century-old national policy to prevent corporate wealth from being used in Federal elections, and it threw out similar policies in many States.

The decision also threw out two decades of precedents upholding that national policy without any relevant changed circumstances from the time the precedents were adopted, except for the composition of the Court. As Justice Stevens pointed out in his dissent, or as I think of it, a future majority opinion-in-waiting, the only thing that matters here is the make-up of the Court. When this Court make-up changes again sometime in the future, I expect the Citizens United decision to be thrown out.

The decision represents breathtaking judicial activism by five Justices who are commonly considered as conservative Justices. The decision also represents an enormous transfer of power in our country from citizens to corporations. It opens the door to the use of immense aggregate wealth of corporations to directly participate in campaigns and thereby to buy influence over Government decisions.

Under this decision, insurance companies, banks, drug companies, energy companies and the like, and their trade associations, each will be free to run multimillion dollar campaigns to elect or defeat Federal candidates, depending on whether the officeholders voted right or wrong on issues of importance to those groups.

Now, this also opens the door to labor unions to undertake those same efforts, but it is quite clear that the resources of labor unions are dwarfed by the resources of corporations.

Prior to the decision, former Senator Hagel, a Republican from Nebraska, pointed out the consequences if this Court overturned the ban. Senator Hagel said in an interview with a Washington Post reporter that if restrictions on corporate money were lifted, "the lobbyists and operators would run wild." Senator Hagel also said that reversing the law would magnify corporate power in society and "be an astounding blow against good government, responsible government," and "would debase the system, so we would get to the point where we couldn't govern ourselves."

We believe it is essential for Congress to move swiftly to enact legislation effective for the 2010 congressional elections that can mitigate the damage done by this decision. We have submitted a list of proposals that we would hope Congress would consider. I would like to briefly address two of them.

Congress should adopt broad new disclosures requirements to cover campaign-related expenditures by corporations and labor unions—disclosure to the shareholders, disclosure to the public, disclosure to the members of labor unions. While other campaign finance reforms have resulted in strong differences of opinion, there has always been a strong bipartisan consensus around the importance of disclosure laws. This has not been a partisan issue in the past, and it should not be a partisan issue now.

The Supreme Court affirming by 8–1 the disclosure provisions involved in the Citizens United case said, "With the advent of the Internet, prompt disclosure of expenditures can provide corpora-

tions and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

Now, we also believe that Congress should fix the lowest unit rate and make it available as soon as possible. The Senate in 2001 voted for such a provision by a large bipartisan majority, 69–31. Of the 14 members of this Committee who were in the Senate at the time of that vote, 11 voted for the provision, including the Chairman and Ranking Member of this Committee, Senate Republican Leader McConnell, and Assistant Democratic Majority Leader Durbin, and Senator Durbin has taken the lead in legislation in this area. We believe it was bipartisan then, it should be bipartisan now, simply to fix an existing lowest unit rate provision that provides the ability to Senators and Representatives now to get the lowest unit rate.

We urge you to move swiftly to enact legislation that can promptly address the problems created by the decision.

[The prepared statement of Mr. Wertheimer – Appendix F:]

Chairman SCHUMER. Thank you.

Professor Gerken.

STATEMENT OF HEATHER K. GERKEN, J. SKELLY WRIGHT PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Ms. GERKEN. Senator Schumer, Senator Bennett, and distinguished members of this Committee, thank you for letting me testify before you today.

The witnesses thus far have presented a starkly different portrayal of Citizens United and its aftermath, but I want to talk about something that I think is quite crucial and has nothing to do with whose ox is gored by this decision, and that is the stark fact that the Supreme Court overruled its own precedent in utter disregard of its criteria for departing from the grand principle of stare decisis. It did so simply because it thought the original decision was badly reasoned and had prompted dissent within the Court.

Whatever you think about campaign finance, that is a remarkable and dismaying fact because if badly reasoned decisions accompanied by dissents are hereby subject to reversal, the Court is going to have an awful lot of work to do.

All of the efforts of some of the prior witnesses to show that Austin was an outlier or that bans on corporate expenditures were 50 years old rather than 100 years old—all of that seems to me quite beside the point. Austin was an outlier among the Court's precedent. But the Supreme Court does not engage in a tit-for-tat approach to its own precedent. Five votes is not a license for vengeance. Five votes is also not a license to do anything that you want to do.

As the Court recognized in Casey, we trust the Court with the precious task of interpreting the Constitution because we expect the Court to accord the same respect to its prior decisions that we accord to its present ones. The fact that a decision was poorly reasoned is not enough to overturn precedent, at least prior to Citizens United.

The fact that a decision prompted controversy is not enough to overturn it, at least prior to Citizens United. The Court has always required a good deal more before reversing itself, and with good reason. No matter what we think of this decision, we should be dismayed by the Court's disregard of its own precedent.

Now, while I wish that the Court had either adhered to its own precedent or at least offered a more compelling reason for overturning Austin, overturn Austin it did. Senator Feingold is correct that no legislation can fully respond to this decision, but several paths, nonetheless, remain open and let me discuss them quickly.

First, Congress may strengthen existing disclosure and disclaimer rules. There is only one issue on which the Court achieved near unanimity in Citizens United, and that was that transparency matters. With respect to Mr. Hoersting, it seems to me that he has mischaracterized the Court's opinion. The Court told us that democratic debate works best when voters know the source of the political messages they receive, and it said that Congress may take the steps necessary to provide that information. The Court told us that disclaimers and disclosure promote First Amendment values rather than undermine them.

Now, disclosure and disclaimer requirements will fail if they are easy to evade. Corporations will be tempted to hide behind vaguely named shell organizations to shield their identity. They can also evade disclosure rules simply by the way they earmark donations. But there are existing State and Federal precedents that suggest good ways to deal with these questions. In my written testimony, I mentioned, for instance, the Washington State approach which requires expenditures to list the name of the top donors who funded the ad so that people know the source of the speech they are listening to.

In my view, disclaimer and disclosure rules stand on firm constitutional footing. Congress' power here is well established, and the Court merely reinforced it.

Second, Congress may take steps to protect shareholders from wasteful spending. Indeed, one of the main reasons that the Court enthusiastically endorsed disclosure rules was to protect corporate shareholders. While I leave the details of such provisions to experts in corporate law, I should urge Congress to keep in mind here that the problem here is not American democracy, but shareholder democracy. Shareholder elections are connected to Federal elections in this one respect: Citizens United vindicated the right of corporations to speak, and shareholders are the corporation.

And, again, if I just may correct what I think is a misstatement of my position, I made no comment on the constitutionality of the 5-percent rule. To the contrary, because I am not an expert in corporate law—and I am under the impression that none of the witnesses here is either—I leave the decision about what is the right percentage here to experts in corporate law. But I will just note that if you start to look at State law cognates and Federal cognates, the numbers range from 10 percent to 20 percent to 25 percent. So I do think that there is room here for Congress to do something with regard to shareholder protection.

Finally, I believe that Congress has the power to protect U.S. elections from the influence of foreign nationals. Again, there are

many rules for doing this, but I believe that they stand on firm constitutional footing. Although there is no direct Court precedent on this issue, the distinction between citizens and non-citizens in elections is well established in constitutional law.

Thank you very much.

[The prepared statement of Ms. Gerken – Appendix G:]

Chairman SCHUMER. Well, thank you. I want to thank our panel for their testimony, diverse and thought-provoking.

As you know, we are looking seriously at introducing legislation in the not-too-distant future. I am working with Congressman Van Hollen on a House side bill. So my questions are aimed in that regard rather than to have discussion and argument, which, of course, we could easily have and it would be fun.

First, I would like to ask Professor Gerken and maybe Mr. Wertheimer about this: Since the decision allows corporate spending to be much more freely done, those corporate dollars can end up being given to 501(c)(4)s, (c)(5)s, and (c)(6)s, so changing their nature as well. Should we consider whatever type of legislation that we want to address for direct corporate spending to apply to these units as well—disclosure, disclaimer, lowest unit rule? You could go through all of them. Professor Gerken, what do you think, or Mr. Wertheimer, whoever wants to go first.

Mr. WERTHEIMER. Absolutely. I think it is essential when you get to the disclosure questions to ensure that the disclosures cover organizations who either are making direct corporate expenditures or are indirectly making corporate expenditures. Many (c)(4)s are corporations already.

But if you are going to make sure that the public knows what is happening with who is responsible for making expenditures, you have to carefully be able to trace the money and have it all out on the table. I mean, the Court was as clear as could be here that disclosure and prompt disclosure is an appropriate way to deal with this situation. The trick is to make sure you get all the information, and I think it is absolutely essential to do that.

Chairman SCHUMER. Do you agree, Professor Gerken?

Ms. GERKEN. Yes, I agree. There has been a large debate about what exactly will be the effect of the Supreme Court's decision, and I think much will depend on what you do on this front. That is, if corporations have the ability to fund 501(c)(4)s and (c)(6)s that are named Americans for America, you could imagine they would be quite tempted to spend that money.

On the other hand, if corporations knew that that money is simply going to be identified as associated with them, I think that the power of corporate spending is much reduced. And here I should note that there are two things that you need to worry about——

Chairman SCHUMER. Can I ask you, the power or the likelihood?

Ms. GERKEN. The likelihood, yes.

Chairman SCHUMER. Okay.

Ms. GERKEN. Which I do think, though, translates, for the reasons that Senator Feingold articulated, into power.

Chairman SCHUMER. Right.

Ms. GERKEN. There are two things that you need to keep track of in my view. The first is simply identifying with a disclaimer on the ad who it is that is really behind the speech. And the second

is to make sure that corporations, by giving what are called non-specifically designated donations to organizations like the chambers of commerce – which do both political work and non-political work that by just failing to earmark it, they can get around having it designated as a political contribution under a current FEC interpretation. That, it seems to me, must be corrected for this to work.

Chairman SCHUMER. Okay. Thank you.

Lowest unit rate, which was mentioned, I think, by a few, does anyone here think if we were to legislate lowest unit rate, for instance, after a certain amount of this corporate money comes in, the candidate against which this is used gets lowest unit rate. Does anyone doubt the—whether you agree with it or disagree with it, doubt the constitutionality of that? Go ahead. I take it the only person then who doubts it is Ms. Hayward because she is the only one who raised her hand. Go ahead briefly.

Ms. HAYWARD. Well, I would be concerned with the Davis v. FEC precedent, that that could be seen as something like in Davis where speech was being punished in a way or burdened in a way by giving the person for whom the speech was, you know, directed a benefit. Then, you know, the independent expenditure maker would be saying, well, look, if I make an independent expenditure, this person who I do not like gets a benefit.

Chairman SCHUMER. Right.

Ms. HAYWARD. That is more or less the logic of Davis. I am not saying that I have a crystal ball, but I think that would be the thing that you would want to look at.

Mr. WERTHEIMER. Well, if I could comment on that.

Chairman SCHUMER. Go ahead, Fred.

Mr. WERTHEIMER. I do not know that you have to have a dollar figure to trigger this. You already have a lowest unit rate provision that has been provided to Federal candidates for many years.

Chairman SCHUMER. Right.

Mr. WERTHEIMER. It just does not work. There have been efforts to fix it in the past. I think it now becomes essential to fix it, and I do not know that you need a dollar figure. And, therefore, you would be providing all candidates the same benefit, and I do not think the Davis case would come into play.

Chairman SCHUMER. Well, it might be triggered for other types of spending, party spending or other types of things.

Professor Gerken?

Ms. GERKEN. Yes, I agree that if you extend it to all candidates and you are careful about its functioning, you can avoid Davis.

Chairman SCHUMER. And what about letting party committees or others get the lowest unit rate should this certain level of corporate money come in against a candidate?

Ms. GERKEN. It is always difficult to predict the Supreme Court's decisions on this front, but there is a sound constitutional argument that can be made.

Chairman SCHUMER. Yes, okay. Let me ask you—I am sorry.

Mr. HOERSTING. Mr. Chairman?

Chairman SCHUMER. Please.

Mr. HOERSTING. May I make a comment about disclosure for (c)(4), (c)(5), and (c)(6) giving?

Chairman SCHUMER. Yes.

Mr. HOERSTING. Express advocacy expenditures will be disclosed under existing law, and they will be attributed to the people who actually further that expenditure, the same with electioneering communications, as the Court reaffirmed in Citizens United. But the compelled disclosure of donations for issue advocacy, there may be a constitutional problem with compelling the disclosure of those donations.

Chairman SCHUMER. Does anyone agree with Mr. Hoersting on that? I thought the Court was pretty clear on that issue.

Mr. WERTHEIMER. Well, I think the Court explicitly said that disclosure for express advocacy, the functional equivalent of express advocacy, and electioneering communications was appropriate. And there are some disclosures now, but they are not comprehensive, and they certainly do not capture where the money is coming from, so they are not adequate.

Chairman SCHUMER. Right. A final question to Mr. Bullock, Attorney General Bullock. Do you think disclosure and disclaimer would be sufficient—not sufficient, but would make a—let me put it a different way—would have a significant impact on limiting what you fear would happen as a result of this decision in your State of Montana? In other words, if those who sought to spend lots of corporate money in Montana were either forced to disclose or even disclaim on an ad, would that have a significant effect? Do you think that is enough in the legislation? Would we have to go further? Give me just your feel for that? Because some are saying we should limit our legislation to disclaimer and disclosure; others are saying we should go further with some of the things that have been outlined here.

Mr. BULLOCK. Yes, Chairman Schumer, twofold, one of which is I think disclosure and disclaimer is critical for our State elections. It needs to go beyond that which we have currently, though, because I think that there is substantial masking even under the extant system. And people do not really know who is behind these ads.

Second of which, I do not believe that that is from a State's perspective sufficient. We need as much sunshine, as much openness as possible, but there needs to be more in order for us to address the rest of the implications of this decision on Montana and other States.

Chairman SCHUMER. Thank you, Attorney General.

Senator Bennett.

Senator BENNETT. Thank you very much, Mr. Chairman, and thank you all for your testimony. This was an interesting panel and an interesting balance of reactions and comments on the decision.

I come at this issue with a little bit different aspect because I am not a lawyer, but I have been a candidate and I have managed campaigns. And the first general comment I would want to make is that he who has the most money does not always win. Indeed, many times he who has the most money spends it stupidly and ends up helping the other side. Just because someone has the right to speak does not mean that he or she will speak intelligently or effectively. And not to touch anybody in a way that might be wounding or create problems, the election in New Jersey for Gov-

ernor was not decided on the basis of who had the most money or who ran the most ads.

I realize I am a Neanderthal on this view, but I still believe that in an election the candidate matters. And when you have a good candidate, yes, you need money and all the rest of it, but you are more likely to prevail than if you had a bad candidate.

And I have spent enough time in the corporate world to know that corporations spend money on ads that do not work. Trying to sell their product, they produce ads that are stupid. Can anybody say "New Coke"? Any demonstration of a corporation that spent a whole lot of money in a campaign that turned out to be really, really dumb demonstrates that many of the fears we are hearing, that the fact that corporations can now do what corporations connected with a media outlet do, is not, I do not think, the end of the world.

I am reminded of the comments that occurred some years ago, you may remember, when people on the right said to all of their followers, "Buy CBS stock so you can become Dan Rather's boss and tell him what has to happen." And, of course, CBS is a corporation. The New York Times is a corporation. The Washington Post is a corporation. Fox News is a corporation. CNN is a corporation. And they all have the right under the Constitution to say in their editorial pages or in the people that they put on the air vote for or against this candidate, and they do it every day—not every day. Every election.

We had a newspaper change hands in Salt Lake, and the new owner—the previous position of the paper was we do not endorse candidates, we just do editorials. And the new owner said we do endorse candidates, and he said he was going to—as a result of that, the paper was now going to have huge influence that it did not have before. And the sudden mention of candidates' names did not change the power of the paper to influence things that it had previously.

Mr. Wertheimer, do you support disclosure for your supporters?

Mr. WERTHEIMER. I support whatever disclosure this Congress thinks should apply across the board.

Senator BENNETT. All right.

Mr. WERTHEIMER. I think we have always had separate rules for campaigns because they deal with elected officials who are raising and spending the taxpayer's money so that the public has a direct stake in knowing who your backers are. But if this Congress wants to adopt across-the-board rules for 501(c) organizations, we will comply with them.

Senator BENNETT. I did not ask if you would comply, because I am sure you will comply. Would you support such a——

Mr. WERTHEIMER. Well, it depends what the rules are.

Senator BENNETT. Exactly, and I think we need to look at what the rules are elsewhere with these other items that you are talking about.

References were made to PACs, which are a terrible thing, at least in some people's comment. I remember Watergate and PACs were the reform. PACs were the way we were going to get away from some kind of corporate challenge and put money in the hands of people.

Do any of you feel that PACs are an improper way of financing elections?

Mr. WERTHEIMER. If I could comment, having worked on that legislation, I disagree that PACs were the reform. The effort back then was to enact public financing of Presidential and congressional elections. The Senate passed legislation supporting Presidential and Senate public financing, and the House failed to pass it by 41 votes, and we were off to history. PACs were not a reform. They were codified because people were concerned that the Justice Department was going to take action against unions and corporations, but particularly unions, for having PACs as a violation of the corporate ban and labor union ban. So I very much disagree that they were viewed as the solution during the Watergate period.

Senator BENNETT. Your memory and mine are different on that issue.

Thank you, Mr. Chairman.

Chairman SCHUMER. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I am one that believes the decision is really catastrophic, and it is catastrophic, I think, on the practical impact of day-to-day life of an elected official.

I think Mr. Wertheimer hit it on page 6, and I want to quote him: "It would not take many examples of elections where multimillion corporate expenditures defeat a Member of Congress, before all Members quickly learn the lesson: vote against the corporate interest at stake in a piece of legislation and run the risk of being hit with a multimillion dollar corporate ad campaign to defeat you."

Let me give you an example. Right now, committees of this House are looking at financial regulation. Should hedge funds be regulated? A huge financial activity out there with no regulation. Credit default swaps, position limits, clearing—all of these things will affect the financial community in a dramatic way. Go against them, and you provide an opportunity for wealthy investment banking firms to pool funds, put them into an independent expenditure campaign against you. And the chilling effect on courage, I think, over time will be enormous.

You can use this on guns, on abortion, on offshore oil drilling, on virtually any issue where the corporate interest is diametrically opposed; corporate or labor union or any other organization's interest is diametrically opposed to what the member stands up and advocates.

And one of the reasons why we have 6-year terms is so that we can be courageous, so we can say what we believe is in the best interest of all of the people of this great country.

Mr. Chairman, I salute you, and the Ranking Member, with whom I have worked for a period of time. I hope we have a bill that has broad new disclosure requirements, approval by stockholders, has a CEO standing up on the disclaimer. If a company is going to put $5 million into an attack ad, the CEO ought to stand up and say, "I, the CEO of XYZ company, approve this ad." A ban on Federal contractors making contributions, and a ban on foreign interest contributions.

I see this as extraordinarily serious on courage in the bodies of Congress. So I just want to say that I think Mr. Wertheimer has

it right. I think we need to take action. And, incidentally, the United Kingdom took some action. I would just like to submit their bill for the record so that the Committee might have it.

Chairman SCHUMER. Without objection.

[The bill – Appendix H:]

Senator FEINSTEIN. And I have no questions. I thank you.

Chairman SCHUMER. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman, and I salute your efforts on this bill. I think disclosure and disclaimers are a good idea. We tried this, though, when we said that candidates had to stand up in the ads and say, "My name is Dick Durbin, and I approved the contents of this ad." And we thought that that might lead to a more genteel and rational debate when it came to the media. The jury is still out. People are still skeptical.

Historically, Attorney General Bullock, your reference to Senator William Clark of your State is one that I identify with because I am reading a book called "The Big Burn" by Tim Egan. It talks about the great forest fire of 1910 and William Clark's efforts to stop the creation of the Forest Service and Federal forest lands. And he really did throw the money around very effectively, and your State passed some reforms as a result of it.

I think back also, John Roberts when he came before the Senate Judiciary Committee told us he was just going to be an umpire, just going to call balls and strikes. Well, this Citizens United decision makes it clear he is an umpire on steroids because what they have done is overturn 100 years of precedent, at least 50, and basically allow corporations to have their will when it comes to political discourse, to give them First Amendment rights to come out for candidates.

And I agree with Senator Feinstein, it will have a big impact on campaigns. It will have a big impact on Congress because it really will increase the pressure which can be put on Members of Congress for critical votes. There is pressure already, but the pressure will be increased dramatically knowing that the corporation you say no to, trying to fight off a new tax, is the same corporation that can now spend $1 million to beat you.

And, Senator Bennett, I agree with you. The wealthiest candidates do not always win, but we all scramble for our power hours and our dialing for dollars and our trips all around the United States when we run, because we know if you do not have money to get your message out, you are going to lose. No matter how good you are, there is a limit to how far it will take you.

I do have a personal interest in this because several years ago I introduced a bill on public financing. I really think that that is what we have to do. We have to break away from this model that we have for political campaigns which has created so much cynicism and so much distrust among the American voters. This Fair Elections Now bill that I have introduced is a voluntary bill, funded by a tax on the corporations that do business with the Federal Government, and basically says you cannot raise any contribution larger than a hundred bucks. If you raise enough of them, you qualify, you will get matching funds. You do not have to spend your life at the other end of a telephone hearing secretaries make excuses about why the boss cannot take another call from you.

I think that that would be a dramatic change, and I thought, I really thought, honestly, Mr. Wertheimer, that it would not go anywhere unless there was a major scandal. That is usually what leads to a reform. But I think this case may be the trigger. This case may be the catalyst. We say now we are going to give voters an alternative, they can choose between a candidate who opts for public financing on a voluntary basis with limited contributions of $100 or the other guys. And the other guys are going to be wallowing in money, and I do not think that they will be able to explain it away very easily when the contrast is made. So I think there is a possibility here that we can renew this debate.

Some of my critics even in the Senate say, you know, the American people are interested in a lot of issues. They are interested in jobs and the economy and health care and so forth. They are not that interested in this issue. This is kind of an intramural issue as far as they are concerned. They think we are all going to be crooked and take too much money no matter what we do. So they are pretty skeptical when you talk about reform.

But I really think they show that they care when given a chance. They did it in Arizona when they had a chance for a statewide referendum on whether or not they would go to public financing. They have done it in other States as well.

I would like to just ask Attorney General Bullock and anyone who would like to comment, What do you think of the idea of public financing of campaigns?

Mr. BULLOCK. Senator Durbin, I have not looked at the bill draft. Conceptually, I have always believed that there is some merit in public financing in campaigns. When I look to the Montana experience, the maximum I could raise by contribution limit was $310. I had to make a lot of calls.

In a lot of respects, for States like mine there is still going to be the concern of the independent expenditures. And in State races, the independent expenditures can far dominate what I can raise. I agree with Senator Bennett that the candidate matters, but I have 147,000 square miles that I have to travel in Montana. But unless you could somehow make some system of financing sufficient to address or counter address the independent expenditures that will still flow into the election, I am not sure it will ever be sufficient to actually make it so that those good candidates can be heard.

Mr. WERTHEIMER. Senator Durbin, I testified in this Committee room for the first time in 1973 urging then-Chairman Howard Cannon and the rest of the Committee to pass congressional public financing, and I have been working for it ever since.

There was a young freshman Senator who had just gotten here who came up to testify and pleaded with his colleagues to pass congressional public financing. His name was Joe Biden.

So I think it is the only fundamental solution to the problems here, fixing the Presidential public financing system, creating a system for Congress.

I do think we have got to respond as quickly as we can right now in whatever ways are appropriate to this monumental decision. And I agree with Professor Gerken here. If the only standard for the Supreme Court is when the make-up of the Court changes, we

will change decisions we do not agree with. I truly can see Citizens United being overturned.

But in the end, we have to have public financing of elections if we are going to give citizens their opportunity to have a voice that is not drowned out by large amounts of private money.

Mr. HOERSTING. Senator Durbin——

Chairman SCHUMER. Thank you. Do you want to say something, Mr. Hoersting?

Mr. HOERSTING. Yes, please, if I could.

Chairman SCHUMER. Please.

Mr. HOERSTING. As the Attorney General mentioned, public financing will not do anything to dampen the relative spending of outside organizations as protected by this opinion. And there is one other point I would like to make about the Fair Elections Now Act. I would respectfully suggest that the Committee fully understand the decertification provisions in the bill. We have heard lots of talk about lobbyists or large interests going to a Congressman's office and saying, "I hope you are with me in the coming election cycle." But in Arizona, the clean elections commissions go so far so to nullify election results; they have the ability to invalidate elections after the fact based on whether they thought the provisions were followed or not.

While the FENA proposals do not have election-nullification provisions, I worry that if the *decertification* provisions are not carefully studied, you may owe your elections and your financing not so much to constituents who may or may not support you, but to the administrative grace of a fair elections commissioner.

Chairman SCHUMER. Thank you.

Senator DURBIN. Mr. Chairman, if I could just respond.

Chairman SCHUMER. Please.

Senator DURBIN. That is not in my bill. Are you saying it is?

Mr. HOERSTING. Yes, Senator, my understanding of FENA is that it has decertification provisions based on inability to comply.

Senator DURBIN. No, it does not.

Mr. HOERSTING. I will look into that, and I apologize if I have that incorrect.

Chairman SCHUMER. Okay. We are going to go to a next round for anyone who wants to. I have two more questions aimed at crafting the best piece of legislation that we can.

The first, I would address to Professor Gerken. This is on foreign-influenced corporations, which we touched on. The Court discussed the prohibition on foreign nationals financing American elections, and we all know that there is already a provision that prevents foreign citizens and foreign corporations from invading our election process. Yet the Supreme Court did not fully address that area of the law in their opinion. The opinion said that 441(e) is on the books. It did not address the vital aspect that I would like you to talk about.

Will this decision open a loophole in that foreign provision for multinational corporations or foreign-influenced corporations to be heavily involved in our elections? And if so, can you explain one or two ways a foreign-influenced company or government might do so?

Ms. GERKEN. Senator, I think the key concern is the way that foreign nationals might work through the domestic subsidiaries of

foreign corporations. Now, there are rules in the FEC that address that question, although I will just say, with all due respect to the FEC, it has not been a model of an enforcement agency at all times in its history. And so Congress may wish to consider whether or not to put the FEC's regulations into the statute to ensure that they have more muscular enforcement. One can also use disclosure and disclose rules to address the question of foreign nationals.

The key problem, I think, for you is that there really is not much precedent on this from the Supreme Court, and so we are sort of feeling our way through the questions of what would be constitutional. But I do not believe that the Supreme Court is going to say that it is illegitimate for Congress to consider whether foreign nationals are influencing our elections.

Chairman SCHUMER. Right. And if we had an ownership rule—5 percent, 20 percent, 30 percent; we know 51—we have heard Mr. Hoersting on that—do you think how high it goes affects the constitutionality? I mean, if there were one foreign-owned share somewhere of a huge corporation, obviously you are getting into violating the spirit of the Supreme Court's decision as much as we may not like it. But let us say it was 5 percent or some relatively low number. Do you think that would get into a constitutional issue?

Ms. GERKEN. So you have two questions here. One is the Court's intuitions about this, and one is what is actually the practice of corporate law.

On the side of the Court's intuitions, the Court used the phrase "predominantly" in the opinion in sort of an offhand statement. I do not believe that the Court will take that sort of seat-of-the-pants estimate, made in passing, to be the rule here. So I do think Congress has leeway to go below 50 percent.

Chairman SCHUMER. Right.

Ms. GERKEN. However, I would strongly encourage you to go with the practice of corporate law. Corporate lawyers have been thinking for a very long time about what constitutes influence. Moreover, you have federal cognates as well. So this Congress has considered this question at least twice: one in worrying about the foreign control of airlines where it chose a 25-percent number; and one in the Communications Act—which is, you know, quite similar to this situation—where it also chose a number that was well under 50 percent. So I think with an adequate factual record supported by corporate expertise, you can go below 50 percent.

Chairman SCHUMER. Okay. Next, this is to Professor Foley about quasi-government agencies and quasi-involvement. I just want expand on your comments on the Amtrak case. If I am hearing you right, it seems that how a company interacts with the Government should determine the public-private balance, not how it is organized.

Mr. FOLEY. Correct.

Chairman SCHUMER. Okay. So if you agree, what other similar entities could fall under that category? And what types of Government involvements could fall under that category as well if, let us say, 80 percent of their contracts were with the Federal Government, something like that?

Mr. FOLEY. Exactly. And I encourage members of this Committee and others to read the Lebron opinion because it is quite rich in the history of its discussion of quasi-governmental corporations going all the way back to the First National Bank, all the way through World War II and the Great Depression, and the myriad different ways that Congress has used these various types of entities to achieve different public purposes. So there is a lot in there.

For example, the Court differentiated between Amtrak on the one hand, which was the company in front of it, from COMSAT, the Communications Satellite Corporation, which has different ownership rules and had a little bit different relationship. So the Court says there is a spectrum here and different companies fall in different parts of the spectrum.

But as, Chairman Schumer, you suggest, degrees of Government ownership matters. The 20-percent figure came up in that case because that was the percentage of ownership that the U.S. Government had in the First National Bank, contractual relationships between the Government and the corporation, the nature of the industry—you know, there has been a long history of understanding that public electric utilities, for example, have the characteristic of natural monopolies and, therefore, need a certain kind of regulation, maybe rate regulation and the like.

So I think that industries that perform those public functions would have this character. That is why I think the language in Citizens United is actually encouraging on this point in relationship to the Lebron case and other precedent because Citizens United itself used that term "Government functions." And so there will be corporations that undertake this role.

For example, there has been a debate in American history from time to time over privatizing prisons. You know, if the Federal Government just hypothetically decided it wanted to privatize prisons because they thought that a for-profit company would run a prison better than the Government itself, that would still be doing a Government function; and even if it was set up as a for-profit corporation, under this analysis it would be quasi-governmental, which means that the Citizens United free speech rights that belong to Americans and private citizens, it would not apply because that would be a Government entity or a quasi-Government entity.

Chairman SCHUMER. Thank you, and we may consult you further as we move the legislation.

One final question, and then I will turn to Senator Murray. We are in the second round here, so we go right next to you. But this is to Mr. Hoersting and maybe to Ms. Hayward, not judging the constitutionality, but let me give you a hypothetical and just ask you if this bothers you. Okay?

Congressman Smith has been the leading fighter against what he sees as abuse in drug companies. He wants to shorten the patent period. He wants to have tougher FDA rules. Call it what you will.

Drug Company B says publicly, "We are going to go after Smith. He is against what we believe in." It spends $5 million, defeats Smith, and they say, "Now, anyone else who does this again is going to be up against the same thing." Five million dollars is nothing to this company.

A, do you think that would have an effect on how Congress behaved? Because you seemed to allude to the fact before that it might now. And, B, would it be a good thing, forgetting the constitutionality right here, or is this just a necessary price we pay for the First Amendment like people telling untruths?

Mr. HOERSTING. I think what I would say, Senator, is, first of all, if there were any sort of collusion or threats, something like that, that might be something addressed elsewhere. But, generally speaking, let me say——

Chairman SCHUMER. There is no collusion or threats. It is a public statement: "We are going to defeat Congressman Smith because he vehemently disagrees with us. We are going to spend $5 million." They do their own disclosure, whatever the laws are, and they defeat him.

Mr. HOERSTING. Thank you for the clarification——

Chairman SCHUMER. And then they say, "We are going to work to defeat anyone else who has similar views." That is their right.

Mr. HOERSTING. Yes. I think what you have there is you have an organization saying, "We are against this candidate and we are prepared to spend vociferously to do so." That will raise the ire of competing factions who think, "That is not right, and I happen to want patents shortened, so I will speak on behalf of this particular Congressman or on behalf of this particular Senator." And, furthermore, at the end of the day, all of this speech is taken into account by the voters who determine, "Do I agree with the position taken by that $5 million spender? And do I think it is valid? Or do I disagree"——

Chairman SCHUMER. Well, wait a minute. Just let me change the hypothetical now.

Mr. HOERSTING. Sure, sure.

Chairman SCHUMER. The $5 million they spend is not on drug issues. It is on the worst vote that Congressman Smith has taken.

Mr. HOERSTING. That is fine——

Chairman SCHUMER. They announce they are going against him because of the drug issues—because this is how—you know, I know how the world works here.

Mr. HOERSTING. Sure.

Chairman SCHUMER. And you are living in an idyllic world, I guess, where someone else would say, first, the ad is always on the issue that really motivates the contribution; and, second, that other speaking out can equal $5 million of negative ads. Don't you agree that is unrealistic?

Mr. HOERSTING. I do not agree, Senator. What I would say is that—what they say now is that the best ad these days is a response ad, a quick response ad. So I think you are always going to have competing voices, and at the end of the day——

Chairman SCHUMER. Smith does not have $5 million. He does not have a competing response ad.

Mr. HOERSTING. Okay. I see this is a floating hypothetical.

Chairman SCHUMER. Well, it is—no, you are just trying to take the typical situation and make it atypical. I am giving you the typical situation.

Mr. HOERSTING. Yes, and I think Smith would have friends, and I think people might be turned off by certain ads. And I think at

the end of the day the idea here is that sovereign citizens have the ability to determine is this valid and am I for it or is this invalid and am I against it. And that is the bedrock principle really of our system, and I think that is where we are.

Chairman SCHUMER. You know, in all due respect, I think you are living in a different world than we all live in. It would be nice. Okay.

Do you want to say something about this, Professor Hayward?

Ms. HAYWARD. Yes, Mr. Chairman, if I could real quickly. This is not a hypothetical. This really happened. The Anti-Saloon League spent buckets of money in its era on initiatives as well as on candidates. It was not organized as a corporation and was able to do that under the Corrupt Practices Act. The people who were responding to the good folks being attacked by the Anti-Saloon League were the brewers. The brewers in 1916 were prosecuted. The Anti-Saloon League never was.

So I do not look at this so much as, "Oh, now we have got people who are spending and we did not have them before." They were there before. But now you have got more who have the ability to muster their resources, and I think you have a——

Chairman SCHUMER. You would agree that not on every issue there is an equal balance of resources. Correct?

Ms. HAYWARD. I think you find that in heavily regulated contexts like what Ned is talking about where you really do not have——

Chairman SCHUMER. You think there is an equal balance of resource in every issue?

Ms. HAYWARD. No. I said I do not think so.

Chairman SCHUMER. Okay.

Ms. HAYWARD. But if I could just add, I think the hypotheticals are fun. I am a law professor, and I engage in them all the time. But I would really urge the Committee to see what happens, because it may be that the trouble you are anticipating right now is not the trouble that you are ultimately faced with responding to, but something else over here that you could never foresee.

Chairman SCHUMER. Thank you.

Mr. FOLEY. Senator Schumer?

Chairman SCHUMER. Go ahead. I just wanted to get to Senator Murray. Go ahead, please, Mr. Foley, and I think Mr. Bullock wanted to say something.

Mr. FOLEY. I was just going to add really quickly that if the concern is the large-level expenditures of $5 million and so, again, I believe my reading of the opinion and the oral argument is that Congress has considerable room to address those large-level expenditures. I think that was specifically what Justice Scalia was addressing in the oral argument. And, in fact, there are other passages of the Court's opinion that are in my written testimony that I will not quote here—unless you would like me to—that talk about that issue.

Chairman SCHUMER. Do you agree with that, Professor Gerken?

Ms. GERKEN. I take a somewhat more skeptical view. It is a serious constitutional position, but I read the Court's opinion as being slightly more doctrinaire on this question.

Chairman SCHUMER. Yes, so do I. I wish Mr. Foley were right. Last word, Mr. Bullock, just to respond to Mr. Hoersting's and Professor Hayward's characterization of what might happen.

Mr. BULLOCK. Chairman Schumer, I think that campaigns would be much more fun in academia than in the real world. I think of outrageous claims in my campaign, like soft on sexual predators. I do not see the opposite side of that running to find the money to make a difference there.

I think that when we get to the real world of political affairs, there is not going to be an equalizing force. And we can say that and know that without waiting for a decade of elections to pass to see that happen.

Chairman SCHUMER. Senator Murray, thank you for your indulgence.

Senator MURRAY. Absolutely. Well, thank you very much, Mr. Chairman. I apologize for being late. We have a Budget hearing as well this morning, and this is an important hearing, and I thank all of you for being here.

I just want to say first—I just have to say it. I am appalled at the Supreme Court's decision in Citizens United and the majority's inability to understand what most Americans do today, that we already have too much corporate influence in American politics. That decision really undid a century of work to make sure that the voices of individual voters are not drowned out by special interests that are more interested in their own bottom line than the welfare of American citizens. And in my judgment, it will be much harder now for grass-roots campaigns, ordinary people to take on entrenched corporate power, on Wall Street, on health care, on issues like environmental regulation. And so I really appreciate your having this hearing and trying to determine what our role is now and what we can do at this point.

I did want to ask a question. It seems that at a basic level the Supreme Court has now equated the freedom to speak with the freedom to spend. And I wanted to ask if constitutionally does it matter if a corporation could afford to buy all the air time on the TV channels most Americans watch on election day. Is that what we are constitutionally protecting here? It is my understanding that the Citizens United decision allows a corporation to do that, buy all of the air time before an election and somebody would not be allowed to even speak back. I wondered if anybody had a comment on that. Mr. Foley?

Mr. FOLEY. Again, it goes back to my reading of the opinion as being about a facial challenge. There has been discussion today about how the Supreme Court, the majority opinion reached out to invalidate the statute on its face, whereas it could have decided the case more narrowly as a so-called as-applied challenge. To me, that is a very important point in terms of looking forward as to what sort of issues are left open and have not been decided by this case.

So your scenario of buying all the airwaves to me is not addressed in the Citizens United opinion at all. It is a different fact pattern. It is a different circumstance. I think it would raise very different constitutional questions.

I would say that the only thing that the Citizens United opinion does as a technical ruling is says that one statute is invalid because it was so broad, it was so sweeping, it was an absolute ban.

Now, there is, of course, language in the opinion that hints at other things that would be constitutionally problematic. An extremely low ceiling as opposed to a zero-level ceiling would also be constitutionally problematic, and we could discuss other examples. But it seems to me that if there—and, again, this goes back to Professor Gerken's correct point about developing a factual record. If in the Supreme Court litigation the record showed that kind of monopolization of the airwaves, that would be a factual predicate for a different kind of constitutional ruling.

Senator MURRAY. So would we have to wait for an election to occur, see that happen, and then be able to proceed?

Mr. FOLEY. No, not necessarily. There are different kinds of factual records, and Congress can build a factual record on its own, and then the U.S. Solicitor General obviously takes the record that Congress builds into the courtroom. That could be supplemented by evidence from elections as well, and obviously the more evidence and the more focused the evidence, the easier it is for a lawyer like myself whose had to appear in court to defend these kinds of statutes.

But congressional evidence is a key point in the Court's deliberations about whether a statute meets the strict scrutiny standard, for example.

Mr. WERTHEIMER. If I could add, the Federal Communications Act requires stations to sell reasonable amounts of time to candidates, but that time could be dramatically squeezed depending on how much money was being spent by outside groups. So I do not——

Senator MURRAY. Does it say specifically candidates? Because——

Mr. WERTHEIMER. It says Federal candidates.

Senator MURRAY. Well, I just know in these economic times, when broadcasters are looking for top dollars, sometimes that time could be squeezed a lot.

Mr. WERTHEIMER. Yes, it could, and one of the predictions that was written about after this decision was that the biggest winners here were broadcasters who are now going to get substantially more advertising by outside groups and benefit and profit from it.

Senator MURRAY. Does anybody else want to comment on that?

Mr. HOERSTING. Senator, if I may, I think at some point the Supreme Court—what I think you are going to have to do eventually is put yourself in a position where you can afford your campaigns more so than you already can and for the party committees to be able to afford their activities more than they already can under McCain-Feingold provisions. I think at the end of the day that is probably the better way to go.

Senator MURRAY. You mean to allow candidates to all of a sudden spend a whole bunch of money?

Mr. HOERSTING. To increase the amount that the party committees are allowed to take in for issue discussion——

Senator MURRAY. So we are flooding a whole bunch more money into this by equality, so we are back to the question: Is this about money or is this about voices?

Mr. HOERSTING. Well, it is about—I think what I would say, you always hear the analogy that travel is not about money, but yet you cannot travel without money. I think you can very easily see that if there were a limit on airline tickets or gasoline, that would be an infringement on one's right to travel. And the Court has always said that while money is not speech, it is necessary to speech. So limiting expenditures without some basis for corruption is unconstitutional now, and that is always the inquiry. Is there a basis of corruption?

Mr. WERTHEIMER. If I could comment on this point that Mr. Hoersting has made twice, the notion of solving this problem of opening the door to influence-buying corruption by corporations, by going back to a corrupt soft-money system that was closed down by a bipartisan majority vote in the House and Senate in a law signed by President Bush and then upheld by the Court in my view is simply an argument that says, well, we ought to respond to this influence-buying corruption problem by opening the door to much more influence-buying corruption.

We cannot go back to what was a $500 million national scandal in the soft-money system. We have to find ways without opening the door to more influence-buying and corruption to respond to this decision. And I think there are going to be ways that will have effect. It will not solve the whole problem, obviously, but there are things that can be done, and I think Congress has to move immediately with first steps so that there will be some protections in place in the 2010 congressional elections.

Chairman SCHUMER. Thank you, Senator Murray.

Senator MURRAY. I think we have our work cut out for us. I think the question becomes: Do we want to open up the floodgates and have, you know, a whole lot more money that this Congress has worked their way through? Or do we want to make sure that now that the Supreme Court decision has been made, we say what—how do we have laws that we put on individual candidates in campaigns apply to corporations?

Chairman SCHUMER. Senator Bennett gets the last round.

Senator BENNETT. Thank you very much, Mr. Chairman. Just a comment about the effectiveness of McCain-Feingold to taking big money out of politics, and I go to the numbers we were given by Senator Kerry, that in 1998 the elections all cost $1.6 billion, and 10 years later, after the passage of McCain-Feingold, it was $5.2 billion. So somehow the goal of taking big money out of politics was not achieved by passing that law.

Let us go back to this whole question of how dramatic this decision is and how it is overturning so many years of precedent. Is there anyone on the panel who believes that if a corporation in 1908 that was critical of a Federal candidate at the time—ran a radio program that was critical of a candidate at the time, would it have been illegal for them to produce it and advertise it with corporate funds?

Mr. HOERSTING. I feel I need to defer to Allison Hayward here because she has written so well on this topic. But my under-

standing is, no, that would not be constitutional. The Court has waited decades to reach——

Senator BENNETT. I will get to that.

Mr. HOERSTING. Sure. I am sorry.

Senator BENNETT. In 1908, a corporation could have produced a radio show, that being the predominant media at the time, attacking a candidate and put it on the air, paid for it, and advertised it with corporate funds. Is that correct?

Ms. HAYWARD. Absolutely. Yes.

Senator BENNETT. All right. Let us go to 1948. Would it have been illegal to use corporate funds to distribute and advertise "Truman the Movie" prior to that election?

Ms. HAYWARD. Well—in 1948.

Senator BENNETT. 1948.

Ms. HAYWARD. It might have been because there was not an exemption for editorials or commentary in the expenditure ban that was part of Taft-Hartley.

Senator BENNETT. Okay. So they do it in 1944 against Roosevelt.

Ms. HAYWARD. Okay. That would have been legal.

Senator BENNETT. All right. So what about, you know, in 2000, of course, Citizens United would have been prohibited from distributing and advertising "Hillary the Movie" in New York 2 months before the general election, and that had to do with the 60-day ban and so on that was put in place.

So we have a long history of corporations having the right to do this kind of thing, and then it is changed, you say first in a fashion in Taft-Hartley and then, of course, by the passage of McCain-Feingold.

Ms. HAYWARD. That is right.

Senator BENNETT. It does not sound to me like we are overturning a whole history of legislative bans if we are only overturning something that is relatively recent.

Ms. HAYWARD. Pardon me, if I could just interject.

Senator BENNETT. Surely.

Ms. HAYWARD. There was great prosecutorial queasiness about the expenditure ban from the very beginning, and you can see there is testimony before the Senate from 1955 where the Assistant Attorney General at that time announces that the Department of Justice is not prosecuting under the expenditure ban because they are concerned about its constitutionality. There is other material I have gotten out of archives that I would be happy to share with the Committee if the Committee is interested that show that concern dating back to 1948, just at the very beginning.

I think the expenditure ban in Taft-Hartley caught a lot of people by surprise, and thus, you do not really have much of a court record on its scope at that period because the Department of Justice was not pursuing cases under it. They did not want that bad decision that would turn the whole thing unconstitutional and lead to some other bad consequence. And so they simply did not bring the cases.

Senator BENNETT. All right. Mr. Wertheimer, you referred to Justice Stevens' dissent. Obviously, that is not the only dissent Justice Stevens has written. Let me quote Justice Stevens in Buckley, and he wrote the following. He said, "I am convinced that

Buckley's holding on expenditure limits is wrong and that the time has come to overrule it. I have not reached this conclusion lightly. As Justice Breyer correctly observes, stare decisis is a principle of fundamental importance. But it is not an inexorable command, and several factors taken together provide special justification for revisiting the constitutionality of statutory limits on candidate expenditures."

Now, if the Court had heeded Justice Stevens' advice in that case and overruled Buckley on that point, what would have been your reaction? How would you have felt about that decision?

Mr. WERTHEIMER. Which case are you referring to his writing in?

Senator BENNETT. Buckley v. Valeo.

Mr. WERTHEIMER. Well, you quoted him as talking about overruling Buckley. What case was he writing in? I am not sure——

Senator BENNETT. Oh, I am sorry. I am sorry. It was Randall v. Sorrell.

Mr. WERTHEIMER. Yes.

Senator BENNETT. Would you have been pleased if the Court had overruled Buckley?

Mr. WERTHEIMER. Overruled Buckley on expenditure limits?

Senator BENNETT. Yes.

Mr. WERTHEIMER. Not particularly, no. But I would say to you that there clearly are exceptions to stare decisis, which is a well-established concept. They do not exist, in my view, in the Citizens United case.

And if I could take one minute to respond to the comment you made about McCain-Feingold?

Senator BENNETT. Sure.

Mr. WERTHEIMER. It was not about big money. It was about big contributions. It was about million-dollar contributions from labor organizations or $5 million contributions or multimillion-dollar contributions from trade associations. That is what the soft-money ban took out of the system. It was never intended to address the question of all of the money in the system. It was intended to address the contributions that had the most clear power to buy influence over Government decisions. And if you look at the Buckley decision approving limits on contributions, it says that inherently large financial contributions have the power to corrupt and create the appearance of corruption.

Senator BENNETT. Thank you for that. The overall pattern that I recall out of the press was this is going to take big money out of politics, and I appreciate your clarifying that that was not your view of it and not the primary thing that was driving you for your advocacy.

Finally, Mr. Chairman, I would just go back to the situation we have heard many times before in this debate, and maybe it does not need to be repeated, but I want to put it on the table for us to recall, and that is the McCarthy campaign of 1968 when Senator McCarthy went to New Hampshire——

Chairman SCHUMER. I worked in it.

Senator BENNETT. You worked in it. All right. And Senator McCarthy went to five individuals, as I recall—this shows what inflation has happened since 1968. He said, "I am going to challenge

President Johnson, and to do that I need some money." And each one of the five gave him $100,000.

Chairman SCHUMER. I was not one of those.

Senator BENNETT. You were not one of those. All right.

[Laughter.]

Senator BENNETT. Each one of the five gave him $100,000, and with half a million dollars and the scale of expenditure challenges and organizational costs and so on, he attracted you to New Hampshire and probably prevented Lyndon Johnson from running for reelection. And that would be illegal today. Eugene McCarthy would not have been allowed to challenge a sitting President today by that kind of funding. I am sure you do not feel that Eugene McCarthy was corrupted by those five gentlemen—I think they were all gentlemen—who gave him the $100,000. I do not think he was corrupted. And I think we need to be a little careful in jumping to many of the conclusions we do on the particular issue of campaign finance reform.

I do understand, Mr. Bullock, the challenge of having outside groups come in and spend a whole lot of money in your State to distort your position. I am going through it right now. None of my opponents in my own race have any money—well, that is not true. One of them is a self-funder, and he is a millionaire entrepreneur, and he is putting in the money he needs to support his race to challenge me. But an outside group having little or nothing to do with the State of Utah is coming into the State, they have promised the whole—the "works"—television, radio, billboards, mail, the whole thing. I really do not like it. But it is their constitutional right, and there is nothing I want to do to prevent them from doing it, even though it makes my life very unhappy.

So I know what you mean when people come in and distort your record, come in from out of State and distort your record. I sympathize with you, and I am glad you have prevailed, and I intend to prevail against that kind of pressure. But, constitutionally, I do not think there is anything we can do to prevent them from doing it.

Thank you, Mr. Chairman.

Chairman SCHUMER. In the spirit of bipartisanship, Senator Bennett gets the last word.

Without objection, the hearing record will remain open for 10 business days for additional statements and documents the Committee may receive.

The Committee is in receipt of statements from groups—I do not have to name them all, do I? No. Without objection, they are all going to be added.

Chairman SCHUMER. I want to thank my colleagues for participating. I want to thank our witnesses for their excellent help, guidance, and diversity on this issue.

The hearing is closed.

[Whereupon, at 12:05 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Appendix B

Testimony of Montana Attorney General Steve Bullock
Executive Summary
United States Senate Committee on Rules and Administration
February 2, 2010

The Supreme Court's decision in Citizens United calls into question more than a century of law around the country. Yet the Court and others have overlooked the distinct impact corporate campaign spending has in state and local elections.

Montana's history provides an example of that impact. Senator William Clark and other "Copper Kings" once dominated political debate in Montana, spending as much as $1000 per vote in a war of corporate interests that drowned out the voices of Montanans. This was corruption as it was understood since the framing of the Constitution: not just bribery but harnessing government power to benefit a single corporate faction at the expense of the broader and more diverse interests represented by the people themselves.

In 1912, Montanans passed an initiative to prohibit corporations from "paying or contributing in order to aid, promote or prevent the nomination or election of any person." Corporations are represented in Montana campaigns, but on equal terms alongside other political committees, all of them speaking through purely voluntary associations of their money, ideas, and voices. It is a system that has worked well, and one Montanans continue to believe in.

After Citizens United, I am concerned about the ways state elections are especially vulnerable to corporate corruption, and ask you keep these concerns in mind as you consider reforms. First, our campaigns are small compared to the corporations that would corrupt them. Second, for states, the concern about foreign corporations includes interstate as well as international influences. Third, special dangers arise from corporate corruption in the majority of states that hold judicial elections. Finally, campaign disclosure laws provide an opportunity to ensure voters know who is speaking, and shareholders know where there money goes.

Testimony of Montana Attorney General Steve Bullock
United States Senate Committee on Rules and Administration
February 2, 2010

Last summer, Montana led more than half of the States in asking the Court to address only the narrow federal issues presented by *Citizens United*.[1] Instead the Court reached a broad decision that questions more than a century of law in Montana and across the country. Yet the case itself, and reactions on both sides of the political aisle, have largely overlooked the decision's impact upon the vast majority of elections in this country: those for state and local offices.

There is historic meaning in a Montanan's appearance here. One hundred and ten years ago, a predecessor of this Committee (the Senate Committee on Privileges and Elections) "expressed horror at the amount of money which had been poured into politics in Montana in elections from 1888 onward."[2] The setting was the investigation into the infamous bribery of the Montana Legislature by Senator William A. Clark, which led to its refusal to seat him.

The corruption of Montana politics was by no means limited to bribery. Senator Clark and his fellow "Copper Kings" dominated political debate in Montana and drowned out Montanans' own voices.[3] This was corruption as it was understood since the framing of the Constitution: not mere theft or bribery, but harnessing government power to benefit a single corporate faction at the expense of the broader and more diverse interests represented by the people themselves.[4] In an 1884 election establishing Helena as the State Capital, for example, Clark and his archrival Marcus Daly combined to spend between $35 and $70 million in today's dollars to influence 52,000 voters.[5] That's about $1000 per vote.

Mining money reached every campaign -- legislators, judges, sheriffs, county commissioners, and assessors.[6] The result was best described in Clark's own testimony here before the Senate committee:

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[1] More than two-thirds of the States have limited corporate spending at some point. *See* Louise Overacker, *Money in Elections, Politics and People: The Ordeal of Self-Government in America*, 294-95 (1932).
[2] K. Ross Toole, *Montana: An Uncommon Land*, 190 (Univ. Okla. 1959).
[3] *See generally*, Carl B. Glasscock, *The War of the Copper Kings* (Bobbs-Merrill 1935).
[4] *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 393 n.245, 406 (2009); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 Kan. L. Rev. 1, 48 (2003).
[5] Michael Malone *et al.*, *Montana: A History of Two Centuries*, 214 (Revised ed., Univ. of Wash. 1991); Toole at 182.
[6] Toole at 205.

> Many people have become so indifferent to voting there by reason of the large sums of money that have been expended in the state heretofore that you have to do a great deal of urging, and it takes a lot of men to do it, to go around among them and stir them up and get them out.[7]

Fed up, in 1912 our citizens through the initiative process passed several political reforms. One prohibited corporations that could most benefit from government action from "pay[ing] or contribut[ing] in order to aid, promote or prevent the nomination or election of any person."[8] The law represented nothing less than the voters taking back a government that belongs to them, and only to them.

Montanans know their history as well as they know their public officials. Over nearly a century, our limit on corporate campaign spending in candidate elections has served us well, and never been challenged. Corporations are represented in Montana campaigns, but on equal terms alongside other political committees, all of them speaking through voluntary associations of their money, ideas, and voices.[9] It is a system Montanans continue to believe in.

We didn't want this fight in Montana, but the *Citizens United* decision will likely invite a challenge to the people's law of 1912. We do not want to be set back a century. I am principally concerned about the ways state elections are especially vulnerable to corporate corruption, and ask you keep these concerns in mind as you consider reforms.

First, our campaigns are small compared to the corporations that would corrupt them. In 2008, the average Montana state senator won on $17,000 of spending; the average senator in this body won spending $8.5 million.[10] That's

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[7] Toole at 184-85.

[8] The full Section 25 of the 1912 Act provided:

> No corporation, and no person, trustee, or trustees owning or holding the majority of the stock of a corporation carrying on the business of a bank, savings bank, cooperative bank, trust, trustees, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, water, cemetery, or crematory company, or any company having the right to take or condemn land or exercise franchise in public ways granted by the state or by any county, city or town, shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party or organization. No person shall solicit or receive such payment of contribution from such corporation or such holder of a majority of such stock.

[9] National Institute on Money in State Politics, *State Overview: Montana 2008*, Table 4 (Top 15 Industries), available at http://www.followthemoney.org/database/state_overview.phtml?s=MT&y=2008.

[10] http://www.opensecrets.org/bigpicture/elec_stats.php?cycle=2008.

more than the combined amount raised by all 327 candidates running for Montana state office in 2008.[11] With the floodgates opened to corporate spending, it won't take a Copper King to buy a $17,000 election.

Second, the "foreign corporations" that can corrupt our elections are more likely to come from Delaware than offshore. While we can legislate to hold Montana corporations accountable to their shareholders, our state laws may not always reach businesses incorporated elsewhere. As you protect federal elections from foreign influence, understand that federalism requires room for states to protect their elections from foreign influence too, whether international or interstate.

Third, Montana's history shows the special dangers arising from corporate corruption in judicial elections. Like the majority of the States, we hold our judges accountable through elections. Supreme Court justices in Montana campaign on as little as $100,000, far less than the stakes in the cases they are asked to decide.[12] As *Caperton* recognized, independent expenditures can have a "significant and disproportionate influence" in corrupting the administration of justice.[13]

Finally, I am encouraged by the Supreme Court's nearly unanimous affirmation of disclosure and disclaimer laws, and hope more can be done. By amplifying disclosure and disclaimer requirements for corporations, voters can know the identity of the wizard behind the curtain. We may not be able to stop Acme, Inc. from using other people's money to campaign, but we can strive to ensure voters know it's Acme speaking in their elections, not "Citizens for Motherhood and Apple Pie" or another front group. We can also protect the shareholders who are just trying to save for retirement, and want nothing to do with some CEO's politics.

In Montana we have ensured that the voices of our candidates, and those of the natural persons that support and vote for them, are not displaced by the treasuries of corporations. The Supreme Court has challenged all of us to find new ways to keep those voices heard. I look forward to working with our legislature and Congress in doing so.

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[11] National Institute on Money in State Politics, *State Overview: Montana 2008*, Table 1 (Candidates).
[12] *Id.*
[13] *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264-65 (2009).

Montana Attorney General Steve Bullock

Steve Bullock was elected as Montana's 20th Attorney General in November 2008. As Attorney General, Bullock is the state's chief lawyer and law enforcement officer. He leads the Montana Department of Justice, which encompasses the Forensic Science Laboratory, the Montana Highway Patrol, the Motor Vehicle Division, Gambling Control, Legal Services and the Division of Criminal Investigation, as well as the department's information technology staff.

Attorney General Bullock is committed to:

- **curbing prescription drug abuse and reducing drunk driving** in Montana by supporting strong enforcement, building community awareness and working with the legislature to strengthen Montana law. He has assembled a diverse advisory council on prescription drug abuse and used grant funding to create a six-person drug diversion unit.
- **protecting Montana consumers**. He has increased the commitment to the Office of Consumer Protection, including adding two new attorneys, one of whom specializes in issues affecting Montana's farmers and ranchers.
- **making Montana communities safer, especially for children**. Bullock has dedicated a prosecutor within his office to focus exclusively on crimes against children; improved the policing of online predators; supported the development of a Children's Justice Center within the Department of Justice to coordinate efforts to enforce the laws relating to sexual violence against children, and provided the staff resources necessary to ensure that offenders comply with Sexual or Violent Offender Registry requirements.

Steve also has a strong **commitment to public access** to Montana's streams and public lands, and worked with the legislature to solidify the public's right to access streams. Another of his top priorities is providing strong **support to local law enforcement and Montana's county attorneys**.

Bullock began his career in public service in 1996 as chief legal counsel to the Montana Secretary of State. He went on to serve four years with the Montana Department of Justice, first as executive assistant attorney general, and later as acting chief deputy (1997-2001). During this time, he also served as legislative director, coordinating the Attorney General's legislative efforts.

From 2001 to 2004, Bullock practiced law with the Washington, D.C. firm of Steptoe & Johnson. While there, he also served as an adjunct professor at the George Washington University School of Law.

Prior to his election as Attorney General, Bullock was in private practice in Helena where he represented individuals, consumer organizations, labor unions, peace officers, associations of political subdivisions, and small and large businesses.

Steve was born in Missoula and graduated from the Helena public school system. He received his undergraduate degree from Claremont McKenna College and his law degree with honors from Columbia University Law School in New York.

Steve and his wife Lisa have three children, Caroline, Alexandria and Cameron.

Appendix C

Before the United States Senate Committee on Rules and Administration

Statement of Professor Allison R. Hayward
George Mason University School of Law

Executive Summary

The holding in *Citizens United* is consistent with the Supreme Court's approach to laws restricting independent political activity. The expenditure ban found unconstitutional in *Citizens United* was placed on corporations and unions in 1947. It had been controversial from the beginning. Additionally, the legislative history of the expenditure ban undermines any argument that Congress carefully calibrated the law to serve compelling governmental interests, as strict scrutiny requires.

When the Court has squarely faced limits on expenditures, it has found them unconstitutional. *Austin v. Michigan Chamber of Commerce* from 1990 falls outside this generality. If for no other reason, the Court in overruling *Austin* in *Citizens United* should be applauded for bringing coherence and consistency to an area of constitutional law that had lacked both.

Phrases from the Senate debate have been taken out of context to argue that the expenditure ban was an incremental clarification of the 1907 Tillman Act. It is asserted that this contribution ban also prohibited independent expenditures. However, in context, one can read those debates as addressing what we would now described as "coordinated expenditures." From its text, it is impossible to see how the 1907contribution ban could have meant more. The 1907 law prohibited "money contributions" specifically.

In short, the expenditure ban was a departure from existing law, enacted as an obscure and little-debated provision buried in a hotly contested legislative package.

Going forward, it would seem appropriate to observe how corporations (or unions) react to *Citizens United* before legislating. Judicial review of any burdens on independent spending will demand evidence of a compelling governmental interest behind the restriction. It is doubtful that interest could be established to a court's satisfaction *ex ante*.

It is the task of Congress, based on experience and sound logic, to respond appropriately if aspects of the political system endanger the integrity of the institution and its members. Only when such issues emerge will there be any way to evaluate the threat, the government's interest, and which of the many means available – campaign finance laws, ethics rules, tax incentives, or others -- might be best to meet that threat.

Before the United States Senate
Committee on Rules and Administration

Statement of Professor Allison R. Hayward
George Mason University School of Law

February 2, 2010

Mr. Chairman and Members of the Committee: Thank you very much for providing me the opportunity to testify before you today. I would like to place the *Citizens United v. Federal Election Commission* decision in context, and discuss with you what it may mean for future efforts to limit corporate participation in federal elections.

My reading of history has convinced me that the holding in *Citizens United* is consistent with the Court's approach over time to these questions. The expenditure ban found unconstitutional in *Citizens United* was placed on corporations and unions in 1947. It had been controversial from the beginning. In the wake of that law's enactment, test cases brought against unions went poorly for the United States Department of Justice. This discouraging record, plus the fear that a test case might eventually yield a decision overturning the law, made federal prosecutors reluctant to bring more prosecutions. That reluctance was resolved only when amendments to the Federal Election Campaign Act in 1974 provided for civil enforcement with the newly created FEC.

The Appendix accompanying my statement demonstrates the history and legal developments leading up to *Citizens United*. The Appendix also shows that when the Court has squarely faced limits on expenditures, it has found them unconstitutional. *Austin v. Michigan Chamber of Commerce* from 1990 falls outside this general trend. *Austin* professes to apply a strict standard of scrutiny to Michigan's corporate expenditure ban, but upheld it with reasoning that fell short of that standard. If for no other reason, the Court in overruling *Austin* in *Citizens United* should be applauded for bringing coherence and consistency to an area of constitutional law that had lacked both.

The legislative history of the expenditure ban undermines any argument that Congress carefully calibrated the law to serve compelling governmental interests, as strict scrutiny requires. The expenditure ban was placed in the lengthy (and management-supported) Taft-Hartley labor reform bill at the eleventh hour during conference committee.[1] There was no real debate in the House about the amendment.[2] The Senate debate pitted Senator Robert Taft against several Democratic Senators, but both sides knew Taft had the necessary votes, and the package passed easily.

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[1] See U.S. v. UAW-CIO, 352 U.S. 567, 582-83 (1957).
[2] 93 Cong. Rec. 3522-23 (1947).

Phrases from the Senate debate have been taken out of context in recent days to argue that the expenditure ban was an incremental clarification of an earlier consensus that the 1907 Tillman Act's contribution ban also reached independent expenditures. There is no doubt that Senator Taft seemed to argue this point, as did a 1946 House Committee report investigating labor union expenditures.[3] However, in context, one can read these statements as addressing what we would now described as "coordinated expenditures." For instance, Taft contended the expenditure ban would be necessary to reach the coordinated purchase by a corporation of advertising *at the behest* of a candidate. The House Report likewise discussed expenditures "in [sic] behalf" of a federal candidate.

Even if Senator Taft did mean to argue that "contribution" properly understood would reach what we call independent expenditures, like those found constitutionally protected in *Citizens United*, it is impossible to see how the 1907contribution ban could have meant that. The 1907 law prohibited "money contributions" specifically. It was later amended (to strike "money") with the discovery of the "in-kind" contribution.

Nor could that broad interpretation of "contribution" have developed over time. The distinction between contributions and expenditures is not new. The reporting requirements dating to the 1920s required separate contribution and expenditure reports. The 1940 Hatch Act amendments set a contribution limit of $5,000, and a committee expenditure limit of $3 million. Both would be rendered nonsensical if the meaning of "contribution" also included expenditures.

Moreover, contemporaneous interpretations of the law point toward a narrower construction of "contribution." As labor unions prepared to spend money independently on "voter education" in the 1944 election, they interpreted the statute to allow these activities. The Department of Justice concurred with this interpretation, analogizing the union activity to expenditures by incorporated newspapers.[4] President Truman, for his part, singled out the 1947 expenditure ban as a "dangerous intrusion on free speech, unwarranted by any demonstration of need and quite foreign to the stated purposes of this bill" in his Taft-Hartley veto message.[5]

In short, the expenditure ban was a departure from existing law, enacted as an obscure and little-debated provision buried in a hotly contested legislative package. It would be better if laws limiting political activities were crafted in a straightforward and open manner.

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[3] 98 Cong. Rec. 6436-47; H.R. Rep. 79-2739 (1946).
[4] Department of Justice Clears PAC, 4 Law. Guild Rev. 49 (1944) (quoting DOJ press release).
[5] H.R. Doc. No. 80-334 (1947)

In the present debate, I would like to offer a few modest suggestions. First, it would seem appropriate to observe how corporations (or unions) react to *Citizens United* before legislating. Judicial review of any burdens on independent spending will demand evidence of a compelling governmental interest behind the restriction. It is doubtful that interest could be established to a court's satisfaction *ex ante*.

Moreover, the conjecture about potential for abuse involves hypothetical conduct that is already illegal. Foreign nationals may not make contributions or expenditures in any election (federal or local), nor may they play a role in the decisions behind fundraising or expenditures. Attempts to disguise the role of such a person, or the true source of funds, are also illegal. Deliberate falsification of reports is a federal crime. If the concern is that we lack the necessary resource to detect and prosecute bad actors, that problem will persist regardless of changes made to the substantive law.

About half the states permit corporate expenditures at present. These states have apparently not found it necessary to amend their state corporation codes in radical or novel ways to regulate pernicious corporate political activity. We may find the same is true in federal campaigns. In any case, federal lawmakers should hesitate before extending federal regulation over corporate governance, which traditionally has been provided in state law.

Citizens United should dispel any lingering doubts that the Supreme Court might not protect political speech with the same vigor it applies to restrictions on speech in the arts, education, or popular culture. It is the task of Congress, based on experience and sound logic, to respond appropriately if aspects of the political system endanger the integrity of the institution and its members. Only when such issues emerge will there be any way to evaluate the threat, the government's interest, and which of the many means available – campaign finance laws, ethics rules, tax incentives, or others - might be best to meet that threat.

Appendix
Benchmarks in the History of Federal Campaign Finance Law
Expenditures by Corporations

Prof. Allison R. Hayward

1907: Following revelations from the New York Insurance investigations, Congress passed the "Tillman Act," which banned "money contributions" by corporations.

1916: The Supreme Court upheld prosecution of several brewers for making campaign contributions to anti-Prohibition candidates.

1943: The corporate contribution ban was temporarily extended to labor unions for the duration of World War II, over Roosevelt's veto. Two weeks after enactment, the CIO organized the first PAC. The Justice Department confirmed that the PAC's expenditures are permitted under the new law.

1947: Over President Truman's veto, Congress made the labor contribution ban permanent, and extended to both corporations and unions a ban on expenditures. The first appearance of the expenditure ban was in the Taft-Hartley conference committee report. Unions pledged to violate this new restriction to bring about a test case.

1947-49: The Truman Justice Department prosecuted three separate unions for making illegal expenditures. In none of those cases did the Department prevail. In a series of corporate *contribution* investigations, the Department was able to negotiate pleas of nolo contendere. However juries acquitted the two corporations tried in court. The Department declined to bring prosecutions for the next six years.

1955-57: The Eisenhower Justice Department prosecuted the UAW for making illegal expenditures. The Supreme Court held that the union's conduct fell within Taft-Hartley's expenditure ban. The subsequent UAW trial ended in acquittal.

1963-66: Lewis Foods was prosecuted for using corporate funds to run a newspaper advertisement in favor of candidates who support "constitutional principles." After the first jury deadlocked, the judge in the second trial dismissed the indictment because the advertisement did not contain "active electioneering." The Ninth Circuit reversed, and on remand the company pled nolo contendere and paid a $100 fine.

1971: The Federal Election Campaign Act reconfigured federal campaign finance laws, tightened reporting requirements, provided rules for labor and corporate PACs, but keeps prosecutorial authority with the Department of Justice.

1974: Major amendments to FECA in the wake of Watergate do not alter the corporate and labor bans, but do provide for civil enforcement of the law under the newly created FEC.

1976: The Supreme Court in *Buckley v. Valeo* interpreted the term "expenditure" to include only communications expressly advocating the election or defeat of a clearly identified candidate for federal office.

1978: The Court in *First Nat'l Bank of Boston v. Bellotti* held unconstitutional under the First Amendment a state law prohibiting corporate expenditures in ballot measure campaigns.

1985: In *FEC v. NCPAC*, the Court held unconstitutional a law limiting to $1,000 independent expenditures by PACs in presidential elections.

1986: The Court in *Massachusetts Citizens for Life* held unconstitutional the corporate expenditure ban as applied to a nonprofit pro-life group, and reiterated its *Buckley* holding that "expenditures" included only communications containing express advocacy.

1990: The Court in *Austin v. Michigan Chamber of Commerce* held constitutional a state corporate expenditure ban applied to a business association.

2002: Congress enacted the Bipartisan Campaign Reform Act. To address the growing practice of using corporate and labor funds in "issue advertising" this law extended the expenditure ban to targeted "electioneering communications" that mentioned a candidate with 30 days of a primary or 60 days of a general election.

2003: The Court in *McConnell v. FEC* upheld the electioneering communications restrictions against a facial challenge to its constitutionality.

2007: In *Wisconsin Right to Life v. FEC*, the Court held the electioneering restrictions unconstitutional as applied to advertising that did not contain the "functional equivalent" of express advocacy.

2010: In *Citizens United v. FEC*, the Court held unconstitutional the ban on independent expenditures by corporations.

Professor Allison Hayward

Prof. Hayward is Assistant Professor of Law at George Mason University School of Law. She has taught constitutional law, election law, ethics, and civil procedure. She writes widely on election law topics and has been published in a variety of law journals and magazines, including the *Harvard Journal of Legislation*, *Case Western Reserve Law Review*, *National Review*, the *Weekly Standard*, *Reason*, the *Journal of Law and Politics*, *Political Science Quarterly*, *The Green Bag*, and the *Election Law Journal*.

Prof. Hayward graduated from Stanford University with degrees in political science and economics, and received her law degree from the University of California, Davis. She clerked for Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. She was an associate at Wiley, Rein & Fielding in Washington DC and Of Counsel at Bell, McAndrews & Hiltachk in Sacramento, California. More recently, she was Counsel to Commissioner Bradley A. Smith of the Federal Election Commission.

Before attending law school, Prof. Hayward served as staff in the California legislature and managed a state assembly campaign. She is a native Nevadan and was born and raised in Las Vegas. She now lives in McLean, Virginia with her husband and two children.

Prof. Hayward is a Board member of the Center for Competitive Politics and Chairman of the Federalist Society's Free Speech and Election Law Practice Group. She also serves on the Board of the Office of Congressional Ethics. She is an active member of the California and Washington DC bars.

Appendix D

Synopsis of written testimony of Professor Edward B. Foley for Feb. 2, 2010 hearing

Citizens United was about a statute that prohibited any campaign spending by any corporation. *Citizens United* tells us very little about a statute that is narrowly tailored to particular categories of corporations or a statute that involves a ceiling on the amount of spending rather than an absolute ban. The concept of narrow tailoring is deeply imbedded in First Amendment law, and *Citizens United* does not change that. In fact, *Citizens United* explicitly recognized narrow tailoring as the controlling standard and rejected the absolute statutory ban because it was not narrowly tailored. On page 45, the Court says that the statute is invalid because it is an "asymmetrical" response to the problem of corruption. "Asymmetrical"—the opposite of narrow tailoring. So, after *Citizens United*, the question is what new statutes would qualify as narrowly tailored.

The oral argument in *Citizens United* confirms this reading of the Court's opinion. In other areas of constitutional law, oral argument shows that a new precedent is unlikely to be as broad in application as might first appear. *Lopez*, concerning Congress's Commerce Clause power, is an example. *Citizens United* potentially fits this pattern.

Citizens United needs to be read in relationship to other cases concerning the distinction between public-sector and private-sector corporations as well as, potentially, an intermediate category of corporations that are public-private hybrids. *Citizens United* itself recognized that entities engaged in "government functions" do not have the First Amendment rights of purely private-sector speakers, which was *Citizens United*'s focus. Accordingly, *Citizens United* should not be seen as applicable to public-sector corporations or even those that may fall into a middle public-private hybrid category.

Lebron v. National Railroad Passenger Corporation, 513 U.S. 344 (1995), illustrates this point. *Lebron* ruled that Amtrak counts as the Government itself under the First Amendment, even though the statute said that Amtrak is a for-profit corporation that is *not* part of the U.S. government. *Lebron* adopted a functional, rather than formalistic, approach to classifying for-profit corporations as either public-sector or private-sector (or perhaps a hybrid somewhere in between). Amtrak does not have the private-sector First Amendment right that *Citizens United* vindicated to use its money for express advocacy. The question is what other for-profit corporations are like Amtrak—or, more importantly, using the functional approach of *Lebron*, what corporations are sufficiently engaged in government functions that Congress is entitled to say that they should be ineligible for the private-sector First Amendment right to engage in express campaign advocacy.

Reading *Citizens United* with *Lebron* and constitutional precedents in general, it should be clear that Congress has considerable latitude to regulate the campaign spending of corporations having a public-sector character. Possible examples include the financial sector, public utilities, government contractors, and corporations deemed "too big to fail." Congress has even greater latitude if it uses ceilings on large-scale expenditures, rather than absolute bans. Finally, *Citizens United*'s concern to protect the private-sector under the *Federalist Papers* principles is inapplicable to foreign corporations.

Testimony of
Professor Edward B. Foley
Director, *Election Law @ Moritz*, &
Robert M. Duncan/Jones Day Designated Professor in Law
The Ohio State University, Moritz College of Law

Before the United States Senate Committee on Rules and Administration
February 2, 2010

Chairman Schumer, Senator Bennett, and Members of the Committee:

Thank you for giving me the honor to appear before you today. My testimony is based on almost two decades of teaching and research in the fields of election law and constitutional law, as well as my service as Ohio's solicitor general and as a judicial law clerk here in Washington, both at the U.S. Court of Appeals for the D.C. Circuit and at the U.S. Supreme Court.

I wish to speak generally, first, about what the Supreme Court did—and did not do—in the new decision, *Citizens United v. Federal Election Commission.* Then, I would like to apply that general understanding to some particular examples of where, in my judgment, Congress retains regularity authority consistent with *Citizens United* and other decisions of the Supreme Court interpreting the First Amendment.

General principles

To understand what *Citizens United* decided, one must focus on the statute that this decision invalidated.[1] It was a *complete* ban on the use of *any* "general-treasury" funds by *any* corporation (or labor union). It was not a ceiling on the amount of expenditures. The ceiling was zero. It applied to all corporations, large or small, profit or non-profit. Indeed, it was the sweeping, all-encompassing nature of the ban that caused the Supreme Court to treat the case as a "facial challenge" to the statute as a whole, rather than focusing solely on the particular corporation in front of it (the Citizens United advocacy organization) or the particular speech that this corporation engaged in (the "Hillary" movie).[2]

Thus, the holding of the Supreme Court in *Citizens United*—to rule this statute facially invalid—was not about Goldman Sachs, or General Motors, or about any other particular corporation. It was about a statute with the particular characteristics of the one before it: namely, a statute that applied to *all* corporations and denied *all* corporations the right to independently spend *any* of their own money on electoral advocacy. Thus, in the aftermath of *Citizen United*, the question remains open: what statutes that do not have the

[1] 2 U.S.C. § 441b.
[2] See Majority Opinion, slip. op. at 16-20; see also *id.* at 47 (refusing to carve out exception because of facial invalidity based on excessive overbreadth).

all-encompassing character of the one in *Citizens United* itself are permissible under the First Amendment?

To be sure, not every statute that is less than a 100% ban on all corporations will automatically be okay, just because it is a different statute than the one in *Citizens United*. But, conversely, it is also true that not every statute after *Citizens United* will be invalid just because it regulates corporate spending on electoral activity. Any statute that is not the kind of absolute ban that was at issue in *Citizens United* must now be analyzed under First Amendment jurisprudence generally, including the addition of *Citizens United* to that jurisprudence. All such statutes are on the table for consideration, so to speak. Some might be more problematic than others; but it is equally true that others, if carefully crafted, will be well within the parameters of First Amendment law, including *Citizens United*.

Narrow tailoring

One of the deeply imbedded features of First Amendment jurisprudence is the idea of "narrow tailoring" as an essential prong of "strict scrutiny" analysis. What narrow tailoring means is that Congress, when regulating political speech, cannot burden speech unnecessarily or excessively even if Congress is pursuing the kind of compelling goals that would justify less intrusive regulations of political speech. The Supreme Court has repeated used its narrow tailoring inquiry in deciding whether to uphold or invalidate legislation on First Amendment grounds, including in previous campaign finance cases. Here are some examples:

Randall v. Sorrell, 548 U.S. 230, 261 (2006) (Vermont's draconian contribution limit not narrowly tailored)

Nixon v. Shrink Missouri Government PAC, 528 U.S. 327 (2000) (Missouri's more generous contribution limits valid as sufficiently tailored)

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (ban on campaign speech by judicial candidates not narrowly tailored)

Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) (regulations on collecting signatures for ballot measures invalid as not narrowly tailored)

Burson v. Freeman, 504 U.S. 191 (1992) (plurality) (prohibition of campaigning within 100 feet of a polling place is valid as narrowly tailored)

Frisby v. Schultz, 487 U.S. 484 (1988) (ban on picketing outside individual home is valid as narrowly tailored)

Boos v. Barry, 485 U.S. 312 (1988) (ban on picketing with 500 feet of embassy is invalid as not narrowly tailored)

Citizen United did not repudiate this narrow tailoring inquiry. On the contrary, on page 23 of its majority opinion in *Citizens United*, the Court explicitly stated that the Court employed that well-settled approach precisely because it was so well-settled, even if one of the individual Justices in the majority might have preferred to create a new First Amendment inquiry.

Thus, the holding of *Citizens United* was simply that the absolute, across-the-board ban on any independent spending by any corporation was not narrowly tailored to the goal of avoiding corruption. Yes, *Citizens United* also tells us that the anti-distortion goal articulated in *Austin* is not a constitutionally accepted goal, and therefore the narrow tailoring inquiry no longer can apply to it. And, yes, *Citizens United* appears to have modified the understanding of the anti-corruption goal that is capable of sustaining campaign finance regulation under the First Amendment. But *Citizens United*, like *Buckley v. Valeo* and all of the Court's campaign finance jurisprudence, accepts the legislative goal of avoiding corruption (appropriately understood) as a compelling one to which the narrow tailoring inquiry applies.

That the Court analyzed *Citizens United* in narrow tailoring terms is evident from the key, controlling passage of its opinion, on page 45. There, the Court was doing its essential work of evaluating the statute in relation to the anti-corruption justification. *The Court explicitly acknowledged the permissibility of Congress to legislate against corruption caused by independent corporate (or labor union) expenditures, as long as Congress does so in appropriately tailored ways*:

> If elected officials succumb to improper influences from independent expenditures . . . then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences.

This passage is important; it confirms that Congress can legislate to avoid the appearance, as well as the reality, of improper influence. Those who have read *Citizens United* to say that Congress may no longer legislate to avoid the appearance of corruption are incorrect. But, as the Court continues, the particular means that Congress chooses to combat this evil must "comply with the First Amendment" and—here's the beginning of the key point—"An outright ban on corporate political speech during the critical preelection period is not a permissible remedy." "An outright ban" is too much. It is not narrowly tailored. But something less than an "outright ban" might be. The next and last sentence of this passage is the most important one, and it confirms that the Court is thinking in terms of narrow tailoring: "Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption."

"Asymmetrical." That's a word to describe the opposite of narrow tailoring. Thus, after *Citizens United*, we know what kind of statute that is legislative overkill in attempting to address the problem of corruption from independent corporate spending.

The question that remains, however, is what other sorts of statutes are *not* asymmetrical, but on the contrary are narrowly and appropriately tailored to the problem at hand.

As a general proposition, statutes that contain ceilings, rather than complete bans, and statutes that are carefully focused on particular categories of corporations that present particular risks of corruptions—these are the kinds of statutes that are more likely to be found to be narrowly tailored: symmetrical responses to the evil that Congress is entitled to address.

The Importance of Oral Argument to Understanding Supreme Court Opinions

A review of the oral argument transcript in *Citizens United* confirms that this case is about a lack of narrowly tailoring. I teach my Constitutional Law students what experienced Supreme Court litigators know well: one understands a Supreme Court opinion best by considering it in relationship to the questions that the Justices asked at oral argument. This is true, for example, of the well-known *Lopez* case involving the scope of congressional power under the Commerce Clause, the one involving a congressional ban on the possession of a gun within 1000 feet of a school.[3] At the oral argument there, Justice O'Connor repeatedly asked the Solicitor General whether the Government's theory of the case meant that "there's no limitation on your rationale, or on Congress's rationale, that would preclude it from reaching any traditional criminal activity."[4] After attempting to evade the question, the Solicitor General conceded that Justice O'Connor was "correct" that the Government's position was boundless. That concession was fatal. The main point that the Court wished to make in its *Lopez* opinion was that it was "unwilling" to collapse the basic distinction of "what is truly national and what is truly local." [5]

Understanding the relationship of the oral argument and opinion in *Lopez* is what explains why the subsequent case *Raich*,[6] involving a congressional ban on the possession of home-grown marijuana even for medical use, did not employ all aspects of the reasoning of the *Lopez* opinion and, instead, limited the reach of *Lopez*. Ruling for the Government in *Raich*, in contrast to *Lopez*, did not require giving Congress unlimited general police powers; instead, the basic principle of federalism could be preserved. The animating concern, as evidenced in the *Lopez* oral argument, was absent, and thus *Raich* confines the doctrine of *Lopez* to fit its original animating concern.

The same kind of lesson can be learned from the oral argument in *Citizens United* and is likely to play out in subsequent cases that determine how far (or not so far) the precedent of *Citizens United* reaches. Former Solicitor General Seth Waxman, representing Senators McCain and Feingold as chief sponsors of the Bipartisan Campaign Reform Act, was attempting to defend the absolute ban on corporate spending. "The idea" underlying the ban, Waxman argued, was "to prevent great companies, the great

[3] *United States v. Lopez*, 514 U.S 549 (1995).
[4] *Lopez*, Oral Argument Transcript (available on Westlaw), at *13.
[5] 514 U.S at 567-568.
[6] *Gonzales v. Raich*, 545 U.S. 1 (2005).

aggregations of wealth from using corporate funds directly or indirectly to send members of the legislature to these halls in order to vote for the protection and advancement of their interests against those of the public."[7] Justice Scalia then interjected:

> "Great aggregations of wealth. . . . [T]he amicus brief by the Chamber of Commerce points out that 96 percent of its members employ less than 100 people. These are not great aggregations of wealth. You are not talking about the railroad barons and rapacious trusts of the Elihu Root era; you are talking mainly about small business corporations.

Waxman tried again, arguing that "Congress was entitled to make the judgment that it would [adopt the absolute ban] in order to address this root evil, a problem of such concern that it goes to the very foundation of democratic republican exercise, that is, the notion of integrity in representative government."

But Justice Scalia persisted on the narrow tailoring point:

> I don't understand that answer. I mean, if that's what you were concerned about, what Elihu Root was concerned about, you could have said all corporations that have a net worth of more than, you know, so much or whatever. That is not what Congress did. It said all corporations.

Justice Scalia, in effect, was telling Waxman (and, by implication, Congress), *Come back to us with a narrower statute, more carefully and appropriately tailored to this concern, and we'll take another look at it. We'll have to take another look at it, because it will be a very different case under long-accepted First Amendment jurisprudence.* What Justice Scalia was telling Waxman at oral argument is what the Court put in the core of its opinion when it wrote that the absolute ban was an "asymmetrical" response. The Court's opinion, like Justice Scalia's colloquy with Waxman, invites Congress to return to the Court with a narrower, carefully crafted statute to see if this new one, by contrast, is a symmetrical response. Thus, the oral argument in *Citizens United* confirms that the true meaning of that opinion will be determined in subsequent cases applying it and deciding what is (and what is not) narrowly tailored, just as the true meaning of *Lopez* was determined in *Raich*.[8]

Citizens United, like *Lopez*, marks a constitutional principle that the Court believes is imperative to protect. The *Citizens United* principle is that corporations, including for-profit corporations, have First Amendment rights and that they cannot categorically be deprived of all opportunity to use their own funds to engage in political speech, including campaign advocacy—they cannot categorically be deprived of this

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[7] *Citzens United*, Oral Argument Transcript at 71 (available at U.S. Supreme Court's website).

[8] The colloquy between Justice Scalia and Seth Waxman at oral argument was also echoed elsewhere in the Court's *Citizens United* opinion. On page 38, the Court cites the same figure from the U.S. Chamber of Commerce's amicus brief and then, as Justice Scalia observed, adds: "This fact belies the Government's argument that the statute is justified on the ground that it prevents the distorting effects of immense aggregations of wealth. It is not even aimed at amassed wealth." (Internal quotation marks omitted.)

First Amendment right just because they are corporations.[9] That's the principle. And the Court will continue to insist on protecting it, just like the Court will be vigilant in protecting the *Lopez* principle that bars converting Congress into a legislature of unlimited general police powers. But just as the *Lopez* principle remains valid even if Congress retains extensive regulatory powers, so too the *Citizens United* principle will remain valid even if some corporations can be subject to some limits on the amount of their spending for campaign advocacy.

This point about the dynamic relationship of the Court's constitutional precedents, and about how an examination of oral argument transcripts helps us understand that dynamic relationship, has many applications. (I want to make sure that no one misunderstands this point by thinking that it establishes more than it does. It does not tell us exactly how *Citizens United* will apply in the future, just as no one knew exactly what shape *Lopez* would take in subsequent cases when *Lopez* was first released. What looking at the oral argument transcript does remind us, however, is how uncertain and fluid the development of constitutional law is when a new line of precedent opens up. We will not know for sure what the scope of *Citizens United* is, other than its invalidation of an absolute ban on any spending by corporations, until the Supreme Court begins to consider the relationship of this new precedent to new statutes, and the oral argument at least hints that Congress may have considerably more regulatory latitude than might first appear from considering only certain aspects of the rhetoric in the Court's opinion.)

One additional example may be instructive as Congress considers *Citizens United* and its relationship to the deep structure of narrow tailoring in First Amendment jurisprudence. With respect to the scope of congressional power under section five of the Fourteenth Amendment, the Supreme Court has adopted what is known as the "congruence and proportionality" test. It functions very much like narrow tailoring in First Amendment law. In a series of cases starting with *Boerne*,[10] which announced this test, the Court invalidated several Acts of Congress as failing the tailoring required by the congruence and proportionality test. But then in *Hibbs*,[11] the Court upheld the Family Medical Leave Act as being appropriately congruent and proportional. Without going into all the fact-specific details here, *Hibbs* is very instructive for how Congress might satisfy narrow tailoring under the First Amendment after *Citizens United*.

The Public-Private Distinction

There is one more fundamental point that must be considered before examining specific categories of corporations in the aftermath of *Citizens United*. This additional point concerns what is known in constitutional law as the "public-private" distinction. It is a concept that relates to the state action doctrine, the protection of private property under the Takings or Just Compensation Clause of the Fifth Amendment, the "public forum" doctrine of the First Amendment, and other areas of constitutional law. This concept is relevant to *Citizens United*—as well as to the inevitable limits on *Citizens*

[9] For repeated statements of this principle throughout the *Citizens United* opinion, see pages 26, 33, 40.
[10] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[11] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

United that will be recognized in subsequent cases—because the idea of the corporation that the Court had in mind when it was considering the excessive overbreadth of the statute's categorical ban was the idea of a purely private-sector corporation (one that is a private entity that bears rights against the government, just like private citizens).

Not all corporations, however, fit that image. Some are *public*-sector entities against which *private*-sector citizens and associations bear rights, including First Amendment rights. *Citizens United*, as a holding about the protection of private-sector First Amendment rights, will be inapplicable to these public-sector corporations.

Citizens United made very clear that it had private-sector corporations in mind when it invalidated the absolute categorical ban on campaign spending. On page 20, it gives three examples of the constitutional violations the opinion seeks to safeguard against. First is a campaign ad by the Sierra Club. Next is a book by the NRA. Third is an ACLU website. These are all quintessential private-sector voluntary associations.

More than just these examples, however, the Court repeatedly says that the First Amendment does not permit the censorship of citizens who have chosen to associate voluntarily among themselves in the form of a corporation. For example, on page 38, in explaining why *Citizens United* overrules the earlier *Austin* precedent, the Court says that *Austin* "permits the Government to ban the political speech of millions of associations of citizens." It is the freedom of the private realm that the Court wishes to protect.

Confirmation of this point comes in the Court's invocation of the idea of "faction" found in the *Federalist Papers, No. 10*.[12] A "faction" is a private-sector group of citizens in the political philosophy of James Madison, the author of this *Federalist Paper* and a principal author of our Constitution and its First Amendment. The Madisonian idea, which *Citizens United* embraces, is that "[f]actions necessarily will form in our Republic," but that the government should not interfere with their private freedom.

Some corporations, however, are not voluntary associations of private citizens who have chosen the corporate form for their shared private-sector goals. On the contrary, some corporations are creatures of the government itself and operate as public-sector instrumentalities of the government. They are not at all what *Citizens United* was talking about. We know this from past decisions of the Supreme Court as well as from *Citizens United* itself.

The prior Supreme Court precedent that best illustrates this point is a 1995 case involving Amtrak, *Lebron v. National Railroad Passenger Corporation*.[13] It was an 8-1 decision, with Justice Scalia writing the opinion of the Court for all eight Justices in the majority. It is essential to read this decision to understand the inherent and inevitable limits of *Citizens United*.

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[12] See majority opinion at 39.
[13] 513 U.S. 374.

The issue in *Lebron* was whether Amtrak was an arm of the federal government for purposes of the First Amendment, even though Congress by statute explicitly had stated that Amtrak was *not* "an agency or establishment of the United States."[14] The Court ruled that Amtrak *is* part of the Government for First Amendment analysis, and the statutory language to the contrary cannot control this point of constitutional law. Thus, *Lebron* adopts a functional, not formalistic, inquiry to determine what corporations—despite being nominally private-sector or non-governmental institutions—are in fact public-sector or governmental entities under the First Amendment.

The reason why this point is important for *Citizens United* is that the Government itself does not have the First Amendment rights of private-sector entities. On the contrary, as *Lebron* conforms, the Government (including all public-sector entities that function as its instrumentalities) is what private-sector entities are protected against by the First Amendment. Specifically, among other things, the Government itself is not permitted to spend its Treasury funds to engage in express advocacy for or against particular congressional candidates. The First Amendment requires that the Government itself not take sides (through the use of its money and otherwise) in the electoral competition between candidates for seats in Congress. But even if the First Amendment did not require this, Congress would be entitled by statute to make sure that the Government's own money was not used in this way. The U.S. Department of Transportation cannot spend money on campaign ads saying "Defeat Smith for Congress because he opposes DoT's railroad safety standards." Neither can Amtrak, even though it is nominally a for-profit corporation, because it counts as part of the Government—equivalent to the Department of Transportation—for purposes of this First Amendment analysis.

Lebron is instructive because, in addition to discussing Amtrak itself, it discusses the "long history of corporations created and participated in by the United States for the achievement of governmental objective."[15] Thus, far from being private-sector association of individual citizens with rights against the government, all these historical examples should or may be considered part of the government itself. From the first Bank of the United States, in which the government retained a 20% share of stock—through the FDIC, the TVA, and other governmental corporations designed to counteract the effects of the Great Depression and manage production for World War II, which led to the Government Corporation Control Act of 1945— down to the present time, Congress has used a myriad of specific corporate forms to create public-sector entities designed to serve public-sector purposes. Under *Lebron*, all of these corporations must be examined functionally to see if the First Amendment *requires* that they be treated as part of the Government rather than private-sector entities.

But *Lebron* signals that there is likely to develop an intermediate category of corporations that Congress *may* consider as part of the Government, or a public-sector entity, even if Congress is not compelled to do so. In other words, there is a middle category of corporation that is sufficiently intertwined with the Government that it cannot

[14] 513 U.S. at 391, quoting 84 Stat. 1330 (see also 45 U.S.C. § 541).
[15] 513 U.S. at 86.

be considered the archetypical private-sector entity, even if it is not so extensively intertwined with the Government that it *must* be considered an instrument of the Government itself. *Lebron* itself suggested an example: Comsat. Even if Comsat is not exactly like Amtrak, it is a enough of public-sector entity that Congress is entitled to treat as sufficiently governmental in function that its funds should not be used to advocate the election or defeat of particular congressional candidates.[16]

Citizens United signaled its recognition of the principles articulated in *Lebron*. On pages 24-25 of *Citizens United*, the Court observed that some entities lack the free speech rights of ordinary citizens and private-sector associations because of the role these entities play in serving "government functions." It gave the example of speech within public schools, prisons, or the military. But, in light of *Lebron*, it could just as easily have given the example in terms of corporations connected with these government functions: for example, a school incorporated by the government to teach foreign languages to members of the diplomatic corps; or a for-profit corporation permitted to run federal penitentiaries; or a corporation set up by the Defense Department or CIA to conduct covert operations. None of these corporations have the kind of First Amendment rights recognized for purely private-sector corporations in *Citizens United*.

Thus, with these general principles in mind, one can begin the task of discerning what specific categories of corporations Congress might address to determine, in the aftermath of *Citizens United*, the extent to which they should be permitted to spend their general-treasury funds on campaign advocacy.

Specific Categories of Public-Sector Corporations & Narrow Tailoring after *Citizens United*

The financial sector

This much should be clear from *Lebron* and its historical discussion of the first and second national bank, as well as the FDIC and related developments in response to the Great Depression: Congress probably will face little resistance from the Supreme Court if Congress determines that a carefully cabined category of financial firms should be deemed ineligible for the private-sector rights identified in *Citizens United*—namely, those major financial firms that are essential to the overall structure and stability of the nation's financial system and thus have a special, almost quasi-governmental relationship with the Federal Reserve. Banking experts can assist Congress in determining exactly how to tailor this special category.

[16] *Lebron* did not have this middle category of hybrid public-private corporation directly before it in that case and thus cannot be considered a holding of the Court with respect to this category. Nonetheless, the functional reasoning of the Court's opinion in *Lebron*, which recognized that corporations fall along a spectrum from most public to most private, indicates that the Court is likely to develop this middle category of hybrid public-private corporations in future cases.

Some small-scale financial firms, if their bankruptcy would not threaten the health of the entire financial system, might still be deemed purely private-sector associations of individual citizens—although the savings-and-loan crisis of a previous decade would caution Congress against thinking that only major national banks could put the overall financial system at risk. In any event, it would seem straightforward that the banks that make up the Federal Reserve System, even if they are technically non-governmental corporations like Amtrak or even Comsat, can be regulated by Congress in a way that they are prohibited from spending their financial assets on advocacy the election or defeat of congressional candidates. Just as the Secretary of the Treasury may not direct U.S. Treasury funds for this purpose, nor may the Chairman of the Federal Reserve. More to the point, nor presumably may member banks within the Federal Reserve System (for example, the Federal Reserve Bank of Kansas City). Indeed, after *Citizens United*, Congress remains entitled to draft an appropriately tailored statute to identify those financial firms—by size and activities—that are sufficiently intertwined with the Federal Reserve System that they should be considered public-sector, not private-sector, entities for purposes of *Citizens United*.[17]

That Congress may choose to permit some of these public-sector firms to operate as for-profit corporations, harnessing the economic advantages of the capitalist profit motive, does not change this First Amendment analysis. As Justice Scalia said for the Court in *Lebron*, Congress expressly set up Amtrak as a "for profit corporation" and hoped that it would be able to make a profit.[18] That fact did not change the Court's conclusion that Amtrak does not have the First Amendment rights of private-sector entities, but rather is a governmental entity that must respect the First Amendment rights of the true private sector. Likewise, with financial firms. Congress can properly charter (or license) them as profit-making corporations but decide that, when it comes to using their ability to leverage their access to Federal Reserve funds in their profit-making endeavors, they are public-sector entities that should not spend their funds to advocate the election or defeat of federal candidates.

A nuanced, narrowly tailored regime with respect to the entire financial services sector may take something of a sliding scale approach. There may be some banking corporations that are so close to the Federal Reserve itself, or the Treasury Department, that they should be permitted to spend zero dollars on advocating the election or defeat of federal candidates—just like the dollar limit for the Treasury Department on this kind of

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[17] A hypothetical example illustrates this point. Consider a 30-second TV ads that says: "Re-elect Senator [John Doe Incumbent] to the U.S. Senate. He's helped save the national economy from brink of financial meltdown. This ad is paid for by the U.S. Department of the Treasury [or the Federal Reserve Bank of New York]." Once the proposition is acknowledged that the Government may not use its own money to advocate the election of congressional candidates from one party or another—this proposition must be acknowledged *or at the very least Congress is entitled to determine that the Government may not use its funds in this way*—then it is simply a matter of a line-drawing exercise as to what entities Congress legitimately may determine fall within the scope of this basic proposition. The fact that major banks needed to receive TARP funds would seem factually to demonstrate the kind of interrelationship with the Federal Reserve System that would entitle Congress to make appropriate line-drawing judgments of this sort.

[18] See 513 U.S. at 384-385.

activity is zero. But there may be other financial firms, further removed from the center of the banking system, for which a zero limit would not be narrow tailoring. These firms may have something of a public-private hybrid character, for which some sort of dollar ceiling on their campaign advocacy would be appropriate tailoring. As long as Congress undertakes the calibration of the ceiling in a measured way—raising it as the corporation's connection to (and dependency upon) the government becomes more attenuated, and conversely lowering it as the corporation takes on an increasingly public-sector character—then Congress's legislation in this regard should pass narrow tailoring scrutiny under the First Amendment.

Natural monopolies and public utilities

Another category of corporations that has long been recognized as having an especially public-sector character, because they perform public functions that the government itself would need to undertake if the government did not permit profit-making firms to do so, are gas and electric utilities and other so-called natural monopolies. Amtrak itself arguably fell into this category. But it does not matter whether Congress itself charters the corporation that undertakes this public function. It is the nature of the enterprise and the fact that the government has let the for-profit firm does the work, subject to especially close government supervision.

Consider the operation of nuclear power plants. Given the sensitivity of the technology, both for national security and public safety, Congress could choose to have the Government itself operate the nation's nuclear facilities. Or Congress can choose to let for-profit firms become licensed to do so, subject to strict government oversight on how the for-profit firms handle this public function. If Congress chooses this later course, it does not mean that operators of nuclear power plants automatically have a First Amendment right under *Citizens United* to advocate for the election or defeat of federal candidates. On the contrary, precisely because these corporations are performing a public function under the government's supervision, Congress can say that they should be considered more like Amtrak, or alternatively Comsat, for First Amendment purposes. In other words, it would be the carefully considered judgment of Congress that these operators of nuclear power plants cannot use the money they earn from doing the government's business, at the government's behest, to pay for campaign ads to elect or defeat candidates for Congress. (Why? Because, again, it is too much like the Government itself using U.S. Treasury funds to advocate for or against particular congressional candidates.[19])

[19] To be clear, just because a corporation is not in the purely private-sector category governed by *Citizens United*, it does not follow that a corporation must be put into the fully public-sector category of *Lebron* itself, like Amtrak. Instead, if the Court remains faithful to the functional approach it employed in *Lebron*, it is likely to determine that there is a middle category of corporations that have enough of a quasi-governmental character (performing a "government function" in the words of *Citizens United*) that they are neither the Government itself (like Amtrak) nor a purely private-sector bearer of First Amendment rights (like the NRA or many for-profit corporations, including those that operate local restaurants, or dry cleaning stores, and the like). Operators of nuclear power plants at the behest of the Government would seem a good example of falling into this middle category. The consequence of doing so is that Congress should be able to say, notwithstanding *Citizens United*, that—unlike a corporate owner of a small

The health-care sector

Without getting into the debate over what sort of health-care reform Congress should adopt, the recent public discussion concerning the role of the health insurance industry in the nation's economy, as well as the nature of that industry in terms of its public-sector character, indicates that Congress appropriately should be able to consider at least certain portions of the health insurance industry as being beyond the scope of the private-sector right identified in *Citizens United*. Medicare itself, of course, has no First Amendment rights under *Citizens United*, and that is true whether Medicare is administered directly by the Department of Health and Human Services or by a corporation authorized by Congress to do so. (By analogy, the Pension Benefit Guarantee Corporation has no private-sector *Citizens United* rights.)

Thus, Congress need not create a "single-payer plan," or even a so-called "public option," to legislate that for-profit firms that operate in lieu of publicly provided health insurance are exercising a government function (comparable to nuclear power plants or Federal Reserve member banks) and thus are public-sector, rather than private-sector, entities that lack the right to spend their funds for express campaign advocacy. Indeed, one of the health-policy arguments that is frequently made against the so-called public option is that, rather than having the government get into the health insurance business directly, it would be preferable for Congress to regulate for-profit health insurance firms with the same extensive degree of government oversight that public utilities receive. (Apparently, some European countries extensively regulate their health insurance companies on a public utility model, and that European example has been invoked here in our health care debate as an alternative to government-run health insurance.)

The recognition that health insurance has the character of a public utility, however, means that Congress should be able to say that the for-profit firms permitted to exercise this governmental function are not permitted to spend the funds they earn from performing this government function on express candidate advocacy. Simply put, these public utility firms are not equivalent to private-sector corporations that operate restaurants, or clothing stores, or the myriad of other private-sector activities to which the *Citizens United* right applies.[20]

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restaurant, but more like a major financial firm that received TARP funds—these nuclear power plant operators may not use their earnings from performing this "governmental function" to run campaign ads that expressly advocate for or against congressional candidates.

[20] In drawing this analogy between health insurance firms and operators of nuclear power plants, I do not mean to suggest that they occupy the exact same spot on the spectrum between public-sector and private-sector corporations. Rather, from the perspective of a Supreme Court litigator tasked with defending the constitutionality of statutes that Congress, or state legislatures, may adopt in the wake of *Citizens United*, there will be easier and harder cases along this spectrum. Without examining all the relevant facts about the different industries—and thus in the absence of a record that Congress and the Department of Justice would develop to prepare for an actual court challenge—the nuclear reactor example would seem an easier case than the health insurance example (in part because nuclear reactors are already recognized as public utilities in a way that health insurance firms currently are not). But the key point is that neither of these hypothetical examples has been decided, or foreclosed, by *Citizens United*, and there are cogent arguments that could be made in defense of a carefully tailored statute directed towards either of these industries, and

Government contractors

Arguably, government contractors necessarily perform a "government function" at least with respect to that portion of their business in which they do work under the government contract. But an assertion that broad might be inconsistent with the functional analysis in *Lebron*. A government contract to sell food in a goverment office building is not an inherently public function in the same way as operating or regulating a public utility is (particularly, if the workers in the office building can walk outside and find a multitude of alternative private-sector food vendors from which to choose).

Therefore, for purposes of narrow tailoring, it would be appropriate to divide the entire category of government contractors into various sub-categories. Some, like defense contractors for which a large part of their revenue flows from manufacturing military items necessary for the national defense, are performing an inherently public function. The government would have to do this (as it did during the Manhattan Project) if it did not decide to contract with for-profit firms (in the expectation that they will harness the entrepreneurial spirit of capitalism to perform the government's work more efficiently). Congress can treat these large-scale public-sector defense contractors—part of what President Eisenhower famously called the "military-industrial complex"—as off-limits for the purely private-sector right recognized in *Citizens United*.

Other government contractors likely have a more hybrid public-private character, and narrow tailoring calls for appropriate sensitivity to these differences. Here, again, Congress would do well to consider dollar ceilings and not just complete bans, perhaps as part of a sliding-scale approach, which would look to how much of a corporation's business was tied up in government contractors as well as exactly what sort of services the corporation performed for the government. But as long as Congress does legislate with appropriate sensitivity, there should be little doubt that Congress can regulate the campaign spending of government contractors, just like it can do so with respect to government employees. In this respect, the analysis of Professors Bruce Ackerman and Ian Ayres in the recent op-ed column in the *Washington Post* is correct (and indeed unremarkable, since *Citizens United* itself recognizes as much).[21]

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the strength of the defense would depend on the evidentiary record Congress and the Department of Justice would assemble. Strategically, in its relationship with the Supreme Court, Congress might wish to pursue easier cases before harder ones, so that after *Citizens United* the Court first encounters a statute addressed to corporations much closer to the public-sector end of the public-private spectrum. Moreover, even apart from the kind of argument that I have been sketching out based on the public-private distinction in constitutional jurisprudence, it would also remain open to argue that a statute focused specifically on the health insurance industry is justifiable on the well-recognized anti-corruption ground (as long as it met the test of narrow tailoring in relationship to this goal).

[21] Bruce Ackerman & Ian Ayres, *Despite Court Ruling, Congress Can Still Limit Campaign Finance*, Wash. Post., Jan. 26, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/01/25/AR2010012502970.html.

"Too big to fail"

After *Citizens United*, it would be inappropriate for Congress to completely ban express campaign spending by large corporations just because they are large. That much is clear from the Court's opinion. Instead, Congress should adopt a sector-by-sector, activity-by-activity, approach (as described above). Still, the size of a corporation alone may make a difference for First Amendment analysis if, regardless of the particular business the corporation engages in, Congress deems it too big to fail.

In other words, by the nature of its business, Wal-Mart would not seem to engage in a government function and thus would seem on the private side of the public-private distinction underlying both *Lebron* and *Citizens United* (as well as the Federalist Papers and constitutional jurisprudence generally). But if it turns out that Wal-Mart, like General Motors, is too large for conventional bankruptcy, then one would need to rethink this assumption. Any corporation whose financial health the Government must guarantee, even if that guarantee is waiting in the wings, is inevitably a public-sector entity and not a purely private-sector firm. The Government wouldn't backstop a for-profit firm in this way unless it was doing something essential to the health of the national economy, and if it is so essential, then it is performing a public function that the Government would have to perform in its place. That characteristic would seemingly put it in the category of corporations for which Congress can say its quasi-governmental status means it cannot attempt to influence which candidates win election to Congress.

To prevail under narrow tailoring with this approach, Congress would need to document what it means by "too big to fail"—just how big is too big?—and why the mutual interdependency of the Government and this corporation means that it should not be using its funds to spend on candidate advocacy. If the corporation receives no financial support as long as it remains successful, then arguably it has not yet converted into its quasi-governmental character. But if Congress can demonstrate that a distinct symbiotic relationship exists between the Government and a "too big to fail" corporation even while it remains successful, and this symbiotic relationship would cause campaign spending by this corporation to have the character of campaign spending by the Government itself (or, conversely, that this symbiotic relationship raises unique risks of corruption, which are not present where this mutual interdependency does not exist), then Congress should be able to prevail if it deems the private-sector *Citizens United* right inapplicable in this narrow context.

Corporate size and ceilings on campaign spending

Short of "too big to fail," Congress may not impose an absolute ban on campaign spending by large corporations, just because they are large, for reasons already stated. But what about a dollar ceiling on campaign spending by corporations above a certain size? The answer, under narrow tailoring, would depend upon: (a) the amount of the ceiling and (b) the strength of evidence for its need in order to avoid corruption. The higher the ceiling, the easier to justify.

Under *Citizens United*, it would also be necessary for Congress to justify why it would wish to impose a ceiling only on a certain category of speakers. In other words, for example, if Congress were to attempt to justify a $ 1 million ceiling on independent campaign spending by any single corporation with respect to any single federal election, but would impose this ceiling only on corporations with assets or revenues of a certain amount, the Court would ask: why not impose the same $ 1 million ceiling on all corporations, regardless of size? Those corporations that cannot afford to spend this much, or choose not to, obviously will not do so; but is there a reason to impose the ceiling solely on large corporations? Indeed, the Court would ask, why not impose the same ceiling on individual flesh-and-blood speakers? If a $ 1 million ceiling is necessary, why is it necessary only for corporate (and labor union) campaign spending?

Congress may well be able to answer these sorts of questions, but it needs to tread carefully here. Late in the briefing and argument of *Citizens United*, the Government began to argue for a novel justification for regulating the campaign spending of for-profit corporations that differed from the anti-distortion rationale that had been accepted in *Austin* but is now repudiated. This new rationale was tied specifically to the inherent profit motive of for-profit corporations and how that profit motive relates to what economists call rent-seeking behavior insofar as corporations interact with the government.

This rationale was speculative at best in *Citizens United*, without any sort of evidentiary foundation. Moreover, it is clear after *Citizens United* that this rationale cannot support an absolute ban on campaign spending by for-profit corporations, and thus almost certainly could not support a low-level ceiling. But if there were adequate evidentiary support concerning the distinctively rent-seeking behavior of large for-profit corporations, and it could be shown that a high-level dollar ceiling appropriately addressed this problem while still leaving large corporations with ample opportunity to engage in campaign advocacy, then a carefully justified statute along these lines might meet the test of narrow tailoring.

In any event, the important point so soon after *Citizens United* is simply to say that this new decision did not rule out a high-level ceiling of this type. The Court did not have a high-level ceiling in front of it; and, as Justice Scalia said at oral argument in *Citizens United*, a high-level ceiling on campaign spending by large corporations (and labor unions) would be a different case, to be evaluated on its own merits under narrow tailoring analysis.

Foreign corporations

The Court in *Citizens United* expressly stated that it was not addressing the potential First Amendment issue of express candidate advocacy by foreign corporations.[22] But there should be little doubt that a core element of its reasoning has no applicability to foreign entities. "Factions will necessarily form in our Republic," but

[22] Majority opinion at 46-47.

foreign entities are no part of the republican community of Americans who are entitled to disagree (and debate) among themselves about policies and candidates.

In thinking about the regulation of campaign advocacy by foreign entities, it may be worth distinguishing between foreign governments and foreign individuals. Although Congress is likely entitled to prohibit any advocacy to elect or defeat congressional candidates undertaken by a corporation controlled either by a foreign government or foreign nationals, when it comes to setting specific standards for what constitutes control Congress may have more regulatory latitude with respect to potential control by foreign governments. Thus, again, Congress may wish to adopt a multi-pronged approach to deal with the different facets of the risk of inappropriate foreign influence in congressional and presidential elections. Doing so would be another sign of narrow tailoring.

Thank you very much. I would be happy to answer any questions.

Edward B. Foley, Robert M. Duncan/Jones Day Designated Professor in Law, is the Director of *Election Law @ Moritz*. One of the nation's preeminent experts on election law, Professor Foley teaches and writes in all areas of this field. He is currently at work, with his Moritz colleague Steve Huefner, on book tentatively titled *Disputed Elections in the United States: History, Law, and Policy*. The first historical chapter of this book, focusing on New York's disputed election of 1792, was delivered at Ohio State on October 14, 2008, as the University Distinguished Lecture, and was entitled "The First *Bush v. Gore: Disputed Elections in Historical Perspective*." In recent months, for another chapter of the book, he has closely followed the disputed U.S. Senate election in Minnesota and has appeared widely in media discussion of this dispute. He also designed a simulated dispute of the 2008 presidential election, *McCain v. Obama*, which a distinguished panel of three retired judges decided in an opinion that will aid in resolving future disputes. His prior writings on *Bush v. Gore*, provisional ballots, and related topics, set the foundation for these current and ongoing projects.

Appendix E

BEFORE THE COMMITTEE ON RULES AND ADMINISTRATION
Executive Summary: Testimony of Stephen M. Hoersting
February 2, 2010

Corporations, of course, are not individuals. But they are "persons" under U.S. law and protected by the First Amendment. Protestations to the contrary, including those based upon on a misreading of the *Trustees of Dartmouth College* case of the 1800s, confuse municipal corporations with private ones, and are wrong.

Foreign participation in U.S. elections is already (and absolutely) banned. Legislative efforts to *tighten* the existing ban can only violate the rights of U.S. nationals using money raised within the United States to participate in U.S. elections. Likewise, mere belt-and-suspenders provisions that can achieve nothing of substance are unworthy of the Senate.

All of the proposed "fixes" for the Court's proper recognition that the First Amendment applies to all American associations, whether the "fixes" include so-called shareholder protection measures, corporate speech taxes, or an invocation of the antitrust laws, are unconstitutional violations of speech, association, or equal protection.

While the *Citizens United* opinion only takes us back to the regime of the late 1990s, there is one key difference. In the 1990s, party officials had some input over the decisions of the party committees that received a portion of available funds. Unless Congress recognizes that the remaining McCain-Feingold provisions will drive the parties to irrelevancy, party affiliation will continue to weaken significantly—not because the public disagrees with your message. Rather because current law makes it relatively impossible to affiliate with anything labeled "Democrat" or "Republican", and relatively simple to affiliate with an outside organization.

Left may beat right after this Court opinion, or right may beat left. That remains to be seen. But it is clear that when party loyalists and 2002 McCain-Feingold advocates like Karl Rove and Ed Gillespie are busy founding outside organizations, you may know that the party committees, and the political parties they speak for, are already in trouble.

BEFORE THE UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION

Examining the Supreme Court's Decision to Allow Unlimited Corporate and Union Spending in Elections

Tuesday, February 2, 2010, 10 a.m.
SR-301 Russell Senate Office Building

Testimony of:

Stephen M. Hoersting
Vice President
Center for Competitive Politics
124 South West Street
Suite 201
Alexandria, Virginia 22314
www.campaignfreedom.org

Chairman Schumer, Ranking Member Bennett, and Members of the Committee, thank you for the opportunity to testify today on behalf of the Center for Competitive Politics.

By way of introduction, my name is Stephen M. Hoersting, vice president and co-founder of the Center for Competitive Politics and former general counsel to the National Republican Senatorial Committee.

The *Citizens United* opinion is a landmark in First Amendment jurisprudence. It reestablishes core rights to political speech by reaffirming the principal that any association of individuals may speak independently about candidates without limitation. Nonetheless, there is consternation in certain quarters over the opinion. Some believe that the First Amendment enshrines egalitarianism and empowers the government, one way or another, to silence the large for the supposed benefit of the small. It doesn't. Others believe the opinion will somehow lead to the establishment of a corporate- (or perhaps a union-) controlled state. These concerns miss three fundamental premises of our democracy: First, it is voters that decide who holds power in our constitutional republic, and the Court's opinion only allows voters access to more information. Second, the citizens are capable of sifting through the relative value and veracity of information they receive from multiple sources. And third, that government has no place in determining either who has said enough or when the People have heard enough.

The *Citizens United* opinion protects movie makers from government censors. The basis for that censorship, as the Deputy Solicitor first conceded, extended, in dormancy, to the banning of books. What is remarkable about the *Citizens United* opinion is not that it was decided 5-4, or even that it permits full participation by all associations in America, but rather that not one of the

4 dissenting Justices would concur in the judgment and eschew a regime that would ban documentary films and political books. *This* is what's shocking in the *Citizens United* opinion.

There are mischaracterizations now circulating about the opinion that need correcting.

Corporations are "persons" under our laws and enjoy rights protected by the First Amendment

The first mischaracterization is that corporations are not "persons" under our laws, and therefore not deserving of protection under the First Amendment. Proponents of the mischaracterization assert that this has been the case since the 1800s. Nothing could be further from the truth. Corporations are not lacking in First Amendment rights. All citations to the *Trustees of Dartmouth College* case of 1819 for this proposition are wrong. As detailed by Mark Fitzgibbons in an accompanying article incorporated in this testimony, "*Trustees of Dartmouth College* discusses the clear distinctions between 'private' corporations (established by individuals) and 'public' or 'civic' corporations such as cities, townships, and those established by the government." Justice Stevens' dissenting conclusion in *Citizens United* "that the sovereign may interfere with First Amendment or other rights of privately founded and financed corporations because they are "artificial" creations is not only absent in the *Trustees of Dartmouth College* decision, but it is contradictory to it."

Professor Lawrence Tribe makes similar assertions. They are equally incorrect, for the reasons detailed in another article incorporated as part of this testimony: Bradley A. Smith, "*Citizens United*, Shareholder Rights, and Free Speech: Restoring the Primacy of Politics to the First Amendment."

Foreign participation in U.S. elections is absolutely illegal, not just mostly illegal.

The second mischaracterization is that the *Citizens United* opinion somehow opens the door to foreign participation in U.S. elections. This is wholly in error.

Citizens United struck down a blanket prohibition on corporate expenditures found in 2 U.S.C. §441b. A separate section of the law, 2 U.S.C. §441e, prohibits "foreign nationals" from making expenditures or contributions, which extends to corporations, unions or other associations which are neither incorporated nor headquartered in the United States. Current law provides a complete prohibition on foreign participation in any U.S. election, from dogcatcher to President, and to any activity "in connection with" an election. The *Citizens United* opinion specifically leaves this prohibition in place.

FEC regulations at 11 CFR 110.20 further delineate the prohibition. It is instructive:

> *A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.*

Foreign-owned but U.S. incorporated and headquartered subsidiaries ("domestic subsidiaries") using solely those funds earned inside the United States and controlled solely by U.S. nationals, are eligible to operate PACs. This is because PACs allow U.S. employees and U.S. executives to participate in politics no matter their employer. Indeed, even domestic subsidiaries with a majority of foreign directors are permitted to establish PACs so long as all decisions are delegated to a U.S. national. *See* FEC Advisory Op. 2006-15. But understand: Domestic subsidiaries with a majority of foreign directors will *not* approve corporate political

expenditures going forward, even as they continue to allow their U.S. employees to fund a PAC. This is because doing so would be a crime under existing law.

Any characterization that this decision allows foreign corporations to spend without limit in our elections is incorrect, at best. Any *tightening* of the existing ban to "fix" a nonexistent problem would only prevent U.S. nationals from participating in U.S. elections with funds earned within the United States. This would be shameful legislation, violating the rights of U.S nationals. Tangentially, any harmless belt-and-suspenders approach that merely restates existing law and achieves nothing would be a cynical statute unworthy of U.S. Senators.

Congress should not attempt measures to put the genie back into the bottle

There is a belief that Congress must "do something" about the opinion, other than accept its freeing of core political speech. Professor Lawrence Tribe proposes a new slate of corporate restrictions purportedly aimed at protecting shareholder rights while at the same time diluting them. *See Smith, supra.* Tribe's remedies are predicated on the contradictory assertions that corporate political spending must be limited because corporations seek policies that will benefit its shareholders, but at the same time corporate political spending must be limited because it merely wastes the resources of the shareholders. It cannot be both.

The "various solutions proposed indicate a certain schizophrenia." Smith, *supra.* Professor Tribe argues that "the impact of a corporate political ad would surely be cut down to size" if the law made corporations attach disclaimers that indicate its profit-furthering motive. But if the concern is for shareholders, shouldn't the ad be presented as effectively as possible to benefit the corporation?

Tribe would hold CEOs personally liable and in treble damages for any campaign violation, for no other purpose than to deter and restrict the very speech rights the Court just vindicated in *Citizens United*. Punitive legislation, however, is unconstitutional. *See Davis v. FEC*.

The same is true for a 500% tax on corporate speech, and it limiting the tax to corporate speech would pose an equal protection problem.

Invoking the antitrust laws fares no better. Collusion in business is called antitrust and is illegal. In politics, "collusion" is generally called the right of association and is protected by the First Amendment.

Sen. Chuck Schumer (D-N.Y.) is reportedly considering a proposal to ban political expenditures by companies which "employ Washington lobbyists; or enjoy government contracts; or receive government bailouts or other substantial subsidies." Rep. Grayson introduced a bill restricting companies who employ or retain registered lobbyists from political spending. Rep. Niki Tsongas proposed legislation "prohibiting entities from using Federal funds to contribute to political campaigns or participate in lobbying activities."

Each of these targeted bans would pose constitutional concerns under the First and Fourteenth Amendments. Public employee unions (associations of teachers, firefighters, police officers, etc.) depend on government funds for their salaries and pensions. Doctors and other medical professionals depend on government reimbursements for Medicare and Medicaid patients. Millions of businesses and unions benefit from targeted tax breaks passed by Congress. If Congress banned business corporations from political spending because of a voluntary,

financial relationship with the government, it must also ban all other organizations with similar financial connections. Congress should only impose political expenditure restrictions on corporations that receive no-bid government contracts or whose controlling shareholder is the federal government (Fannie Mae, Freddie Mac, Sallie Mae, General Motors, Chrysler and AIG).

A regime of unlimited spending takes us back only to the late 1990s, but with one major difference

Another mischaracterization is that a law permitting "unlimited" political spending by corporations must result in "unlimited" spending by corporations. A review of recent political spending by incorporated entities shows, however, that legal permission has not led to corporations emptying their treasuries in support of political agendas.

In the 2002 election cycle, the Republican and Democratic parties raised approximately $300 million combined in soft money from businesses, unions, and other organizations,[1] during a period when after-tax corporate profits totaled over $1 trillion.[2] And, looking to the dreaded ExxonMobil as the "worst" possible example, lobbying expenditures in 2008 totaled roughly $29 million[3] while the company earned profits of more than $45 billion the same year.[4] An internal

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[1] "Soft Money Backgrounder," Center for Responsive Politics, available at http://www.opensecrets.org/parties/softsource.php
[2] Charles P. Himmelberg, James M. Mahoney, April Bang, and Brian Chernoff, "Recent Revisions to Corporate Profits: What We Know and When We Knew It," Current Issues in Economics and Finance, p.3, table 1, March 2004, Federal Reserve Bank of New York, available at: http://ny.frb.org/research/current_issues/ci10-3.pdf
[3] "Lobbying: Top Industries (2008)", Center for Responsive Politics, available at: http://www.opensecrets.org/lobby/top.php?showYear=2008&indexType=i
[4] "ExxonMobil shatters annual profit record," Jan. 30, 2009 CBS News, available at: http://cbsnews.com/stories/2009/01/30/business/main4764148.shtml

memo regarding ExxonMobil's giving to public policy groups in 2002 shows that they gave only $5.1 million to such groups,[5] while earning profits of approximately $11.5 billion.[6]

As campaign finance lawyer Adam Bonin noted in a *DailyKos* post,[7] campaign finance regulations changed modestly after *Citizens United*: Before the ruling, corporations could contribute directly to candidates in more than half the states, run political expenditures with "express advocacy" — using words like "vote for" or "vote against"—in more than half the states, and run issue ads in all 50 states and federal elections using words like, "Sen. Smith is wrong on the environment, call him and tell him so." Such ads, after McCain-Feingold in 2002, could not be aired within 30 days of a primary or 60 days of a general election. After *Citizens United*, business corporations, unions and nonprofit advocacy groups can now run "express advocacy" ads for or against candidates in all 50 states and run their issue ads anytime, instead of only when they're likely to be ignored by the voting public (i.e. not near an election). In defending McCain-Feingold in the Courts, "reformers" argued vociferously that these "issue ads" were no different in effect from the "express advocacy" ads the *Citizens United* Court ruled corporations have a right to broadcast, and the Court had expressly adopted that view in *McConnell v. FEC*. If that is true, then the change in the law is merely, as a practical matter, back to the status quo of the 1980s and 1990s. While many people do not like that change, it is difficult to argue that elections improved, or special interest influence declined, during the seven-year reign of McCain-Feingold.

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[5] http://www2.exxonmobil.com/files/corporate/public_policy1.pdf
[6] David Koenig, "ExxonMobil set record profit in 2003," Jan. 30, 2004, Associated Press, available at: http://media.www.thebatt.com/media/storage/paper657/news/2004/01/30/News/Exxon.Mobil.Set.Record.Profit.In.2003-592894.shtml
[7] *DailyKos*, "Citizens United: Don't Panic," Jan. 28, 2010; http://www.dailykos.com/storyonly/2010/1/27/830892/-Citizens-United:-Dont-Panic

But there is one big difference between the 1990s and now. In the 1990s some corporate and union resources made their way to national political party committees to be spent by operatives who had the short-term and long range interests of the political parties in mind. Unless Congress now frees itself of the only McCain-Feingold provisions not now held to be unconstitutional, the party committees will see their relative fortunes whither as others spend all around them. The Center for Competitive Politics has compiled "A Modern, Moderate Agenda", which suggests reforms Congress should make to unburden itself in the wake of the *Citizens United* opinion. Those recommendations are attached to this statement and incorporated in this testimony.

Thank you.

February 08, 2010

The Honorable Charles E. Schumer
Chairman
Committee on Rules and Administration
UNITED STATES SENATE
305 Russell Senate Office Building
Washington, DC 20510

RE: Clarification of the Record: *Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections*

Dear Chairman Schumer:

In reviewing a web cast of the Feb 2 hearing, I believe that Senator Durbin may have taken my position to be that the Fair Elections Now Act, S. 752, contains election-nullification provisions similar to those of the Clean Elections Commission of Arizona. That is not my position and not the basis for my recommendation to the Committee.

My recommendation was for Senators to understand fully FENA's "de-Certification" provisions before adopting any FENA legislation. The provisions to which I was referring are partially listed in Sec. 515(b)(1)(B), below.

SEC. 515. CERTIFICATION.

`(a) In General- Not later than 5 days after a candidate for Senator files an affidavit under section 511(a)(3), the Commission shall--

`(1) certify whether or not the candidate is a participating candidate; and

`(2) notify the candidate of the Commission's determination.

`(b) Revocation of Certification-

`(1) IN GENERAL- The Commission may revoke a certification under subsection (a) if--

`(A) a candidate fails to qualify to appear on the ballot at any time after the date of certification; or

`(B) a candidate otherwise fails to comply with the requirements of this title, including any regulatory requirements prescribed by the Commission.

`(2) REPAYMENT OF BENEFITS- If certification is revoked under paragraph (1), the candidate shall repay to the Fund an amount equal to the value of benefits received under this title plus interest (at a rate determined by the Commission) on any such amount received.

During the hearing, many commented on the possibility that private constituents may enjoy increased influence over a candidate's election outcome after the Supreme Court's opinion in *Citizens United.* My recommendation is for Senators considering FENA to understand the out-of-proportion influence that Fair Elections Commissioners may have upon a candidate's funding if FENA becomes law.

If 2009 has taught us anything, it is that tax subsidies come with strings. Senators favoring FENA may one day be surprised to learn just how much they are like other Americans on this score. My reading of FENA is that it provides the one thing reform advocates have long been seeking for enforcement commissioners and the thing no election commissioner should ever be given: "relevance." FENA, as written, would give Fair Election commissioners the ability to determine the outcome of an election by determining which of competing candidates may keep his federal funding. I would advise deleting, amending, or clarifying this provision before discussing FENA any further. Any candidate that becomes certified should stay certified until after the election.

Respectfully submitted,

Stephen M. Hoersting
Center for Competitive Politics
124 South West Street
Suite 124
Alexandria, Va. 22314
(703) 894-6800
www.campaignfreedom.org

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January 28, 2010

A Dangerous Dissent on *Citizens United*

By Mark J. Fitzgibbons

The dissenting opinion in *Citizens United*, written by Justice Stevens and joined by the court's other three liberals (including Justice Sotomayor), is remarkable for a number of reasons. Justice Stevens attempts to base his opinion in originalism, which is quite welcome for the mere fact that it better exposes the sometimes-camouflaged antipathy towards freedom held by liberal, big-government types.

Citing *Trustees of Dartmouth College v. Woodward* (decided in 1819) to support his thesis that the First Amendment does not extend fully to corporations, except for the "institutional press" as he so names it, Justice Stevens writes,

"The Founders thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare" since "the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign."

That contradicts the fact the Dartmouth College was established to fulfill a mission protected by the First Amendment (the teaching of religion), and *Trustees of Dartmouth College* said that no legislature in America has the authority to deprive a chartered entity of "vested rights."

Trustees of Dartmouth College was decided long before the 14th Amendment was ratified, which courts in the 20th century claimed as the basis to apply the Bill of Rights to state actions. But even in 1819, due process was considered beyond the authority of states to violate, and courts recognized that legislative power was limited. The decision also acknowledges the fact that corporations may be established with express or implied purposes that include the free exercise of rights.

The common law recognized that the sovereign does have the authority to regulate the formation of corporations and imposes certain conditions on their existence and operations. *Trustees of Dartmouth College* discusses the clear distinctions between "private" corporations (established by individuals) and "public" or "civic" corporations such as cities, townships, and those established by the government.

Justice Stevens' conclusion that the sovereign may interfere with First Amendment or other rights of privately founded and financed corporations because they are "artificial" creations is not only absent in the *Trustees of Dartmouth College* decision, but it is contradictory to it.

Founder and our fourth Chief Justice John Marshall wrote:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, *or as incidental to its very existence*. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, *individuality*; properties, by which a perpetual succession of many persons are considered the same, *and may act as a single individual*.

In other words, Justice Marshall's written opinion supports the principle that corporations may act and speak as any individual may, and the opinion notes that legislatures lack the power to take away "vested" rights. The position that follows from Justice Stevens' must be that First Amendment rights are not vested. That is as dangerous a judicial notion as any I know.

Perhaps an even more radical and equally dangerous statement in the liberals' dissent is that "every corporate activity ... rest [s] entirely in a concession of the sovereign," and therefore could be "comprehensively regulated in the service of the public welfare." As I mentioned earlier, the opinion in *Trustees of Dartmouth College* makes the clear distinction between private

corporations versus public (or civic) corporations such as cities and townships. Justice Stevens' language is pulled from the description of public corporations found in *Trustees of Dartmouth College.*

I do not know whether Justice Stevens' intent in failing to acknowledge this important distinction between private and public corporations was to influence more than just restrictions on First Amendment rights. The Marshall court makes clear, however, that government may not intrude on private corporations the way it may on public ones, and it must respect the *private* nature of *private* corporations even when their purposes may be for the public benefit. That may be just horribly incompetent lawyering on Justice Stevens' part (although the other three liberal justices signed onto his dissenting opinion).

I can, however, guarantee this: Left-wing and government lawyers will glom onto that language to attempt to justify the most invasive intrusions into corporations -- including nonprofits -- and their First Amendment, property, and other rights. That is why it is important to expose Justice Stevens' error now, before it becomes incorporated into our jurisprudence by mistake or design.

Justice Stevens also writes about the "unique role played by the institutional press in sustaining the public debate." Justice Scalia's concurrence with the majority opinion helps expose the fallacy of Justice Stevens' First Amendment favoritism and bias. In footnote 6 to his opinion, Justice Scalia writes, "It is passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish."

"*Liberty of the press*," he continues (and I omit the cite), "in civil policy, is the free right of publishing books, pamphlets, or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state."

Justice Scalia notes correctly that the freedom of the press -- i.e., the freedom to publish one's thoughts -- rests with each individual. It is not a right reserved to some professional society. It strikes me as of no small inconsequence that the corporate media are among the biggest whiners about *Citizens United.* They are rapidly losing the artificial monopoly, created in part by Congress and in part by the courts, but not by the First Amendment, on the protections afforded under the freedom of the press.

Justice Stevens, in his footnote 16, sums it up best: "We do not share [the majority's] view of the First Amendment." That may be the most accurate statement in his dissenting opinion.

(Excerpted from a speech to be delivered at the January 29-31 Leadership Tea Party Class, Dallas, Texas.)

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***Citizens United*, Shareholder Rights, and Free Speech: Restoring the Primacy of Politics to the First Amendment**

By Bradley A. Smith, Josiah H. Blackmore II/Shirley M. Nault Designated Professor of Law, Capital University Law School, Columbus, Ohio; and Chairman, Center for Competitive Politics.

Last month's Supreme Court decision in *Citizens United v. Federal Election Commission* is an important step to restoring political speech to the primacy it deserves under the First Amendment.

For years, now, both outside observers such as I and members of the court, most notably Justices Scalia and Thomas, have pointed out that the Court has been giving greater protection to such non-political speech as internet pornography, nude dancing, and the transmission of stolen communications than it has to core political speech. These charges, whether made in judicial opinions, *see e.g. Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000) (Thomas, J. dissenting) or in public commentary have gone unanswered. It is, of course, relatively easy to defend the First Amendment when the consequences of doing so seem unlikely to upset one's own life or to have little broad impact, *see e.g. East Hartford Education Association v. Board of Education,* 562 F.2d 838 (2d Cir. 1977) (upholding the right of a teacher not to wear a tie in the classroom), than it is when upholding the First Amendment may have major consequences for one's own cherished political beliefs. And let us make no mistake – there is a reason that the political left has been howling about *Citizens United,* and it is the belief that corporate political speech will benefit causes with which they disagree. *See e.g.* Katie Obradovich, *Harkin: SCOTUS Ruling Benefits GOP*, Des Moines Register, Jan. 21, 2010 (available at http://blogs.desmoinesregister.com/dmr/index.php/2010/01/21/harkin-supco-ruling-benefits-gop/) ("[T]hey want to cut corporate taxes. They want to do away with estate taxes for the wealthy... ")(quoting Senator Tom Harkin); *id.* ("The legislation I introduced today will prevent the Wall Street corporations ... from turning around and pouring that same money into candidates that will prevent financial regulation on their industry.") (quoting Leonard Boswell, D-Ia); Paul Abrams, *Supreme Court to Hand Government to Republicans, Again,* Huffington Post, Dec. 17, 2009 (available at http://www.huffingtonpost.com/paul-abrams/supreme-court-to-hand-gov_b_395239.html) (complaining that overruling ban on corporate speech will "gut" healthcare reform, prevent financial regulation or "breaking up" of banks, end subsidies for "clean energy," result in tax cuts, end regulation of business; return prayer to schools, end abortion rights, and result in "perpetual war.") ; Jeff Zeleny, *Political Fallout From Supreme Court Ruling,* New York Times, Jan. 21, 2010 (available at http://thecaucus.blogs.nytimes.com/2010/01/21/political-fallout-from-the-supreme-court-ruling/) ("It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.") (quoting President Obama).

In fact, the Supreme Court had to rule in favor of Citizens United, and what is remarkable is not that it did, but that four Justices dissented. Remember, the government's position in the case was that under the Constitution, it had the power to ban the distribution of books through Kindle; to prohibit political movies from being distributed by video on demand technology; to prevent Simon & Schuster from publishing, or Barnes & Noble from selling, a 500 page book with even one sentence of candidate advocacy; or to prevent a union from hiring a writer to author a book about the benefits to working Americans of the Obama agenda. For all the outrage about this opinion, I have yet to hear anybody seriously defend that result. The fact that not one of the dissenters could find a middle ground on which to concur in the judgment suggests that the majority was correct – this case was all or nothing. Far from being activist, the majority reached the only logical conclusion. The dissenters were the activists here, prepared to enforce an interpretation of the First Amendment wholly foreign to most Americans.

In his critique of the decision here at SCOTUS Blog, Professor Tribe avoids the hysteria that has taken over much of the left. While there is no doubt that this decision is important and will result in more public political speech (which I believe is a good thing), Professor Tribe notes that fears of an "overwhelming flood" of corporate political spending are overblown. Professor Tribe correctly points out that before *Citizens United*, 26 states already allowed unlimited corporate spending in elections (and two more allowed limited corporate spending), and these states, representing over 60 percent of the nation's population, were not overwhelmed by corporate or union spending in state elections. Moreover, they include the top five rated states in *Governing* Magazine's rating of the best governed states (Utah, Virginia, Washington, Delaware and Georgia). Furthermore, prior to the McCain-Feingold Act of 2002, corporations could fund "issue ads," hard hitting ads that discussed candidates and issues but stopped short of asking citizens to vote in any particular way. In defending McCain-Feingold in the Courts, reformers had argued vociferously that these "issue ads" were no different in effect from the "express advocacy" ads the *Citizens United* Court ruled corporations have a right to make, and the Court had expressly adopted that view in *McConnell v. FEC.* If that is true, then the change in the law is merely, as a practical matter, back to the status quo of the 1980s and 1990s. While many people do not like that change, it is difficult to argue that elections improved, or special interest influence declined, during the seven year reign of McCain-Feingold.

Nevertheless, Professor Tribe joins the chorus of those who seem to assume that Congress must "do something" about *Citizens United.* And here, the arguments have taken a curious twist.

The new rallying cry seems to be a combination of simultaneously attacking shareholder rights while claiming to defend them. The attack on shareholders rights comes in the form of claims, voiced by Justice Stevens in his interminably long dissent, by Justice Sotomayor at oral argument, and by numerous liberal commentators, that corporations really have no rights, since they are "creatures of the state." In dissent, Stevens pulled a quote from the great Chief Justice John Marshall, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it." (quoting *Dartmouth College v. Woodward*, 17 U.S. 518 (1819). Never mind that Justice Marshall found that the corporation did have constitutional rights – Stevens uses Marshall to argue that it does not.

Here again, Stevens reveals the radical, activist position of the dissenters. For well over 100 years, it has been recognized that corporations possess constitutional rights as "persons." Few of us, for example, would endorse the proposition that a corporation could have its property seized (i.e., the property of the natural persons who are its shareholders) without due process. While corporations do not have the ability to exercise, as corporations, all Constitutional rights, they have long been recognized as able to assert constitutional rights where doing so is necessary to preserve the rights of the corporate members or shareholders. Thus, where a corporation asserts a right to speak, it is really the members of the corporation asserting a right to associate and to speak as a group. That is why corporations possess First Amendment rights (as opposed to the Fifth Amendment right against self-incrimination, or the right to vote, which are only exercised on an individual basis, not through association in the group).

If Stevens and the others who joined his opinion are serious in thinking that corporations have no rights other than those granted (at whim, apparently) by the state, they are perhaps the most radical group of justices we have ever seen, prepared to overturn hundreds of precedents from the nation's earliest days to the present.

At the same time that the dissenters launch this remarkable assault on shareholder rights, they claim to be defending the rights of shareholders. This schizophrenic position seems to be the result of schizophrenic beliefs about a subsidiary issue. The desire to "do something," as we have seen, comes about precisely from the belief that corporations, when engaging in political participation, will focus solely on turning a profit for their shareholders, *see Citizens United* (Stevens, J., concurring)(citing brief of American Independent Business Alliance as amicus curiae). This is the *quid pro quo* rationale that has long undergirded campaign finance restrictions, *see Buckley v. Valeo,* 424 U.S. 1 (1976), and even the "corrosion" rationale behind the now overruled *Austin v. Michigan Chamber of Commerce*: corporations will attempt to influence public policy solely to gain undue favors that enrich their shareholders, and that is a bad thing. Yet now, we are told that corporate spending must be limited to protect those same shareholders from, in Professor Tribe's words, corporations "squandering their property in federal elections." Thus, corporate spending on politics must be limited because corporations (unlike individuals?) seek to promote policies that will maximize their benefits to the corporation, but must be restricted because in doing so they are "squandering" corporate resources. The two propositions do not work in tandem.

If corporate shareholder rights are really at issue, then the problem really arises when managers spend corporate funds in ways not intended to boost corporate profits. This is an implied critique of *Citizens United* when critics attack corporate managers as "spending other people's money." But even if this is true, this is a question not of campaign finance law, but of corporate law. What is really under attack here is the business judgment rule. If the business judgment rule is the problem, corporate political spending is the least of our worries. Even before McCain-Feingold, Fortune 500 companies spent roughly ten times as much money on lobbying as on campaign expenditures. Must shareholders approve all lobbying in advance? (And, from the public interest side, is it better if corporations seek to exercise influence by lobbying lawmakers rather than lobbying the public, through campaign spending?). Furthermore, these companies give away roughly ten times as much money as they spend on lobbying. These donations can go not only to such causes as United Way or the local Opera, which many shareholders might not like, but to controversial "political" charities, including groups such as the Brennan Center for Justice (which has long received corporate contributions to support its crusade for campaign finance reform, without ever expressing concern for whether the shareholders were in agreement with its agenda), Planned Parenthood, and even the Boy Scouts, once non-controversial but now a lightning rod for gay rights organizations (which, themselves, are sometimes controversial recipients of corporate charity). Many corporations voluntarily support affirmative action, even though many shareholders disagree with such policies. The managers do this under the business judgment rule. Similarly, managers may decide to increase pollution within legal limits in order to boost profits, though some shareholders would prefer they do not – or they may decide to make a voluntary reduction in pollution at some cost in profitability, even though some shareholders would prefer that they do not. Or corporations may run product ads suggesting that competitors are not treating their customers fairly, leading some shareholders to fear that the long-term effects of such ads will be to turn public opinion in favor of industry-wide regulation that will harm the corporation's own profitability. But these types of decisions are all made under the business judgment rule.

Corporate scholars have long wrestled with the scope of the business judgment rule – indeed, it may be fair to say that there is no more vexing issue in corporate law than the question of how to have efficient corporate governance while preventing officers and managers from betraying their duties to shareholders. But that is precisely why it would be a huge mistake to make a radical assault on long considered issues of corporate law due to a short term populist panic about corporate political spending, which is a miniscule portion of what any for-profit corporation does.

Meanwhile, the various specific solutions posed also indicate a certain schizophrenia. For example, Professor Tribe, having argued that shareholders must be protected from resources being "squandered" on political ads, seeks added disclosure on corporate ads. He argues that "the impact of a campaign ad, whether in the form of a thirty-second spot or an extended production, would be cut down to size if it had to be (accurately) presented as a self-interested attempt by big pharma or by a cigarette or oil company or a bank holding company or hedge fund to influence the outcome of a candidate election for the benefit of the sponsoring company's bottom line rather than masquerading behind a veil of public-spiritedness." But if the concern is really for shareholders, shouldn't we want the corporate spending to be done as effectively as possible, with as much impact as possible? Why would we limit that? (And as an aside, since when do most politicians, or individual voters, forthrightly declare that they simply want more stuff from the government, rather than hiding behind the "public interest?")

Professor Tribe says that the idea is not "to suppress political speech," but in fact that is exactly the idea. He makes a series of proposals specifically designed to suppress political speech. For example, he wants all corporate political ads to feature the name of the corporation's CEO and the percentage of its treasury spent on the ad. But of what benefit would any of that be to the listening public? The apparent goal is simply to discourage speech. Moreover, he proposes making corporate executives personally liable for treble damages and attorneys fees as a "deterrence" to spending corporate dollars on political activity. The basis of such claims would be a "federal cause of action for corporate waste." This would either be toothless, simply relying on the manager's claims of good faith, or would result in hindsight second guessing by prosecutors, minority shareholders, and juries as to whether the corporation could show specific *quid pro quo* benefits from its political involvement - exactly the thing that campaign finance reformers have long argued should be prevented, not required, when corporations engage in politics.

The lack of wisdom in these proposals is illustrated by the fact that there is no evidence that any substantial percentage of decisions on corporate political spending are in fact opposed by shareholder majorities. It seems more likely that the opposite is true. These proposals are clearly intended to make it much harder, if not impossible, for the shareholder majority to support its own best interests (which, again, the reformers seem to presume is contrary to the policy preferences of the reformers), in the name of shareholder rights. It is hard to defend any of this as a victory for shareholder rights, rather than an effort to silence voices that the silencers seem to assume they will not like.

In summary, lacking a rationale for the corporate speech ban that can withstand even rational basis First Amendment analysis, opponents of corporate political speech are making a series of contradictory arguments, both underinclusive and overinclusive in their scope, in the name of shareholder rights, with the specific intent of hindering corporate speech by majority shareholders.

Finally and unfortunately, at this stage no discussion of *Citizens United* can be complete without addressing the question of foreign corporations engaging in political spending. Of course, no one seriously believes that the ban on corporate spending was enacted to prevent foreign corporations from engaging in spending, as opposed to all corporations, nor did the government defend the statute on that grounds, but even if we take that argument in good faith, it makes little sense. First, a separate and very broad provision of the law clearly bans all foreign nationals from participating financially in any U.S. election, from dog catcher to president. It is true that U.S. subsidiaries of foreign owned corporations could spend money in an election (just as they were able to do in 28 states before *Citizens United),* but even to do that the subsidiary must be U.S. incorporated and U.S. headquartered, and must make expenditures from funds earned in the United States. So a foreign corporation could not simply run

money into the company to then make expenditures. Furthermore, no foreign national can be involved, directly or indirectly, in any way, in decisions to spend, or on how to spend, any funds for political purposes. So to address one hypothetical I have heard, it would be a violation of the law for a Saudi billionaire to suggest to the U.S. citizens making decisions that the U.S. subsidiary spend money in an election. And finally, note that these U.S. subsidiaries are already eligible to spend unlimited sums on lobbying congress or on promoting or opposing state ballot measures. Additionally, these U.S. subsidiaries already have, and have long had, the right to create and pay the expenses for corporate Political Action Committees, which can not only spend on political races without limit, but can contribute directly to candidates. The horror stories about foreign corporations simply illustrate, again, how weak are the both the First Amendment and broader Constitutional arguments against the Court's ruling in *Citizens United*.

Citizens United is important not because it will lead to a flood of corporate and union spending in political races, but because it re-establishes a core principle of First Amendment law, which is that the government cannot be in the business of discriminating against U.S. citizens engaged in political activity simply because of the organizational form of their engagement. But even if it should lead to a flood of corporate spending, the alternative endorsed by the government and the dissenting justices on the Supreme Court – an America where the government could ban political books and movies – is clearly far worse.

After Citizens United

A Moderate, Modern Agenda for Campaign Finance Reform

Prepared by the

Center for Competitive Politics

124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
http://www.campaignfreedom.org

Introduction

On Jan. 21, 2010, the U.S. Supreme Court handed down its ruling in *Citizens United v. Federal Election Commission*, dramatically altering the campaign finance landscape for federal candidates. Previously silenced, incorporated businesses and unions as well as many advocacy organizations and trade associations will be able to spend money directly from their general treasuries advocating the election or defeat of federal candidates.

While the full impact of this ruling will be unknown for several years, there is little doubt that the ruling in *Citizens United* places candidates and political parties at a distinct disadvantage to incorporated entities that wish to spend independently. While candidates and political committees remain limited in their ability to raise funds to communicate their message, incorporated entities face no such limit.

This unlevel playing field was noted by Supreme Court Justice Breyer during oral arguments, when he observed that "...the country [would be] in a situation where corporations and trade unions can spend as much as they want... but political parties couldn't... [and] therefore, the group that is charged with responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want..."

In *After Citizens United: A Moderate, Modern Agenda for Campaign Reform,* the Center for Competitive Politics proposes a modest agenda of six proposals that will help to put candidates and parties closer to a level playing field with individuals and corporations engaged in independent expenditures.

We believe these modest steps towards reform can attract broad, bipartisan support because they do not dramatically alter the current system. Many simply update decades-old laws that have failed to keep up with the times, while others allow more Americans to contribute and to give to more candidates.

It is our hope at the Center for Competitive Politics that this reform agenda will not only lead to more modern system of campaign finance regulation that shows greater respect for the First Amendment, but that it will also spur elected officials and the public to re-examine the fundamental premises on which current regulations and restrictions on political speech rest. We are confident that such a re-examination will lead to a better understanding of the First Amendment, and ultimately to further liberalization of speech regulations.

Brad Smith, Chairman Sean Parnell, President

1. Remove Limits on Coordinated Party Spending

Under *Buckley v. Valeo*, individuals and organizations have a right to engage in unlimited spending if they do so independent of a candidate's campaign. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* ("Colorado I"), the Supreme Court clarified that this right extends to political parties. And, of course, in *Citizens United* the Court has now held that incorporated entities including businesses, unions, and trade associations have the right to draw on an unlimited amount of funds for independent expenditures.

At the same time, the law still limits how much political parties can spend in coordination with their candidates, a limitation upheld by the Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* ("Colorado II").

The odd result of these cases is to drive a wedge between parties and candidates. Parties can spend unlimited sums to help their candidates, but only if they do so independently of the candidates — that is, without sharing information on the candidate's strengths and weaknesses, strategies, plans, polling data, and so forth. Prior to McCain-Feingold, this dichotomy might have made some type of sense, in that parties could accept and spend "soft" money — unregulated funds — to support candidates so long as they avoided "express advocacy" in spending their dollars. Therefore, "soft money" could be spent independently and hard money could be spent in coordination with the candidate.

Since McCain-Feingold, however, national political parties are prohibited from accepting any unregulated contributions. Thus, all party spending is "hard" — regulated and limited, money. There would seem to be no purpose in any longer limiting the ability of political parties to spend unlimited "hard" money in coordination with a campaign. Eliminating this barrier is unlikely to lead to any added spending — it would merely allow parties and candidates to do what parties and candidates ought to do: work together to gain election, and to spend money on the races they deem most important.

Beyond removing a needless barrier that raises the costs of campaigning, allowing parties and candidates to work together may actually increase accountability and confidence in the system. For example, in 2006, when some observers called on Tennessee Republican Senate candidate Bob Corker to denounce certain ads about his opponent being run by the National Republican Senatorial Committee, Corker had to say — truthfully — that he had nothing to do with the ads (nor could he have under the coordination restrictions).

Because most citizens simply do not believe that a candidate cannot somehow instruct his party on advertising, cynicism among the voting public increases when they are correctly told candidates cannot legally ask their own party to stop running a specific ad.

2. Restore Tax Credits for Small Contributions

Prior to the federal tax reform of 1986, taxpayers received a tax credit for political contributions up to $50, or $100 on a joint return. Adjusted for 1978 dollars (the last time Congress adjusted the amounts) it would today be approximately $165, or $330 on a joint return.

Restoring the tax credit at these levels would increase the pool of small donations available to candidates, which would make it easier to raise funds and reduce time spent fundraising. In addition, a tax credit might encourage more people to become involved in the political process and could do far more than contribution limits to restore faith in government.

3. Adjust Contribution Limits for Inflation, Including the Aggregate Limits

The McCain-Feingold bill doubled individual limits on giving to candidates and indexed them for inflation. This increase, however, accounted for barely half of the loss in value of contributions since the limits were first enacted in 1974. Moreover, other limits were not increased at all.

Had all contribution limits been increased with inflation since their enactment in 1974, by the time McCain-Feingold was passed in 2002 the limit for an individual to contribute to a campaign would have been approximately $3,650. The limit for PACs, both what an individual can contribute to a PAC and what the PAC can contribute to a candidate, would have been approximately $18,250.

Similarly, the aggregate limit for an individual in a two year election cycle would have been in excess of $180,000, up from the $50,000 allowed at that time by the law. McCain-Feingold partially redressed the problem, raising the aggregate limit over a two year election cycle to $95,000 and adjusting it for inflation, but this made up a bit less than half the deficit that had been created by the simple lapse of time.

Individual contributions to political parties show a similar story. Originally set at $20,000 per year, the limits were modestly raised and indexed for inflation in 2002. The annual limit on contributions to political parties is currently only $30,400, while it would be closer to $87,760 had it been indexed to inflation in 1974.

Much of the "soft money" problem that served as the justification for McCain-Feingold was, in reality, a hard money problem, created by contribution limits that were unadjusted for inflation, let alone population growth. By adjusting the contribution limits for inflation to match the original amounts set in 1974, much of the political funding that was first called "soft money" and that has since flowed to 527 and 501(c)4 groups to escape the low limits would instead flow back into candidates and political parties.

Restoring the original buying power of the 1974 contribution limits would also have the effect of reducing the demands on candidate time for fundraising while also providing a boost to lesser-known candidates who would be helped by higher limits. It is worth noting that in 2004, a previously little-known state senator from Illinois was able to build an effective campaign organization in his race for U.S. Senate in part because of the higher contribution limits he operated under thanks to the so-called "Millionaires Amendment" (since struck down by the U.S. Supreme Court in *Davis v. Federal Election Commission*). Four years later, of course, that relatively unknown state senator was elected President of the United States.

Higher contribution limits also address what many regard as the problem of self-funding candidates. While a candidate's wealth does not increase relative to contribution limits, the ability of non-wealthy opponents to raise funds to remain competitive would significantly increase.

4. Permit Independent Solicitation and Facilitation of Contribution to PACs

Congress should allow new groups making use of new technologies more leeway than they already enjoy under the Federal Election Campaign Act to empower existing PACs and small donors.

Currently, connected PACs are permitted to solicit contributions from a restricted class of potential donors, such as corporate executives, union members, or donors to a citizen group. Although they may not solicit contributions outside of their restricted class, they are permitted to accept them if someone wishes to donate.

ActBlue is a non-connected political committee that was formed to enable individuals, local groups, and national organizations to raise funds for Democratic candidates of their choice. ActBlue—which has its counterparts on the Republican side of the political spectrum—serves primarily as a conduit for contributions earmarked for Democratic candidates and political party committees. ActBlue lists Democratic candidates' campaign committees on its website, and it solicits contributions designated for those committees on its website's blog and fundraising pages. Viewers may make a contribution designated for a listed campaign committee through ActBlue's website.

ActBlue has in the past sought permission from the Federal Election Commission to solicit funds for the separate segregated funds (PACs) of corporations, labor unions, and associations. This request was largely denied by the Federal Election Commission, although the statutory language does not specifically bar what ActBlue wished to do.

PACs represent an opportunity for citizens to join together and associate themselves with their fellow citizens on specific interests and issues, and to speak with one voice through direct

contributions as well as through independent or coordinated expenditures. Expanding the potential sources of contributions for PACs without upsetting the prohibition on the use of corporate or union treasury funds to solicit beyond the restricted class would add yet another strong voice to the political process.

To strengthen the ability of PACs to compete with unlimited independent expenditures, Congress should clarify the laws regarding separate segregated funds and solicitation of restricted classes by allowing registered political committees that serve as conduits for other political committees to solicit contributions on behalf of the separate segregated funds of corporations, labor unions, and other associations.

5. Adjust Disclosure Thresholds for Inflation

Disclosure, according to the Supreme Court, helps to prevent corruption or its appearance by shedding sunlight on the money supporting candidates. It also can provide voters with helpful voting cues. The donations of interest groups and knowledgeable contributors may send signals to voters at large as to which candidates are worthy of support. And disclosure does not directly limit one's ability to speak. For these reasons, disclosure of contributions and expenditures is one part of the law on which most observers agree.

Disclosure is not, however, without its costs. Foremost among them is invasion of privacy. There are many reasons why people might wish to give anonymously. Some persons, for example, would not want their contributions to the Log Cabin Republicans, an organization of gay Republicans, to be disclosed publicly. Others will prefer to give anonymously in order to avoid retaliations by vengeful politicians. As John McCain himself argued in urging his colleagues to pass the McCain-Feingold law, many people will choose not to speak — and especially not to criticize incumbent lawmakers — if faced with disclosure.

Assuming that some disclosure of campaign contributions is worth these costs, we must still consider the level of disclosure. The Federal Election Campaign Act's (FECA) thresholds for reporting individual donors and independent expenditures have not been adjusted since 1979. As a result, these thresholds, low when enacted, are ridiculously low now: $200 and $250, respectively. It is absurd to believe that donations and expenditures of $200 to $250 pose a danger of corruption and undue influence in the political process. If these numbers had merely kept up with inflation, the threshold on disclosure of individual contributions would now be approximately $600, and the limit on the disclosure of independent expenditures would now be approximately $750.

Beyond the costs in privacy, mandatory disclosure at low levels may actually decrease whatever utility disclosure generally has. These small donations fill page after page in the reports of any

major campaign, making it more difficult and time-consuming to find large donors that may in fact provide "voting cues" to the broader public.

The extensive reporting of small contributions also increases the administrative burden on campaigns of reporting. This both raises the costs of campaigning and places the heaviest burden on small, grassroots campaigns, and on campaigns that rely more on small donors — curious results for the "reform" community to support.

Finally, raising the disclosure threshold may increase the number of Americans willing to contribute more than $200 to candidates, or even contribute at all, once they know their contribution will not become public knowledge and potentially subject them to retaliation.

Adjusting disclosure limits for inflation, as has already been partially done for contributions, would be a modest measure that would pose no danger of corruption and that would have a salutary effect on the system and the privacy rights of individuals, and potentially increase the funds available to candidates who must compete against unlimited independent expenditures in the post-*Citizens United* world.

6. Abolish the Prohibition on Corporate and Union Contributions

Today's corporate world is far different than it was in 1907 when the Tillman Act was enacted into law. It is difficult to see how banning contributions by advocacy groups — whether major organizations formed specifically to promote certain national issues, such as NARAL Pro-Choice America or the National Rifle Association — unleashes "great aggregations of wealth" into our politics. It is even more difficult to see how banning contributions from community groups, regional chambers of commerce, local unions, and local businesses does so.

Lifting the outright ban on corporate contributions does not mean permitting unlimited contributions. Corporate contributions could have the same limits imposed as individual or PAC contributions currently do, including aggregate caps and provisions to ensure that corporate subsidiaries aren't able to evade the cap. The advantages of doing this would be many.

First, operating a PAC is expensive. Many corporations and small trade associations spend as much money operating their PACs as those PACs actually spend on politics. But there are definite economies of scale, so that the expense of complying with PAC regulation tends to favor larger enterprises. Indeed, for many small corporations, the cost of maintaining a PAC and soliciting contributions is not worth the benefit. The same, of course, applies to unions — the repeal would favor small union locals. Current complex reporting requirements could be replaced by a simple statement of contributions at a reasonable point before any election.

The egalitarian effect here would not only come in contributions. Indeed, primarily it would come in the ability of smaller corporations and unions to host candidates and allow candidates to meet with employees and members. Present law blankets such activity, once common, with a web of restrictions and prohibitions. However, a corporation with a large PAC can pay for such activities through the PAC and thereby avoid this added regulation. Smaller businesses cannot. Not only would abolishing the PAC requirement favor smaller businesses, unions, and advocacy groups, it would promote more opportunities for direct worker-candidate interaction.

The Tillman Act also failed to foresee the rise of subchapter-S corporations (S-corp), which are in many cases, and perhaps in most, small businesses owned by a single individual or family. Owners of S-corps often send contributions to candidates from their company accounts, thinking of themselves as small-business owners and not corporations. This causes campaigns to have to return the contribution and explain to would-be contributors that they need to send a personal check instead, which typically means the business owner transfers money from their business account to their personal account, then writes the check using essentially the same funds. Allowing corporate contributions would end the confusion and hassle associated with S-corps.

Another advantage of abolishing the PAC requirement would come in streamlined enforcement. The complete ban on corporate and union contributions means that a violation occurs when the first dollar is spent. The FEC has detailed rules that prohibit, for example, corporate lobbyists from even touching personal checks written to candidates by corporate executives, or that make it illegal for a secretary in a corporation or union office to type a note from an officer to a colleague, urging the latter to make a contribution. These regulations could be largely scrapped, and the minor complaints that come with them flushed out of the system, simply by allowing some minimal level of corporate and union expenditure.

It will be said in some quarters that allowing corporations to spend funds for political activity directly from corporate treasuries is unfair to shareholders, but this argument does not hold water. Corporations are free to use shareholder funds now for any number of things, including activities with political overtones that many shareholders may oppose. This includes lobbying, something nearly all large corporations and many smaller engage in.

For example, a corporation may support the Boy Scouts, which some oppose because of their stance on homosexuality; or it may support Planned Parenthood, which some oppose because of its advocacy of abortion rights. These matters are traditional questions of corporate governance. They are not the province of campaign finance laws.

It should also be noted that replacing the ban on corporate and union contributions with reasonable limits would be harmonious with the *Buckley v. Valeo* admonition that the legitimate

constitutional purpose of limitations is to prevent corruption. It is hard to believe that a contribution from the treasury of a small business is any more "corrupting" than a contribution from a corporate PAC or from the CEO of a Fortune 500 company.

Over 30 states currently allow some corporate contributions. These states include Utah and Virginia, which allow unlimited corporate contributions, and were recently named among the best-governed states in America by the Pew-funded *Governing Magazine*. There is no evidence that states that allow corporate contributions in state races are more "corrupt" or less well governed than other states.

Finally, in an era in which incorporated entities are now free to engage in unlimited independent advocacy, allowing direct contributions would provide businesses, unions, advocacy groups, and trade associations an alternate option to support or oppose specific candidates. Rather than engaging in independent expenditures or contribute to a 527 or 501(c) organization, an incorporated entity might instead chose to contribute directly to a candidate or political party. This would be particularly beneficial for smaller entities, which might not have the funds or sophistication to mount an effective independent expenditure campaign.

Conclusion

Candidates for federal office in 2010 and beyond face a dramatically different campaign environment than that of 2008. Incorporated entities, including for-profit companies, unions, trade and professional associations, and advocacy groups are now free to conduct unlimited independent expenditure campaigns urging the election or defeat of specific candidates.

This new freedom for independent groups comes at a time when candidates, political parties, and PACs are limited to a greater extent than ever before in their own fundraising. Our proposals aim to modernize elements of the campaign finance system while removing some of the limits that put candidates, parties, and PACs at a disadvantage, while not fundamentally altering the general regulatory system that Congress has set in place over the last 35 years.

The six reforms offered here offer the best hope for candidates hoping to compete in the new campaign environment. Because of the modest nature of these reforms, we believe that bipartisan support in Congress and even the support of many in the pro-regulation community can be had for some if not all of these proposals. Restoring and enhancing the ability of candidates to effectively communicate their message to voters in a post-*Citizens United* world will improve our election process, and help to sustain the competitive balance vital to our democratic republic.

Summary for Policymakers

1) Remove Limits on Coordinated Party Spending
   a. Since all party spending is hard money, or regulated money, there is no purpose in limiting party expenditures in coordination with a campaign.
   b. This will allow parties and candidates to do what they ought to do – work together to gain election, and also increase accountability.

2) Restore Tax Credits for Small Contributions
   a. Restoring tax credits on small contributions would dramatically increase the pool of small donations available to candidates, making it easier to raise funds and reduce time spent fundraising.
   b. It would encourage more citizens to become involved in the political process and could do more than contribution limits in restoring faith in government.

3) Increase Contribution Limits, Including Aggregate Contribution Limits
   a. Increasing contribution limits would reduee the need for large donors to give to 527 and 501(c)3 organizations.
   b. It would free up candidate time from fundraising, because fewer large donors would need to be solicited.

4) Permit Independent Solicitation and Facilitation of Contributions to PACs
   a. Enabling more contributions to PACs beyond their restricted class would permit for more participation by citizens in the political process, allowing them to contribute regulated dollars directly to causes they support.
   b. Promotes more opportunities for direct interaction between workers and candidates.

5) Increase Disclosure Threshold
   a. Adjusting the threshold for disclosure for inflation back to 1979 would respect donor privacy and allow the focus to be on large contributions.
   b. Campaigns would shed the administrative burden of disclosing contributions that are in no way corrupting, lifting the burden on campaigns and grassroots groups that rely on small donations.

6) Abolish the Prohibition on Corporate and Union Contributions
   a. Repealing the corporate and union ban in favor of allowing direct corporate and union contributions, subject to limits, would reduce the need to fund independent expenditures or give to 527 and 501(c) organizations.
   b. Promotes more opportunities for direct interaction between workers and candidates.
   c. Streamlines enforcement by weeding out minor complaints from the system while allowing people to focus on larger donations.

The Center for Competitive Politics (CCP) is a 501(c)(3) nonprofit organization based in Alexandria, Va. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication is to promote and defend citizens' First Amendment political rights of speech, assembly, and petition, and to educate the public on the actual effects of money in politics and the benefits of a more free and competitive election and political process. Contributions to CCP are tax deductible to the extent allowed by law.

124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
http://www.campaignfreedom.org

Stephen M. Hoersting is vice president and co-founder of the Center for Competitive Politics. He served as general counsel to the National Republican Senatorial Committee under its Chairman, Senator George Allen (R-Va.), during the 2003-2004 election cycle. He advised Senate offices and campaigns, including candidates, vendors, pollsters and consultants in the first election after the passage of McCain-Feingold, and helped win seven of eight open seat races for U.S. Senator. As a former counsel to then Vice Chairman Bradley A. Smith of the Federal Election Commission, Mr. Hoersting has a detailed understanding of campaign finance law, its jurisprudence, and the enforcement and regulatory processes of the Federal Election Commission. He has published on campaign finance issues for the Cato Institute, the Election Law Journal, *The Washington Times*, *Roll Call*, and *National Review Online*; has appeared on C-SPAN's Washington Journal, CNBC's Street Signs, and offered expert testimony on Capitol Hill. Mr. Hoersting earned a J.D. from Capital University Law School, *cum laude*, in 1996, and a B.A. in economics from The Ohio State University in 1990. He is an alumnus of the Institute for Humane Studies, and served as The Federalist Society's Publications Chairman for the Free Speech and Election Law Practice Group.

Appendix F

Testimony of Fred Wertheimer

President, Democracy 21

Before the Senate Rules Committee

On the Supreme Court Decision in *Citizens United v. FEC*

February 2, 2010

Executive Summary

The 5 to 4 Supreme Court decision in the *Citizens United* case declaring unconstitutional the ban on corporate expenditures in federal campaigns is the most radical and destructive campaign finance decision in the Court's history.

It is fair to say, as Justice Stevens does in his dissent, that this case was brought by the Justices themselves. It is also fair to say, as Justice Stevens does in his dissent, that "the only relevant thing that has changed" since the *Austin* (1990) and *McConnell* (2003) Supreme Court decisions upholding the corporate campaign spending ban "is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*…."

The dissent in *Citizens United* by Justice Stevens is a majority opinion-in-waiting. One day the *Citizens United* decision will be given the same kind of deference and respect by a new majority of the Court that the current Supreme Court majority gave to the *Austin* and *McConnell* decisions; that is to say, none.

The *Citizens United* decision represents an enormous transfer of power in our country from citizens to corporations. It opens the door to the use of the immense aggregate wealth of corporations to directly influence federal elections and, thereby, government decisions for the first time in more than a century.

Under this decision, insurance companies, banks, drug companies, energy companies and the like, and their trade associations, will *each* be free to run multimillion dollar campaigns to elect or defeat federal officeholders, depending on whether the officeholders voted right or wrong on issues of importance to the corporations and trade associations.

Members of Congress will have a sword of Damocles hanging over their heads. A "wrong" vote by a Member on an issue of great importance to major corporations or trade associations could trigger multimillion dollar campaigns by the corporations and trade associations to defeat the Member. And Members would be forced to consider this consequence repeatedly in deciding how to vote on legislation. Although not expressly addressed by the Court's opinion, under the Court's reasoning, labor unions also have been freed up to use their treasury funds for these purposes, although their resources are dwarfed by corporate resources.

Democracy 21 believes it is essential for Congress to move swiftly to enact legislation to mitigate the enormous damage done by the decision. The organizing principles for such legislation should be to advance legislation that directly responds to the impact of this decision, that can promptly pass the Senate and the House and that can be enacted in time to be effective for the 2010 congressional elections.

We believe Congress should focus on enacting the following provisions to respond directly to the *Citizens Uni*ted decision: new disclosure rules for corporations and labor unions; a provision to close the *Citizens United* created loophole for foreign interests to participate in federal elections through domestically-controlled corporations; provisions to make effective the existing Lowest Unit Rate requirements; meaningful and effective rules to define what constitutes coordination between outside spenders and candidates and political parties; and provisions to extend the existing government contractor pay-to-play restrictions.

Chairman Schumer and Members of the Committee:

I am Fred Wertheimer, the president of Democracy 21 and I appreciate the opportunity to testify today on the impact of the Supreme Court's decision last month in *Citizens United v. Federal Election Commission,* and on the need for an immediate legislative response by Congress, within the confines of the decision, to limit the damage to our political system that will result from the decision.

Democracy 21 is a nonpartisan, nonprofit organization which supports the nation's campaign finance laws as essential to protect against corruption and the appearance of corruption in the political process and to provide for fair elections. I have worked on campaign finance issues and reforms since 1971.

The 5 to 4 Supreme Court decision in the *Citizens United* case declaring unconstitutional the ban on corporate expenditures in federal campaigns is the most radical and destructive campaign finance decision in the Court's history.

The *Citizens United* decision represents an enormous transfer of power in our country from citizens to corporations. It opens the door to the use of the immense aggregate wealth of corporations to directly influence federal elections and, thereby, government decisions for the first time in more than a century.

Democracy 21 believes it is essential for Congress to move swiftly to enact legislation to mitigate the enormous damage done by the decision. The organizing principles for such legislation should be to advance legislation that directly responds to the impact of this decision, that can promptly pass the Senate and the House and that can be enacted in time to be effective for the 2010 congressional elections.

The Supreme Court has long recognized the importance and constitutionality of the role played by campaign finance laws in preventing corruption and the appearance of corruption.

In the landmark *Buckley* decision, the Court stated about contribution limits:

> Laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption *inherent in a system permitting unlimited financial contributions*, even when the identities and of the contributors and the amounts of their contributions are fully disclosed. (Emphasis added.)

The Court further stated in *Buckley*:

> Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'

Democracy 21 supported the Bipartisan Campaign Reform Act of 2002 (BCRA), a portion of which dealing with corporate and labor union campaign expenditures was invalidated by the Court in the *Citizens United* opinion. The principal component of BCRA, the ban on soft money contributions to political parties, was not involved in the *Citizens United* case.

In order to reach the *Citizens United* decision, Justice Kennedy, Chief Justice Roberts and three of their colleagues abandoned longstanding judicial principles, judicial precedents and judicial restraint to decide an issue which had not been raised in the case. The issue was waived by Citizens United in the court below, was not brought to the Supreme Court by Citizens United on appeal, and could have been avoided by resolving the case on any one of a number of narrower grounds.

It is fair to say, as Justice Stevens does in his dissent, that this case was brought by the five Justices themselves.

It is also fair to say, as Justice Stevens does in his dissent, that "the only relevant thing that has changed" since the *Austin* (1990) and *McConnell* (2003) Supreme Court decisions upholding the corporate campaign spending ban "is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*...."

Disregarding all of the restraints that Justices – particularly so-called conservative Justices – usually appeal to in the name of judicial modesty and respect for precedent, the majority here engaged in breathtaking judicial activism to toss aside a settled national policy established more than 100 years ago to prevent the use of corporate wealth in federal elections.

The *Citizens United* is decision wrong for the country, wrong for the constitution and will not stand the test of time.

The dissent in *Citizens United* by Justice Stevens is a majority opinion-in-waiting.

One day the *Citizens United* decision will be given the same kind of deference and respect by a new majority of the Court that the current Supreme Court majority gave to the *Austin* and *McConnell* decisions; that is to say, none.

Until less than two weeks ago, the financing of federal elections in our country had been limited by law to individuals and groups of individuals, functioning through PACs. The citizens who have the right vote in our elections were also the only ones who had the right to finance the elections.

Prior to the *Citizens United* decision, corporations were prohibited from using their corporate wealth to influence federal campaigns, whether through contributions or expenditures, dating back to 1907 when Congress banned corporations from "directly or indirectly" making contributions in federal elections.

The changes made in the law in 1947 only affirmed that expenditures always had been covered by the 1907 law. I am enclosing for the record to accompany my testimony a memorandum prepared by Democracy 21 on the history of the 1907 and 1947 laws.

Under the *Citizens United* decision, the immense aggregate wealth of corporations has now been unleashed to influence federal elections and, thereby, government decisions. The *Fortune* 100 companies alone had combined revenues of $13 trillion and profits of $605 billion during the last election cycle. Although not expressly addressed by the Court's opinion, under the Court's reasoning, labor unions also have been freed up to use their treasury funds for these purposes, although their resources are dwarfed by corporate resources.

Corporations and labor union funds have been freed up to make these expenditures in, and have the same damaging impact on, state, local and judicial elections as well.

Former Senator Chuck Hagel (R-NE) understood the enormous stakes in the *Citizens United* case and the disastrous impact striking the corporate ban would have on how our government works. He was interviewed for an opinion piece in *The Washington Post* before the decision was issued:

> Chuck Hagel, the Nebraska Republican who retired from the Senate last year after serving two terms, said in an interview that if restrictions on corporate money were lifted, "the lobbyists and operators . . . would run wild." Reversing the law would magnify corporate power in society and "be an astounding blow against good government, responsible government," Hagel said. "We would debase the system, so we would get to the point where we couldn't govern ourselves."

The *Citizens United* decision changes the character of our elections and governance.

Under this decision, insurance companies, banks, drug companies, energy companies and the like, and their trade associations, will *each* be free to run multimillion dollar campaigns to elect or defeat federal officeholders, depending on whether the officeholders voted right or wrong on issues of importance to the corporations and trade associations.

These campaigns, in addition to TV ad campaigns, can include direct mail campaigns, computerized phone bank campaigns and various other efforts, all urging voters to elect or defeat candidates. The TV ad campaigns, furthermore, are likely to often come in the form of negative attack ads, which often occurs with independent expenditures.

Members of Congress, in effect, will have a sword of Damocles hanging over their heads. Any "wrong" vote by a Member on an issue of great importance to major corporations or trade associations could trigger multimillion dollar campaigns to defeat the Member. And the Member would be forced to consider this consequence repeatedly in deciding how to vote on legislation.

Furthermore, once major corporations and trade associations used independent campaign expenditures to take out one or a couple of Members for voting wrong on a bill of importance to the spenders, just the threat of such expenditures could have the same effect of influencing the votes of other Members, without the spenders even having to make the expenditures.

As *The New York Times* (January 22, 2010) noted in discussing the impact of the *Citizens United* case, lobbyists have gotten a new "potent weapon" to use in influencing legislative decision making. The *Times* article stated:

> The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.
>
> "We have got a million we can spend advertising for you or against you – whichever one you want,'" a lobbyist can tell lawmakers, said Lawrence M. Noble, a lawyer at Skadden Arps in Washington and former general counsel of the Federal Election Commission.

It would not take many examples of elections where multimillion corporate expenditures defeat a Member of Congress, before all Members quickly learn the lesson: vote against the corporate interest at stake in a piece of legislation and run the risk of being hit with a multimillion dollar corporate ad campaign to defeat you. The threat of this kind of retaliatory campaign spending, whether the threat is explicit or implicit, is likely in itself to exert an undue and corrupting influence on legislative decision-making.

While individuals have long had the right to run independent expenditure campaigns to elect or defeat federal candidates, opening the door to the nation's corporations to conduct full-blown direct expenditure campaigns to elect and defeat candidates takes us into a whole new world. Large corporations have immense resources and the economic stakes they have in Washington decisions are enormous. These corporations have ongoing, continuous agendas in Washington they are trying to advance and they now have a huge new opportunity to use their resources directly in campaigns to buy influence to advance those agendas.

Some have said that they expect *Citizens United* to have a modest impact on the use of corporate funds to influence federal campaigns – either directly or through trade associations

Experience would argue otherwise.

Once it became clear that the soft money system was a way to use unlimited contributions to buy influence over government decisions, the soft money system grew rapidly.

Political party soft money tripled from 1992 to 1996 and then doubled again by 2000. By 2002 when the system was shut down, soft money had turned into a $500 million national scandal, with business interests accounting for the great bulk of the contributions.

A report by Peter Stone and Bara Vaida last week in the *National Journal* illustrates the dangers that lie ahead. The article, entitled "Wild West on K Street," states:

> All across town, lobbyists and campaign consultants, media consultants, and pollsters discussed how and whether clients should take advantage of the January 21 Supreme Court decision, which ended a ban on direct spending by corporations and unions in political elections. Business groups, increasingly unhappy with President Obama's agenda, are buzzing about the potential for unleashing multimillion-dollar ad drives in the last months of the 2010 elections, while unions are jittery about their ability to match corporate war chests.

According to the story, one Republican strategist "predicted the change would be huge. 'That decision was like a cannon – the short heard around the political world,' he said, adding that the ruling will take Washington back to 'the Wild, Wild West of spending money.'"

The *National Journal* report states that a Democratic campaign strategist "theorized that companies with fat profit margins might even look at ways to purchase Senate seats. 'No question, if you are looking at a strategy about how you buy a Senate seat, where is the cheapest place to go? The rural states, where $5 million can buy you a Senate seat and is nothing for a company like ExxonMobil.'"

Major corporations may, at least initially, be concerned about their public image and therefore may resist making these expenditures themselves. But under current rules, these corporations could keep their images intact by making large donations to and through third party groups, such as the Chamber of Commerce or other trade associations, and those intermediaries could make the expenditures without the source of the money being made public.

According to the *National Journal* report:

> [Republican strategist John] Feehery and others on K Street are likely to advise their clients to direct their money to tax-exempt 501(c)(4) and 501(c)(6) trade groups, which will now be freer to spend member money to explicitly target ads in support or opposition of candidates. These organizations do not have to disclose their donors.
>
> Established business groups, such as the U.S. Chamber of Commerce, which have become more strident about the direction that congressional Democrats and the Obama administration have taken energy, financial services, and health care reform in the past year, are seeing a big opportunity.

And where the economic stakes are high enough for corporations, sooner or later we can expect to see the expenditures being made by the corporations themselves.

Further, the *Citizens United* opinion itself is likely to encourage corporations to exercise their just discovered "free speech" rights by making expenditures to influence elections, even if they have not engaged in permissible non-express advocacy spending in the past. The fact that

corporations are now unconstrained in mounting full fledged campaigns against Members of Congress, and that corporate spenders no longer have to worry about the line between so-called "issue" discussion and express advocacy or its functional equivalent, is likely to encourage an increase in corporate electioneering spending.

Congress must respond quickly to the *Citizens United* decision, with legislative remedies that address the problems caused by the decision, within the constitutional confines of the decision, and that can be made effective for the 2010 congressional elections.

A number of possible reforms have been publicly discussed and various bills have already been introduced.

We believe Congress should focus on enacting the following provisions to respond directly to the *Citizens Uni*ted decision: new disclosure rules for corporations and labor unions; a provision to close the *Citizens United* created loophole for foreign interests to participate in federal elections through domestically-controlled corporations; provisions to make effective the existing Lowest Unit Rate requirements; meaningful and effective rules to define what constitutes coordination between outside spenders and candidates and political parties; and provisions to extend the existing government contractor pay-to-play restrictions.

New Disclosure Rules for Corporations and Labor Unions

A cornerstone of the legislation to respond directly to *Citizens United* should be new disclosure rules for campaign expenditures campaign expenditures and electioneering communications by corporations and unions. This should include providing the actual sources of the funding of these activities. It is important to require disclosure not only of direct spending by corporations and unions, but also the disclosure of transfers of funds that corporation and unions make to others to be used for campaign expenditures or electioneering communications.

The new disclosure regime should not be thwarted by the use of third party intermediaries to hide the actual sources of the funding.

While there have been strong differences over the years about limits and prohibitions on contributions and expenditures, there has been a general consensus in support of disclosure of campaign activities. This has not been a partisan issue in the past and it should not be a partisan issue today.

The Supreme Court, in *Citizens United* strongly affirmed by an 8 to 1 vote the constitutionality of requiring disclosure for express advocacy expenditures, the functional equivalent of express advocacy expenditures and electioneering communications. The latter are defined in the campaign finance laws as any broadcast ad that refers to a candidate and is run within 60 days of a general election and 30 days of a primary.

The Court stressed disclosure as an appropriate remedy: "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

New legislation should translate the Court's endorsement of prompt disclosure into new public disclosure rules. As the Court noted in *Citizens United* in upholding disclosure:

> Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities,' *Buckley*, 424 U. S., at 64, and 'do not prevent anyone from speaking,' *McConnell, supra*, at 201.

The Court also explicitly reaffirmed its holding in *Buckley* that the governmental interest which supports the constitutionality of disclosure is the interest in "'provid[ing]the electorate with information' about the sources of election-related spending. 424 U. S., at 66."

The new disclosure rules should provide disclosure to the public, to corporate shareholders and to labor union members. It should include campaign expenditures and electioneering communications, the donors who actually fund those expenditures, transfer of funds to and through third-parties and new disclaimer requirements on campaign-related ads.

A recent article in *National Journal* (January 12, 2010) by Peter Stone illustrated what needs to be captured by new disclosure laws. According to the article:

> Just as dealings with the Obama administration and congressional Democrats soured last summer, six of the nation's biggest health insurers began quietly pumping big money into third-party television ads aimed at killing or significantly modifying the major health reform bills moving through Congress.
>
> That money, between $10 million and $20 million, came from Aetna, Cigna, Humana, Kaiser Foundation Health Plans, UnitedHealth Group and Wellpoint, according to two health care lobbyists familiar with the transactions. The companies are all members of the powerful trade group America's Health Insurance Plans.
>
> The funds were solicited by AHIP and funneled to the U.S. Chamber of Commerce to help underwrite tens of millions of dollars of television ads by two business coalitions set up and subsidized by the chamber. Each insurer kicked in at least $1 million and some gave multimillion-dollar donations.
>
> The U.S. Chamber has spent approximately $70 million to $100 million on the advertising effort, according to lobbying sources. It's unclear whether the business lobby group went to AHIP with a request to help raise funds for its ad drives, or whether AHIP approached the chamber with an offer to hit up its member companies.

The article further stated:

> Since last summer, the chamber has poured tens of millions of dollars into advertising by the two business coalitions that it helped assemble: the Campaign for Responsible Health Reform and Employers for a Healthy Economy.

Thus an industry trade association solicited huge donations from its corporate members which were then funneled through the Chamber of Commerce to two "business coalitions" with innocuous names that were established by the Chamber and that did the actual spending.

In order to be effective, new disclosure rules for independent expenditures and electioneering communications must capture, to use this example, the actual sources of the funding, the role of the Chamber as an intermediary or pass-through for the funds, and the contributions to and expenditures made by the organizations that buy the ads.

Another new disclosure provision that should be adopted is a stand by your ad requirement for express advocacy, the functional equivalent of express advocacy and electioneering communications ads run by corporations, labor unions and other organizations.

Just as candidates are required to appear in and take responsibility for their ads, the CEOs of corporations and the heads of other organizations should be required to appear in and take responsibility for their campaign-related ads.

New Rules to Close the New Loophole for Campaign Expenditures by Foreign-Controlled Domestic Corporations

The *Citizens United* decision creates a new loophole which will allow foreign interests to participate in federal elections through unlimited campaign expenditures made by domestic corporations that they control. I am enclosing for the record to accompany my testimony a memorandum prepared by Democracy 21 on the loophole opened by the *Citizens United* decision for foreign-controlled domestic corporations.

Although an existing statute, 2 U.S.C. § 441e, prohibits spending by foreign corporations to influence U.S. elections, it does not prohibit spending by domestic corporations owned or controlled by foreign nationals. An existing FEC regulation which purports to address this issue is ineffectual and will not prevent foreign interest involvement in such campaign spending. Furthermore, the regulation is "enforced" by a Federal Election Commission that is dysfunctional and has ceased to function as an enforcement agency.

The public needs effective statutory protection against foreign interests using domestic corporations to participate in federal elections. Providing this protection by statute, not just by FEC regulation, would also provide the Justice Department with a basis for enforcing the statute against any knowing and willful violators.

Congress should close the loophole opened by *Citizens United* by prohibiting foreign-controlled domestic corporations from making campaign expenditures and electioneering communications.

Repair the Existing Lowest Unit Rate Requirement to make it Work

Congress should repair the Lowest Unit Rate (LUR) rules to make them effective by providing candidates and parties with enhanced access to low cost and non-preemptible broadcast time. This would significantly increase the value of the funds raised by candidates and parties to spend on their campaign activities.

There is past precedent for the Senate passing such legislation with strong bipartisan support. In 2001, the Senate adopted an amendment to fix the LUR by a large bipartisan majority vote of 69 to 31. The legislation, however, did not pass in the House and was not enacted.

Repairing the LUR would instantly increase the value of resources available to candidates and parties.

Democracy 21 is strongly opposed, however, to any efforts to increase the hard money limits for parties and candidates and thereby to increase the role of "influence-buying" contributions in our elections.

Any effort to undermine the party soft money ban, either by increasing the party contribution limits or by repealing the soft money ban, would take us back to a corrupt system in which large contributions to parties were used to buy influence over government decisions.

The soft money system was banned by Congress in 2002 with strong bipartisan votes in the House and Senate. The ban was signed into law by President George W. Bush and upheld as constitutional by the Supreme Court in the *McConnell* decision. The Supreme Court decision upholding the soft money ban in *McConnell* was not considered or affected by *Citizens United.*

Any effort to head back to the corrupt large contributions of the soft money system would be nothing less than having the "influence-buying" corruption unleashed by the *Citizens United* decision beget even more "influence-buying" corruption. This is a completely unacceptable response to the *Citizens United* decision.

Coordination Rules

The Supreme Court majority in *Citizens United* gave great weight to the idea that "independent" campaign expenditures by corporations could not be corrupting.

Yet, despite the fact that Congress in the Bipartisan Campaign Finance Reform Act of 2002 instructed the FEC to adopt new coordination regulations, eight years and four elections later, the FEC still has failed to adopt lawful coordination regulations to ensure that outside spenders do not coordinate with candidates and parties.

Democracy 21's legal team has been involved in litigation with the FEC over its failure to adopt lawful coordination regulations since 2003, representing former Representatives Christopher Shays and Marty Meehan.

The lawsuits have resulted in two federal district court decisions and two D.C. Circuit Court of Appeals decisions holding that the FEC coordination regulations are arbitrary, capricious, an abuse of discretion and contrary to law. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III Appeal*") aff'g in part 508 F. Supp. 2d 10 (D.D.C. 2007) ("*Shays III District*"); *Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I Appeal*") aff'g in part 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I District*").

And incredible as it may be, eight years after the FEC was instructed by Congress to adopt new coordination regulations, we still do not have lawful coordination regulations that comply with court decisions . Instead, regulations found illegal by the courts remain in effect.

After the D.C. Circuit invalidated the FEC's coordination rules for a second time in 2008, the Commission waited 16 months to even begin a new rulemaking in response.

Based on this extraordinary performance, or more accurately, this extraordinary failure to perform, there is no reason to believe that the FEC is going to adopt legal and effective coordination rules in its current rulemaking. And, therefore, we now face a fifth election in a row without lawful coordination rules in effect.

The *Citizens United* decision has made it all the more clear just how important it is to have lawful and effective coordination regulations to ensure that independent expenditures are actually independent. If we are to achieve this goal it is clear that Congress will have to enact new coordination provisions and bypass the Federal Election Commission which has failed for eight years now to adopt such rules.

Extend Government Contractor Pay to Play Rules

Congress should consider pay-to-play rules to see if any new legislation is possible in this area. Any such legislation would have to fall within the boundaries of the decision in *Citizens United*.

One pay-to-play rule that already exists is a ban on federal contractors making contributions in federal campaigns. This ban should be extended to cover independent expenditures by contractors as well.

Federal contractors – such as defense contractors – have a direct contractual relationship with the federal government and a heightened and direct financial interest in government contracting decisions. The government has a compelling interest in ensuring that federal contractors, including corporations, do not use the power of their treasuries to buy favoritism in the federal contracting process.

Congress should adopt this focused pay-to-play rule.

Other areas that Congress may want to explore include requirements for shareholders to approve corporate campaign-related expenditures and union members to approve labor union campaign-related expenditures, and tax laws, which Justice Stevens in his dissent specifically referenced as an area that could be available for new rules.

In the longer term, it is essential for Congress to enact fundamental campaign finance reforms. These reforms include fixing the presidential public financing system, establishing a new system of public financing for congressional races and replacing the failed Federal Election Commission with a new, effective campaign finance enforcement body.

The Internet provides the opportunity to revolutionize the way we finance campaigns. By combining breakthroughs in Internet small donor fundraising with public matching funds, we can dramatically increase the role and importance of smaller donors in financing presidential and congressional races and provide major incentives for small donors to contribute.

The Supreme Court's ruling in *Citizens United* was a radical and unjustified assault by five Justices against a longstanding cornerstone of Congress's effort to safeguard the integrity of federal elections and government decisions against "influence buying" corruption and the appearance of such corruption. Congress should do everything in its power to enact appropriate safeguards that will minimize the enormous damage done by the Court's ruling.

Democracy 21 Memorandum:

National Policy Banning Use of Corporate Wealth in Federal Campaigns Established in 1907

The question has been raised about whether the policy to ban corporate contributions and expenditures in federal elections dates back to 1947 or to 1907. It is clear from the history of the law that the policy to ban corporate expenditures originated in 1907.

In 1907, Congress enacted legislation to prohibit corporations from "directly or indirectly" making contributions in federal elections.

In 1947, Congress amended the statute to make clear that the "directly or indirectly" language in the 1907 statute had covered expenditures as well contributions.

The history shows why this is true.

In 1943, Congress extended the 1907 contribution ban on a temporary basis to cover labor unions as well as corporations. But the 1943 law was deemed ineffectual when reports surfaced that unions were circumventing the contribution restrictions in the 1944 elections by making expenditures to support their favored candidates. Thus, in 1947, Congress acted to reaffirm that the 1907 contribution ban had covered expenditures as well, and also to extend the ban to cover unions on a permanent basis.

Senator Robert Taft, the principal sponsor of the 1947 law, explained: "The previous law prohibited any contribution, direct or indirect, in connection with any election." He said that his legislation "only make[s] it clear that an expenditure...is the same as an indirect contribution, which, in [his] opinion, has always been unlawful." 93 CONG. REC. 6594 (1947) (statement of Sen. Taft)

A House Committee report at the time (H.R. REP. NO. 79-2739, at 40 (1946) stated that House Special Committee was "firmly convinced" that the "act prohibiting any corporation or labor organization from making any contribution" "was intended to prohibit such expenditures."

The Supreme Court recognized this point in the *CIO* case in 1948, when it said that the intent of the Taft-Hartley Act was not to "extend greatly the coverage" of existing law, but rather to restore the law to its original intent. 335 U.S. at 122.

Thus when Congress in 1907 decided to prevent the corrupting influence of direct or indirect corporate contributions in federal election by banning such contributions, it adopted a policy at that time to keep corporate wealth out of our elections, whether in the form of contributions or expenditures.

It was only because the 1907 prohibition was circumvented through direct expenditures in federal campaigns that Congress acted in 1947 to reaffirm and make clear that expenditures were included in the scope of the original 1907 ban.

Democracy 21 Memorandum:

Citizen United Decision Opens Loophole for Foreign Interests to Participate in Federal Elections through Domestic-Controlled Corporations

In his State of the Union address, President Obama called on Congress to enact legislation to correct the problems caused by the Supreme Court's recent decision in *Citizens United v. FEC*. The President said that the decision "reversed a century of law to open the floodgates for special interests - including foreign corporations - to spend without limit in our elections."

The policy to ban corporations from using their corporate wealth to influence federal elections, whether by making contributions or expenditures, does date back to 1907.

According to press reports, Supreme Court Justice Samuel Alito, who was present at the State of the Union address, shook his head and mouthed "Not true" in response to the President's statement about spending by foreign corporations.

In contrast with Justice Alito's reported reaction, many others have expressed the same concern as the President - that the Court's action in striking down the longstanding ban on corporate expenditures has opened the door to foreign interests participating in federal campaigns.

Some have argued that this will not happen because there remains a separate federal law that prohibits contributions and expenditures to be made by any "foreign national" in connection with any Federal, State or local election. The Court in *Citizens United* did not review this separate law - section 441e - and it remains in effect.

Section 441e prohibits contributions or expenditures by any "foreign national" - which is defined to include any corporation "organized under the laws of or having its principal place of business in a foreign corporation."

Thus, a corporation organized in Germany, or with its headquarters in China, remains subject to a ban on spending in U.S. elections. But there are domestic corporations - those organized under state law in the United States - which are and can be controlled by foreign interests.

Those kinds of corporations - domestic corporations owned by or controlled by foreign governments, foreign corporations or foreign individuals - are not in any way prevented by section 441e from spending corporate treasury funds to influence U.S. elections.

Prior to the *Citizens United* decision, these corporations were prevented from spending their funds on expenditures to influence federal campaigns by the general prohibition on corporate campaign spending. But now that that prohibition has been struck down, these foreign-controlled domestic companies are free to spend their treasury funds directly to influence U.S. elections.

Thus, there is no statutory prohibition against foreign-controlled domestic corporations from making expenditures to influence federal elections, following the *Citizens United* decision.

The Federal Election Commission has a regulation in this area, but it is inadequate and does not provide effective protection for the public against foreign involvement in federal elections.

The FEC regulation prohibits any foreign national from directing, controlling or directly or indirectly participating in "the decision-making process" of any person, including a domestic corporation, with regard to that person's "election-related activities," including any decisions about making expenditures.

The regulation does not prevent foreign owners from making their views known to their American domestic subsidiaries about the governmental and political interests of the controlling foreign entity; it just prevents them from directly or indirectly participating in the formal "decision-making process."

Those who manage the domestic subsidiaries, furthermore, can be expected to know the governmental and political interests and needs of their foreign owners, and to be responsive to the needs of their owners, even absent any participation by the foreign owners in the formal "decision-making" process regarding expenditures in federal elections.

In other words, the existing FEC regulation is an inadequate and ineffective safeguard, by itself, to prevent foreign nationals from exerting influence on U.S. elections through the use of election-related expenditures made by domestic corporations which they own or control.

Thus, following the Supreme Court's invalidation of the ban on corporate expenditures, section 441e does not address at all the problem of expenditures made by domestic subsidiaries of foreign companies or domestic corporations controlled by foreign nationals, and there is no statutory prohibition on foreign nationals being directly involved in expenditure decisions made by foreign owned domestic corporations.

The only restriction here is an ineffective FEC regulation administered by an agency that is widely recognized as an abject failure in carrying out its responsibilities to enforce the nation's campaign finance laws.

Congress should move quickly to address this problem by enacting a statute to prevent foreign-owned or controlled domestic corporations from making expenditures in federal campaigns.

EXECUTIVE SUMMARY

Testimony of Professor Heather K. Gerken

J. Skelly Wright Professor of Law

Yale Law School

Submitted to the United States Senate Committee on Rules and Administration

February 2, 2010

While the Supreme Court's decision in *Citizens United v. FEC* cut back on Congress's power to regulate campaign finance, several regulatory paths remain open. This submission discusses three avenues for congressional action:

First, Congress may strengthen disclaimer and disclosure rules for corporations' independent expenditures. This strategy stands on the strongest constitutional footing. Congress's power to regulate here is well established, and the Court believes such regulations promote rather than undermine First Amendment values.

Second, Congress may take steps to ensure that shareholders exert meaningful control over corporate spending. Such regulations will be subject to rigorous constitutional scrutiny, as they raise both First Amendment and federalism concerns. They must be designed to empower shareholders, not to suppress corporate speech; they must be appropriately tailored; and Congress must build a record establishing the effects of corporate political spending on interstate commerce in order to justify entering an area traditionally, but not exclusively, regulated by the states.

Finally, Congress may take steps to protect U.S. elections from foreign influence. While the Court has provided no guidance as to the constitutionality of this approach, constitutional tradition suggests that the Court will allow Congress to regulate provided that the law is appropriately tailored and supported by adequate factual findings.

Testimony of Professor Heather K. Gerken

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Submitted to the United States Senate Committee on Rules and Administration

February 2, 2010

Chairman Schumer, Senator Bennett, and distinguished members of this committee:

My name is Heather Gerken. I am the J. Skelly Wright Professor of Law at Yale Law School. I teach and write in the area of election law and constitutional law. I am honored to have the opportunity to testify before you today and would ask that my written testimony be entered into the record.

Introduction

During the last few years, the United States Supreme Court has gradually dismantled key campaign-finance provisions that were designed to protect our democratic system from the damaging effects of money and undue influence. Two weeks ago, the Supreme Court went so far as to jettison its own precedent on independent corporate expenditures in *Citizens United v. FEC*. In striking down the federal ban on independent expenditures funded from a corporation's general treasury, the Court overruled two of its decisions: *Austin v. Michigan Chamber of Commerce*, decided in 1990, and portions of *McConnell v. FEC*, decided a scant 7 years ago. It also suggested new limits on legislative power in this area by embracing a narrow conception of corruption.[1]

While the Supreme Court's decision cuts back on Congress's power to regulate campaign finance, several regulatory paths remain open. I will discuss three avenues for congressional action. First, Congress may strengthen disclaimer and disclosure rules for corporations' independent expenditures. This strategy stands on the strongest constitutional footing. Congress's power to regulate here is well established, and the Court believes such regulations promote rather than undermine First Amendment values.

[1] Heather K. Gerken, "The Real Problem with *Citizens United*," *The American Prospect Online* (Jan. 22, 2011).

Second, Congress may take steps to ensure that shareholders exert meaningful control over corporate spending. Such regulations will be subject to rigorous constitutional scrutiny, as they raise both First Amendment and federalism concerns. They must be designed to empower shareholders, not to suppress corporate speech; they must be appropriately tailored; and Congress must build a record establishing the effects of corporate political spending on interstate commerce in order to justify entering an area traditionally, but not exclusively, regulated by the states.

Finally, Congress may take steps to protect U.S. elections from foreign influence. While the Court has provided no guidance as to the constitutionality of this approach, constitutional tradition suggests that the Court will allow Congress to regulate provided that the law is appropriately tailored and supported by adequate factual findings.

I. Disclosure and Disclaimer Requirements.

There was only one issue on which the Court achieved near unanimity in *Citizens United*: transparency matters. Democratic debate works best when voters have information about the source of the political messages they receive, and Congress may take steps to provide that information. *Citizens United v. FEC*, slip. op at 55 (U.S. Sup. Ct., Jan. 21, 2009). Indeed, *Citizens United* offered a ringing endorsement of the role that disclaimer and disclosure rules can play in a healthy democracy. So enthusiastic was the majority about transparency that it went so far as to propose a new model of campaign finance, one that "pairs corporate independent expenditures with effective disclosure" so that "shareholders can determine whether their corporation's political speech advances the corporation's interest" and "citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." Slip op. at 55 (citations omitted).

Background. *Disclaimer rules* generally require the sponsor of the political message to be clearly identified within the message itself. A well known example is the "stand by your ad" rule created by the Bipartisan Campaign Reform Act of 2002 (BCRA), which requires a candidate running a television ad to appear on camera and say that she/he approves of the advertisement. *Disclosure rules* require those who fund electioneering to disclose their identity and the amount they spent. According to campaign-finance expert Richard Briffault, disclosure rules in the United States date back more than 100 years.[2] Further, "disclosure appears to be the

[2] Richard Briffault, "Campaign Finance 2.0," at 1 (unpublished paper, January 29, 2010) (on file with the author).

most widely adopted form of campaign finance regulation in democracies around the world . . . and is probably the most successful element of our campaign finance system."[3]

The Court's decision. Plaintiff Citizens United challenged the constitutionality of both types of requirements. It challenged a federal disclaimer requirement (that a televised electioneering communication identify its funder) and a federal disclosure requirement (requiring certain disclosures from those who spend more than $10,000 on electioneering communication during a calendar year). *Citizens United*, slip op. at 52 (discussing challenge to BCRA §§ 201 & 311).

The Justices in the majority and those who joined Justice Stevens' dissent[4] agreed that while disclaimer and disclosure rules place some burdens on corporate speech, they "help citizens 'make informed choices in the political marketplace,'" *Citizens United*, slip op. at 52 (quoting *McConnell v. FEC)*, and thus represent a constitutional alternative to the regulations the Court struck down in *Citizens United*, *id.* at 53. The Court also reaffirmed its holding in *McConnell v. FEC* that Congress may take steps to prevent groups from "running election-related advertisements 'while hiding behind dubious and misleading names.'" *Id.* at 51. Indeed, the Court even rebuffed Citizens United's attempt to limit disclosure requirements to speech that is the functional equivalent of express advocacy, noting that "the public has an interest in knowing who is speaking about a candidate shortly before an election." Slip op. at 54. As the Court observed, disclosure requirements are constitutional even when Congress lacks the power to ban the activity itself. Slip op. at 54 (discussing disclosure requirements for lobbying).

The Court also signaled its willingness to accept the type of "rapid and informative" disclosures made possible by the Internet. Indeed, it encouraged reliance on the Internet to guarantee the "prompt disclosure of expenditures" to "provide shareholders and citizens with the information they need to hold corporations and elected officials accountable for their positions and supporters." Slip op. at 55. Similarly, in *McConnell* the Court emphasized that "given the relatively short timeframes in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant." *McConnell*, 540 U.S. at 200.

Policy implications. For disclosure and disclaimer requirements to be effective, they must be timely and accessible. Information disclosed after the election and giant data dumps do little to help citizens or shareholders. Moreover, there may be at some point a limit to the efficacy of disclosure rules; if too much information is disclosed, it becomes difficult for the

[3] *Id.* at 1-2.

[4] Justice Thomas wrote a solitary dissent to this portion of the Court's opinion.

media, advocacy groups, and citizens to find an effective way to sort the wheat from the chaff.[5] This may counsel in favor of raising the threshold limits for disclosure, which began fairly low and have not been indexed to inflation,[6] or creating a disclaimer rule identifying the top funders of an advertisement, as with the Washington rule discussed below. Finally, Congress may wish to consider how to balance citizens' privacy interests against their interest in obtaining information about political spending, something that may again favor raising disclosure thresholds.[7]

Disclosure and disclaimer requirements will fail if they are easy to evade. One common method of evasion is for corporations to hide behind vaguely named shell organizations to shield their identity. Another common evasion strategy is for corporations to give money to a multipurpose organization (one that engages in political and nonpolitical activities) without specifying whether the money is specifically designated for political activities. In some instances, the corporation knows that the money will be used for electioneering but the donation nonetheless falls outside of existing disclosure requirements as they have been interpreted by the Federal Election Commission.

Here Congress might look to state sources for guidance in dealing with these sources of evasion. Washington State, for instance, has addressed the first type of problem. It prevents corporations from using vaguely named fronts to shield their identity by requiring disclosure of the sponsor or the "top five contributors" of a political advertisement within the advertisement itself. Wash. Rev. Code § 42.17.510. If a group of companies wanted to run a radio advertisement, for instance, the advertisement must clearly state that the ad was "paid for" by those companies. *Id.* Although the provision has not to my knowledge been subjected to constitutional challenge, it has been cited with approval by Justice Scalia in dissent.

Similarly, California has offered a solution to the second kind of problem – efforts to evade disclosure rules by failing to earmark donations to multipurpose organizations. *See* California Gov't Code §84211; 2 CCR § 18215(b)(1). The regulation identifies the conditions under which a non-earmarked donation to a multipurpose organization will be deemed a form of political contribution for disclosure purposes. That rule was recently deemed constitutional by

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[5] Richard Briffault raises an important set of questions about the purposes and efficacy of disclosure in Briffault, *supra* note 2.

[6] *Id.* at 65 (noting that the $200 federal threshold for disclosure would now be $585 if it were indexed for inflation and that the *first* federal disclosure requirement – the $100 threshold established by the Publicity Act of 1910 – would now be $2150 if it were indexed for inflation).

[7] *Id.*

the Ninth Circuit Court of Appeals. *California Pro-Life Council, Inc. v. Randolph,* 507 F.3d 1172 (2007).

Alternatively, Congress might require disclosure of funds received by multipurpose and other intermediary groups in response to solicitations indicating that the funds received would be spent on electioneering. Imagine, for instance, that an intermediary group asks a corporation for money to run a political ad, and the corporation immediately responds with a large donation. A solicitation-triggered disclosure rule would address this scenario.[8]

Constitutional considerations. Of all the types of reform discussed here, disclosure and disclaimer rules stand on the firmest constitutional footing. Congress's power to adopt such rules is well established. *Burroughs v. United States*, 290 U.S. 435 (1934) (upholding congressional power to create disclosure rules for federal elections and take other steps to "preserve the departments and institutions of the general government from impairment."). Moreover, while the First Amendment constrains what Congress can do in this arena, the Court believes that transparency rules *promote* First Amendment values:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United, slip op. at 55

Indeed, if anything, *Citizens United* strengthened the constitutional case for disclaimer and disclosure rules. It not only confirmed that citizens have an important interest in knowing who funds campaign speech, but identified a new justification for such rules in the context of corporate speech: helping shareholders hold management accountable. Further, *Citizens United* eliminated any lingering doubt over the constitutionality of disclaimer and disclosure rules that existed in the wake of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

For disclosure requirements to be constitutional, there must be a "'substantial relation' between the disclosure requirement and a 'sufficiently important governmental interest.'" Slip op. at 51 (quoting *Buckley v. Valeo*). Congress may impose disclosure requirements for many reasons, including "providing the electorate with information, deterring actual corruption and

[8] The FEC enacted a regulation that would treat such funds as "contributions," but the regulation was recently invalidated by the D.C. Circuit for reasons unrelated to disclosure. *See Emily's List v. FEC*, 551 F.3d 1 (D.C. Cir. 2009) (invalidating 11 C.F.R. § 100.57 because "donations subject to such solicitations are subject to a $5000 cap" and because "[t]his may require a non-profit to decline or return funds it receives for purely state and local elections").

avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196; *see also Citizens United*, slip op. at 53-55. As noted above, *Citizens United* has added one more justification to that list: providing shareholders information on corporate spending. Slip op. at 55. In pursuing these goals, however, Congress must be sure its regulations are appropriately tailored and do not unduly burden corporate speech. Imagine, for instance, a requirement that 9 seconds of a 10-second advertisement be taken up with a disclaimer. The Court would likely invalidate such a rule as insufficiently tailored.

Finally, while the Court has routinely approved disclosure and disclaimer requirements, it has warned that disclosure rules would be unconstitutional as applied to a specific organization "if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United,* slip op. at 54. Indeed, the roots of the Court's doctrinal test for disclosure rules date back to *NAACP v. Alabama*, 357 U.S. 449 (1958), which involved just this sort of harassment.

It is not clear that Congress needs to write this exception directly into the legislation, however, as this is a matter that can be addressed through administrative guidelines or at the initiative of the affected organizations, which can bring as-applied challenges where such a threat exists. *Citizens United*, slip op. at 54-55. Nonetheless, Congress should take this set of concerns into account in tailoring its legislation. Now that the Internet makes it easy to obtain information about the political spending of even small donors, Congress should be sure that the thresholds it chooses comport with the informational goals it is pursuing. For example, Congress may wish to consider whether the disclosure of small donations has sufficient informational value to justify public disclosure given the privacy interests that exist on the other side.[9]

My analysis here comes with one caveat. The Supreme Court has recently granted certiorari in a case called *Doe v. Reed*, where citizens who signed a petition in support of a controversial referendum proposal sought to prevent the public release of the list of signatories because they feared retaliation and harassment. Although *Doe* is not a campaign finance case, Justice Thomas in his dissent to *Citizens United* drew explicit parallels between the two types of cases, and I would expect the Court's opinion in *Doe* to provide additional guidance about the constitutional relationship between public disclosure and political activities. If the Court does so, it may raise additional questions about disclosure of political spending, particularly with regard to small donors. This again may suggest that Congress should think seriously about the disclosure thresholds it creates.

[9] For further development of this argument, *see* Briffault, *supra* note 2.

II. Protecting Shareholders

One of the main reasons that the Court enthusiastically endorsed disclaimer and disclosure rules was protecting corporate shareholders. The Court recognized that corporate managers may be tempted to fund their pet political projects or simply waste corporate money on unnecessary political expenditures.[10] *Citizens United* thus identified another potential path for reform: regulation that protects shareholders from abuse.

A law to protect shareholders in this area raises more substantial constitutional challenges than disclosure rules for two reasons. First, the Court is likely to look askance at any statute that seems to target only political speech or particular forms of electioneering, as the Court may infer that Congress is simply using shareholder democracy as an excuse to suppress speech. Second, states have typically been the primary – but certainly not the exclusive – source of corporate regulation in the United States. Because this regulation would fall naturally under Congress's Commerce Clause powers, Congress should provide an adequate factual record showing the effect of corporate political spending on interstate commerce.

Policy implications. There is, nonetheless, room for Congress to act. As the debate over executive compensation has made clear, shareholders sometimes lack a dependable means of controlling executive decisions. Campaign expenditures may thus fall into the same category as executive pay or charitable giving.[11] In each instance, there is a potential principal-agent problem if it is too easy for executives to use corporate funds to further their personal interests rather than the interests of shareholders. While state-law actions in theory should correct this problem, they have often proved to be ineffective.[12]

If Congress concludes that shareholders require additional protections, it might demand that companies provide accessible, real-time public accounting of any money spent on political issues to allow shareholders to monitor the firm's spending. A stronger response would be to require management to obtain the approval of a majority of shareholders before spending on political races.

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[10] For a survey of the extant research, *see* Ciara Torres-Spelliscy, "Corporate Campaign Spending: Giving Shareholders a Voice" (Brennan Center for Justice, 2010). For a historical analysis showing that federal efforts to regulate corporate expenditures have long been rooted in a desire to protect shareholders, *see* Adam Winkler, "'Other People's Money'": Corporations, Agency Costs, and Campaign Finance Laws," 92 *Georgetown L. J.* 871 (2004).

[11] *See, e.g.,* Victor Brudney & Allen Ferrell, "Corporate Charitable Giving," 69 *U. Chi. L. Rev.* 1191 (2002).

[12] *See* Torres-Spelliscy, *supra* note 10.

Constitutional considerations. While I will leave the details of such provisions to an expert in corporate law, let me emphasize the constitutional constraints that the Court is likely to impose on such efforts.

The First Amendment: It is imperative that Congress keep in mind the real source of the problem. The problem Congress would be addressing is not a weakness in American democracy, but a weakness in shareholder democracy. The only thing that shareholder democracy has to do with federal elections is this: *Citizens United* vindicated the right of corporations to speak, and shareholders *are* the corporation. No one, for instance, would argue that managers of for-profit companies enjoy a free-standing First Amendment right vis-à-vis their shareholders[13]; management works for the shareholders. Any regulation in this area, then, must be directed toward vindicating the interests of shareholders to ensure that the speech paid for by the corporation is genuinely what the shareholders intend.

In order to make clear that Congress is not using shareholder protection as an excuse to deter political expenditures – something that would surely result in more rigorous constitutional scrutiny and likely invalidation –Congress should address this issue comprehensively. For instance, *Citizens United* explicitly warned Congress not to focus only on "corporate speech in only certain media or within 30 to 60 days before an election," slip op. at 46, lest the Court infer that Congress's real goal is to deter political speech rather than protect shareholders.

In my view, Congress should do more to ensure that its legislation withstands constitutional scrutiny. Any regulation should be part of a broader package of reforms that protect shareholders from comparable principal-agent threats. As noted above, executive pay and corporate charitable giving may fit into this category. Alternatively, Congress might consider this issue when it takes up Senator Schumer's and Senator Cantwell's "shareholder bill of rights."

While congressional regulation must be aimed at protecting shareholders, not deterring corporate speech, Congress must nonetheless pay attention to the fact that its regulations will shape the decision-making process used by companies considering whether to engage in political spending. First Amendment concerns, then, must be taken into account. For instance, Congress should tailor its shareholder protection provisions by exempting corporations where the shareholder problem does not exist. The Supreme Court, for instance, has singled out "nonprofits and for-profit corporations with only single shareholders" as obvious candidates for exemption. Slip op. at 46. Congress should similarly consider whether media corporations raise unique First Amendment concerns that require a different form of regulation, perhaps applying the media exemption typically used in such instances. Finally, Congress must ensure that it does not impose such cumbersome requirements that corporations cannot act expeditiously to

[13] Here I set aside unusual cases, like for-profit media companies or whistle-blower statutes.

influence a political debate. For instance, Congress should not require corporate managers to go through a full-blown voting process every time they wish to purchase airtime or run an advertisement.

Congress must establish an adequate evidentiary record to support any regulation that relates to political speech. That record should clearly establish that a genuine principal-agent problem exists with regard to political expenditures.

Finally, Congress must convince the Court that it is not using a blunderbuss to kill a flea. It is essential that Congress justify not just the need for protection, but the scope of the regulation it enacts, lest the Court suspect that Congress's real purpose is to suppress corporate speech.

Federalism. An adequate evidentiary record is necessary for a separate and independent constitutional reason. Regulation in this area has traditionally been left largely, but not entirely, to the states. For this reason, Congress must also be attentive to federalism concerns. Because this regulation would fall naturally under Congress's Commerce Clause powers, the record must clearly establish that independent corporate expenditures have a substantial effect on interstate commerce. *See, e.g., Lopez v. United States*, 514 U.S. 549 (1995); *Gonzalez v. Raich*, 545 U.S. 1 (2005). I would not expect Congress to encounter any difficulty in satisfying this standard.

III. Protecting U.S. Elections From the Influence of Foreign Nationals.

A final consideration for Congress is whether *Citizens United* makes it possible for foreign nationals[14] to use independent corporate expenditures to influence federal, state, or local

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[14] The FEC defines a foreign national as either "an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence," 11 C.F.R. § 110.20(a)(3)(ii), or a "foreign principal," which is defined under the Foreign Agents Registration Act as follows:

> (1) a government of a foreign country and a foreign political party;
>
> (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
>
> (3) a 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." 22 U.S.C. § 611(b).

11 C.F.R. § 110.20(a)(3)(i).

elections. The United States has sought to shield its elections from foreign influence since 1966, after Senator Fulbright conducted hearings that revealed efforts by foreign nationals to influence U.S. policy on such issues as import quotas.[15] Through a series of amendments to the Foreign Agents Registration Act and the Federal Election Campaign Act, Congress prohibited foreign nationals from directly contributing to campaigns, making soft money contributions to political parties, and making independent expenditures on electioneering. 22 U.S.C. §441(e). The FEC has issued regulations implementing this provision. 11 C.F.R. §110.20.

Policy implications. Congress may wish to ensure that foreign nationals do not use independent corporate expenditures to bypass existing prohibitions on foreign participation in U.S. elections. It might, for instance, use disclosure and disclaimer rules to prevent undue foreign influence. Or it might codify existing FEC regulations on the subject or place additional restrictions on companies controlled by foreign nationals.

Constitutional implications. Efforts to prevent foreign nationals from influencing U.S. elections are not without constitutional doubt. That is largely because there is no direct precedent on the question. To my knowledge, no federal court has issued a written opinion addressing the constitutionality of Section 441(3). In *Citizens United*, the majority explicitly reserved the question, slip op. at 46-47, although Justices Stevens' dissent suggested that such restrictions would pass constitutional muster. Slip op. at 29 (Stevens, J., dissenting). As a result of this judicial silence, we have relatively little guidance as to whether preventing foreign influence on elections is a legitimate state interest or what level of scrutiny would be used to evaluate such regulations.

While it is possible that the Court will hold that companies controlled by foreign nationals – like domestic firms – enjoy a robust First Amendment right to engage in independent expenditures, is it more likely that the Court will find that protecting U.S. elections from the influence of foreign nationals is a legitimate state interest, sufficient to justify appropriately tailored regulations. The Court has long licensed distinctions between citizens and noncitizens in constitutional law as long as the government offers an adequate justification for the distinction. Moreover, the distinction between citizens and noncitizens is firmly established in the elections arena. Foreign nationals, for instance, are prohibited from voting in federal, state, and most local elections, and that prohibition has never raised a judicial eyebrow.

Nonetheless, any effort to prevent foreign nationals from using independent corporate expenditures to influence U.S. elections must be properly tailored. First, as per the discussion above, disclosure and disclaimer rules are likely to pass constitutional muster provided they do not impose undue burden on corporations. For instance, Congress might require corporations

[15] *See* Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 Am. J. Int'l L. 1, 21-25 (1989).

funding independent expenditures to disclose what percentage of its shares are owned by foreign nationals. (Here I will note one potential source of constitutional concern: corporations often find it difficult to identify their own shareholders. Any congressional regulation must take into account what sort of disclosure can be reasonably expected of corporations lest the Court find that Congress is trying to chill speech. It may be necessary to target certain regulations at foreign shareholders rather than corporations as such.)

Second, while the *Citizens United* majority refused to say what type of regulation would satisfy the Constitution, it did indicate that any regulation aimed at foreign nationals should be appropriately tailored. In its brief discussion of the issue, the Court noted that an outright ban on all corporate independent expenditures could not be justified as a protection against foreign influence because it was not "limited to corporations or associations that were created in foreign countries or funded predominantly by foreign shareholders." Slip op. at 47.

The Court's intention is clear: it does not want to license too broad a ban on independent corporate expenditures when there is no reason to think that foreign nationals exercise control over the decision in question. Imagine, for instance, a company where only one percent of the shareholders were foreign nationals. Any rule that banned such a company from engaging in independent political expenditures is unlikely to pass constitutional muster.

The question, then, is whether the Court would accept other indicia of foreign control. For instance, Congress might be able to show that management by foreign nationals over a corporation posed a sufficient risk of foreign influence to justify regulation.

A more difficult question goes to what percentage of a company's shares foreign nationals must control for there to be a legitimate risk of undue foreign influence. The Court used the word "predominantly," which seems to indicate that foreign nationals must own at least 50% of company's shares, perhaps substantially more than 50%.

Given that this statement is dictum and made without the benefit of any congressional findings on the subject, I believe that the Court would be open to revising its seat-of-the-pants example if presented with adequate evidence. For instance, imagine that the Chinese or Russian government controlled 49% of the shares in a company. Surely the Court would entertain the possibility that a 49% voting bloc could exercise control, especially given that not all shareholders vote in any given election.

Much depends, then, on the evidence Congress amasses. If Congress can provide sufficiently convincing evidence to show that shareholders can exercise controlling influence even when they control less than 50% of the company's shares, the Court should accept that finding. As I am not an expert in corporate law, I cannot testify as to the correct number. For these purposes, I will simply note several constitutional considerations that might play a role in the Court's assessment of such a bill.

First, the Court may deem it relevant whether the shares in question are owned by a single entity or widely dispersed among a variety of owners.

Second, Congress should keep in mind the Court's concern for simplicity in this context. The Court plainly signaled its worry that complex regulatory standards in this area chill corporate speech because they make it hard to determine in advance whether a company is covered by a given rule. *Citizens United*, slip op. at 18-19. Congress may thus face a regulatory challenge in addressing the question of foreign control. Corporate law experts may, for instance, believe that the best way to determine what constitutes a controlling share is to take into consideration a variety of contextual factors. But the Court is likely to prefer a bright-line rule to a flexible standard in this context, something that would push Congress toward a clear-cut ceiling, like the one Congress has chosen in the context of the air cargo industry. There, Congress's worries about foreign ownership led it to forbid foreign nationals from owning more than a 25% interest in an air cargo company.[16] Congress might similarly look to its efforts to prevent foreign control of the U.S media in the Communications Act, which prohibits foreign governments, individuals, and corporations from owning more than 20% of the stock of a broadcast, common carrier, or aeronautical radio station licensee and includes a similar prohibition to prevent foreign influence through corporate subsidiaries.[17]

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[16] 49 U.S.C. § 40102(a)(15).

[17] The Communications Act provides:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--
>
> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government;
>
> (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
>
> (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C § 310(b). This provision was upheld against an equal protection challenge in *Moving Phones Partnership, LLP v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993).

Whatever standard Congress chooses, it must be backed by strong empirical evidence and expert testimony in order to withstand the Court's scrutiny. While the Supreme Court generally defers to Congress on issues that relate to foreign policy or the protection of American interests, here the First Amendment interests at stake will likely lead the Court to scrutinize Congress's actions more closely.

Conclusion

Citizens United left a number of regulatory paths open to Congress. Disclosure rules stand on the firmest constitutional footing, but other strategies – including regulations to protect shareholders and efforts to prevent foreign nationals from influencing U.S. elections – are likely to withstand constitutional scrutiny if the regulations are properly tailored and backed by a well developed legislative record.

Biographical Information:

Heather K. Gerken, J. Skelly Wright Professor of Law, Yale Law School

Professor Gerken specializes in election law and constitutional law. She has published numerous articles on these subjects in the *Harvard Law Review*, the *Stanford Law Review*, the *Yale Law Journal*, the *Columbia Law Review*, *Roll Call*, *Legal Affairs*, *Legal Times*, *The New Republic*, and elsewhere. She has served as a commentator on election controversies for a number of media outlets, including *The New York Times*, *The New Yorker*, the *L.A. Times*, the *Chicago Tribune*, the *Boston Globe*, NPR, the Lehrer News Hour, CNN, MSNBC, and NBC News. She has won the teaching awards at Harvard Law School and Yale Law School. In 2007 and 2008, she served as a senior adviser to the national election protection team for Obama for America.

Professor Gerken's proposal that Congress establish a "Democracy Index" – a national ranking system of state election performance – has been incorporated into separate bills by Senator Hillary Clinton, Senator Barack Obama, and Congressman Israel. The proposal has also been the subject of a conference sponsored by the Pew Foundation, the Joyce Foundation, and AEI-Brookings. Mayor Bloomberg announced in September that New York City would create the nation's first Democracy Index. The proposal is the subject of her new book, *The Democracy Index: Why Our Election System is Failing and How to Fix It*.

Professor Gerken's research centers on questions of applied democratic theory, including the role groups play in a democratic system, the translation of institutional design choices into manageable legal doctrine, and the values associated with minority-dominated institutions. Her most recent scholarship explores questions of election reform, diversity, and dissent.

MEMORANDUM February 1, 2010

To: Honorable Charles Schumer

From: R. Sam Garrett, Analyst in American National Government, x76443
Kevin Coleman, Analyst in Elections, x77878

Subject: **2008 Campaign Finance Data**

This memorandum responds to your request for an overview of spending in the 2008 federal elections and an examination of readily available data concerning state elections. As requested, the memorandum briefly comments on possible implications for political spending following the January 21, 2010, Supreme Court's ruling in *Citizens United v. Federal Election Commission*.[1]

As we have discussed, reliable, comprehensive data on how *Citizens United* will affect campaign spending in the United States will likely be unavailable until at least the conclusion of the 2010 election cycle. Also as we have discussed, various approaches could be taken to exploring potential effects on campaign spending. Using different data or methods compared with those employed here would yield alternative findings. Finally, please note that this memorandum has been produced in response to your time-sensitive deadline; CRS can provide additional research assistance as your future needs warrant.

Overview of Spending in the 2008 Federal Elections

As **Table 1** shows, congressional campaigns, parties, and political action committees (PACs) spent almost $3 billion during the 2008 election cycle.[2] It is important to note, however, that this figure does not include all spending that might have affected the 2008 election cycle.[3] Importantly, the $3 billion figure is

[1] See CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker, for a discussion of legal issues.

[2] CRS obtained data on spending in the 2008 federal elections from the Federal Election Commission (FEC).

[3] Data provided by the FEC reflect approximately $6.03 billion in total federal spending when including disbursements by parties, political action committees (PACs), convention committees, independent expenditures, and other communications costs. Importantly, however, the $6.03 billion likely overstates total spending because the FEC data "double count" expenditures. For example, a PAC contribution that a Senate campaign subsequently spent would be reported both in the total PAC disbursements and in total Senate campaign disbursements. The data in **Table 1** also presumably include some expenditures twice (e.g., contributions from a House campaign to a Senate campaign), but the impact of these transfers from one committee to another is likely to be far less than for transfers from parties and PACs to campaign committees.

both over-inclusive and under-inclusive because it does not include all spending that *might* be relevant for federal campaigns. This includes spending by parties and PACs. The data also do not include spending by Section 527 organizations, which typically do not report to the FEC but arguably affect the political environment surrounding campaigns.[4] Therefore, the $3 billion figure can be viewed as one component of the larger spending picture.

Table 1. Spending by Federal Candidate Campaign Committees, 2008

Political Committee Type	Total Disbursements in Millions of Dollars
Senate Campaigns	$433.7
House Campaigns	$941.5
Presidential Campaigns	$1,596.0
Total	$2,971.2

Source: CRS analysis of data provided by the Federal Election Commission.

Notes: The FEC data report all expenditures, meaning that some spending may overlap. Notes accompanying the text of this memorandum provide additional detail. Amounts are rounded.

Overview of Contributions in the 2008 State Elections

Examining state experiences with campaign finance might illustrate how different forms of regulation, such as the potential changes following *Citizens United*, affect political money. The states are also relevant because some states have less-regulated campaign finance environments that partially reflect what the federal regulatory structure might look like after the *Citizens United* decision is implemented.

Given your deadline, and as we have discussed, this memorandum relies on state-level data provided by the National Institute on Money in State Politics (NIMSP).[5] NIMSP identifies itself as "the only nonpartisan, nonprofit organization revealing the influence of campaign money on state-level elections and public policy in all 50 states."[6] The institute is a widely used source for scholarly and other research on state campaign financing issues, but CRS has not verified the data. As with the federal data discussed above, the state-level NIMSP data come with important caveats. Perhaps most notably for your interests,

[4] Estimates of Section 527 spending vary substantially by source and methodology. As CRS has noted elsewhere, two prominent sources, CQ MoneyLine and the Center for Responsive Politics, estimate that 527 spending relevant for the 2008 federal elections ranged from approximately $247.3 million to $310.0 million. See Table 3 in CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by R. Sam Garrett. For additional discussion of 527s, see, for example, CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder.

[5] The data are taken from Appendix A in Denise Roth Barber, *Citizens United v. Federal Election Commission: The Impacts — and Lack Thereof — on State Campaign Finance Law*, National Institute on Money in State Politics, online publication, Helena, MT, January 22, 2010, http://www.followthemoney.org/press/ReportView.phtml?r=414. For Appendix A, see http://www.followthemoney.org/press/ReportView.phtml?r=414&ext=2.

[6] See the institute's mission statement at http://www.followthemoney.org/Institute/index.phtml.

NIMSP staff report that the institute does not separately track data on corporate express advocacy[7] because many states do not require specific disclosure of such spending.[8] Second, the NIMSP data are based on contributions rather than expenditures. The data also do not include all contributions in state elections, such as those from political parties, for example.

The NIMSP data can, however, be used to draw rough inferences about how various degrees of campaign finance regulation affect the allocation of political money in the states. Specifically, the NIMSP data divide states into three categories based on the institute's analysis of the state's type of campaign finance regulation: (1) states that ban corporate contributions; (2) states that allow unlimited corporate contributions; and (3) states that limit corporate contributions.[9] These three categories nonetheless offer insights into how different forms of campaign finance regulation—which *Citizens United* arguably addresses—have affected the states.

What do the data suggest about individual influence in elections versus influence by corporations, associations, PACs, or other groups? As **Table 2** and **Figure 1** show, in states that ban corporate contributions, more than twice as much money in political contributions came from individuals than from "non-individuals" ($303.0 million versus $144.2 million respectively). The "non-individual" category is not synonymous with corporate contributions, but, according to NIMSP, it may include contributions from corporations, corporate PACs, associations, and ideological groups. Conversely, non-individuals contributed almost twice as much as individuals ($110.4 million versus $61.7 million) in states that permitted unlimited corporate contributions. It is unclear why non-individuals contributed more in states that *limit* corporate contributions ($272.4 million from non-individuals versus $229.9 million from individuals).

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[7] Corporate express advocacy has emerged as one of the central areas of interest following *Citizens United* because the decision appears to permit corporations (and presumably unions) from using their corporations from funding such advertising—which explicitly calls for election or defeat of a clearly identified candidate—from their treasuries. Even before *Citizens United*, some states permitted corporate express advocacy, but the ads now appear to be permissible in federal elections, too. For additional discussion, see CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker.

[8] Telephone consultation between R. Sam Garrett and Denise Roth Barber, research director, National Institute on Money in State Politics, January 26, 2010. See also Linda King, *Indecent Disclosure: Public Access to Independent Expenditure Information at the State Level*, National Institute on Money in State Politics, Helena, MT, August 1, 2007, http://www.followthemoney.org/press/Reports/200708011.pdf.

[9] Despite *Citizens United*, the ban on corporate contributions in federal elections remains in effect.

Table 2. Contributions to Candidates in State Elections, By Category, 2008

Millions of Dollars

Type of Contributor	States That Ban Corporate Contributions (22)	States That Allow Unlimited Corporate Contributions (6)	States That Limit Corporate Contributions (22)
Non-Individual	$144.2	$110.4[a]	$272.4
Labor	$31.9	$21.4	$46.4
Individual	$303.0	$61.7	$229.9

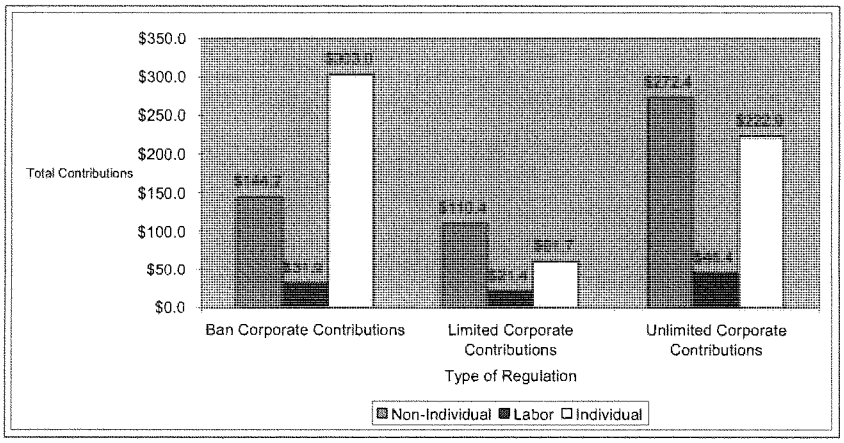
Source: The data are derived from state summaries reported by the National Institute on Money in State Politics, at http://www.followthemoney.org/press/ReportView.phtml?r=414&ext=2#tableid2.

Notes: Non-individual contributors may include corporations, corporate PACs, associations, and ideological groups. Amounts are rounded.

a. For this cell in the table, four states are relevant: Illinois, Missouri, Utah, and Virginia. The NIMSP data do not include non-individual contribution amounts for two states (New Mexico and Oregon) among the six that reportedly permit unlimited corporate contributions.

Figure 1. Contributions to Candidates in State Elections, By Category, 2008

Millions of Dollars



Source: CRS figure based on data derived from state summaries reported by the National Institute on Money in State Politics, at http://www.followthemoney.org/press/ReportView.phtml?r=414&ext=2#tableid2.

Notes: Non-individual contributors may include corporations, corporate PACs, associations, and ideological groups. Amounts are rounded.

Concluding Comments

The data presented above show that in 2008, non-individuals—including, but not limited to, corporations—in the states contributed generously to campaigns where they were allowed to do so. Non-individual contributions outpaced individual contributions in states that permitted corporate contributions. Those concerned about the impact from *Citizens United* might fear that non-individual giving in the states will translate into large amounts of corporate advertising praising or criticizing politicians at the federal level. Such an outcome is possible. Importantly, however, the contribution data discussed here might or might not be a reliable indicator of corporations' (or unions') willingness to engage in independent express advocacy in federal elections. It is possible that other factors could explain the differences between states that ban, limit, or do not restrict corporate contributions. Other research on state campaign finance could yield different interpretations.[10] As mentioned previously, the full effect of the *Citizens United* decision will likely be unclear until at least the conclusion of the 2010 elections.

We trust that this information will be helpful to the Committee and meets your needs. Feel free to contact us with any questions at rgarrett@crs.loc.gov or x76443 or kcoleman@crs.loc.gov or x77878.

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[10] For example, in a *Citizens United amicus* brief, the Center for Competitive Politics, which generally supports deregulation, argued that corporate and union independent expenditures "in the several states suggest that corporate and union participation in politics increases the depth of voter knowledge and, far from corrupting the political process, coincides with some of the best governed states in the nation." See page 14 of the brief at http://www.fec.gov/law/litigation/citizens_united_sc_08_ccp_supp_brief_amici.pdf.

Appendix A.

Janesville Gazette: Court decision opens floodgates for corporate money in campaigns

By Sen. Russ Feingold

Sunday, Jan. 31, 2010

In its ruling in the case of Citizens United v. FEC, the Supreme Court has undone protections against corporate power that stood for more than a century. This decision is a terrible mistake, which gives corporate money a breathtaking new role in federal campaigns.

To see corporations gaining this much power may feel like a new era in American politics, but in fact it's an old one. The Supreme Court has taken us back to the beginning of the 20th century, when Teddy Roosevelt battled the trusts, including the railroads, steel companies and oil companies.

Wisconsin's "Fighting Bob" La Follette refused to be intimidated by the trusts. In 1906, he urged the Senate to pass legislation reining in the power of the railroad monopolies, saying "At no time in the history of any nation has it been so difficult to withstand these forces as it is right here in America today. Their power is acknowledged in every community and manifest in every lawmaking body."

A year after La Follette spoke those words, Congress passed the Tillman Act to keep corporate money from overwhelming our democratic system. Over the next 100 years, further reforms were enacted to curb corporate influence over elections and respond to scandals such as Watergate or the auctioning of the Lincoln Bedroom to the highest bidder—and the Supreme Court consistently upheld them.

The Supreme Court's decision returns us to a legal framework that fostered a golden era of corporate influence. While the core of the McCain-Feingold law—the ban on unlimited "soft-money" contributions by corporations, unions and wealthy individuals directly to political parties—remains intact for now, the reasoning of the Supreme Court's decision undermines the very foundation of a host of laws enacted to strengthen our democracy and curb corruption in government.

The court's decision gives a green light to corporations to unleash their massive coffers on the political system. Oil companies, with virtually no harm to their balance sheets, can now try to "take out" members of Congress who don't toe their company line on energy policy. Foreign-owned companies—even those owned and controlled by foreign governments—are free to underwrite the candidates of their choice.

This new reality strengthens the grip that corporations already have on our democratic institutions. Time and again, the American people have seen their concerns ignored in favor of wealthy interests: in the approval of trade agreements that sent their businesses and jobs overseas, and the undoing of common-sense safeguards on financial companies that contributed to the worst financial crisis since the Great Depression, among many other decisions.

I will be working with my colleagues to try to restore the voice of the average citizen in elections. We must not stand by as corporations threaten to dominate our democratic process. In our democracy, it's the power of the voters—not the power of corporate wealth—that should decide our elections.

Sen. Russ Feingold, D-Wis., can be reached at 506 Hart Building, Washington, D.C. 20510-4904; phone (202) 224-5323; e-mail russell_feingold@feingold.senate.gov.

Washington Post
Who is helped, or hurt, by the Citizens United decision?

Sunday, January 24, 2010

SEN. RUSSELL FEINGOLD (D-WIS.)

Co-author of the McCain-Feingold campaign finance legislation

The Massachusetts election Tuesday was the last one conducted under rules that had been in place for over a century to protect the right of the people to choose their government free from enormous expenditures of corporate wealth. Next time voters want to send us a message at the ballot box, they may find their voices drowned out by wealthy corporations with their own special-interest agendas.

This Supreme Court decision takes us back a century to a legal framework that fostered a golden era of corporate influence. While the core of the McCain-Feingold law - the ban on unlimited "soft money" contributions by corporations, unions and wealthy individuals directly to the political parties - remains intact for now, the reasoning of this decision undermines the foundation of a host of laws enacted to strengthen our democracy and curb corruption in government. Indeed, the soft-money ban could very well be the next target of those who want to see our political system dominated by corporate influence.

This decision gives a green light to corporations to unleash their massive coffers on the political system. The profits of Fortune 500 companies in 2008 alone were 350 times the entire amount spent on the last presidential election.

Oil companies, with virtually no harm to their balance sheets, can now try to "take out" members of Congress who don't toe their company line on energy policy. Foreign-owned companies - even those owned and controlled by other governments - are free to underwrite the candidates of their choice.

Because of the scope of the Citizens United decision, it will take close examination to see what can be done to restore the voice of the average citizen in elections. We must not stand by as corporations threaten to dominate our democratic process. If the race in Massachusetts showed us anything, it's the power of voters. In our democracy, that power - not the power of corporate wealth - should decide our elections.

USA Today: High court opens the floodgates

By Russ Feingold

In its ruling in the case of *Citizens United v. FEC*, the Supreme Court unraveled campaign-finance laws that stood for more than a century. The court was originally presented with a relatively narrow legal issue in the case, but chose instead to consider a much broader question: whether to roll back laws that have limited the role of corporate money in federal elections since Theodore Roosevelt was president. Now the court has handed down its ruling, and made a terrible mistake in giving corporate money a breathtaking new role in federal campaigns.

It is important to note that the decision does not affect the ban on "soft money" contributions, which was the core provision in the Bipartisan Campaign Reform Act, also known as McCain-Feingold. That ban will continue to prevent corporate contributions to the political parties from corrupting the process. But the decision does significantly increase corporations' clout in campaigns.

For decades, corporations could only contribute to candidates and pay for political ads from funds collected from their administrative and executive employees and kept in special accounts called PACs. With the court's decision, corporations will now be able to dip into their huge general treasuries to pay for independent advertising. With their enormous resources, corporations can now vastly outspend the candidates and other outside parties in almost any race.

With the gates opened for a virtually unlimited amount of corporate money, I fear that our elections will become like NASCAR races — underwritten by companies. Only in this case, the corporate underwriters won't just be seeking publicity, they will be seeking laws and policies that the candidates have the power to provide.

During the 2008 election cycle, Fortune 500 companies alone had profits of $743 billion. By comparison, spending by candidates, outside groups, and political parties on the last presidential election totaled just over $2 billion. There's just no comparison; corporations and unions have the resources to effectively dominate federal campaigns.

Just six years ago, the state of campaign-finance law was quite different. When the Supreme Court ruled that the Bipartisan Campaign Finance Reform Act that Sen. John McCain and I championed was constitutional, it noted that the prohibition on corporations and unions dipping into their treasuries to influence campaigns was "firmly embedded in our law." Yet the court only a few years later has upended that prohibition.

A majority of the court ignored several time-honored principles that have served for the past two centuries to preserve the public's respect for and acceptance of its decisions. One is the concept

of "judicial restraint," the idea that a court should decide a case on constitutional grounds only if absolutely necessary, and should rule as narrowly as possible. Here, the court did just the opposite — decided the constitutionality of all restrictions on corporate spending in connection with elections in an obscure case in which many far more narrow rulings were possible.

The court also ignored *stare decisis*, the historic respect for precedent, which Chief Justice John Roberts termed "judicial modesty" during his 2005 confirmation hearing. It's hard to imagine a bigger blow to *stare decisis* than the court's decision to strike down laws in over 20 states and a federal law that has been the cornerstone of the nation's campaign-finance system for 100 years.

Finally, the court ignored the longstanding practice of deciding a case only after lower courts have fully examined the facts. Here, because the broad constitutional questions considered by the Supreme Court were not raised in the court below, there was no factual record at all on which the court could base its legal conclusions.

We now face the undoing of laws that have helped to prevent corruption in government for more than a century. Some will say that corporate interests already have too much power and that members of Congress listen to the wishes of corporations instead of their constituents. While the campaign-finance system certainly needs further reform, I can only imagine how much worse things will be in a system where the views and interests of American voters are completely drowned out by corporate spending.

Russ Feingold is the Democratic senator of Wisconsin.

Mr. Chairman,

I have served on the Rules Committee since my first term. As Majority and Minority Leader, and President Pro Tempore, I have worked continually for reforms to modernize this institution -- streamlining the committee system to move bills more effectively, bringing radio and television to the Senate, and championing ethics and campaign finance reforms.

As Majority Leader in the 100th Congress, I filed cloture eight times on campaign finance reform legislation. Since then, I have spoken many times in support of legislation that would provide for voluntary spending limits and public financing, and curb the influence of Political Action Committees.

The incessant money chase is rotting the institution from within. It makes every Senator a part-time Senator, and full-time fund raiser. Few challengers could do today as I did when I was first elected to the Senate in 1958 -- run a joint campaign with the late Senator Jennings Randolph, for two open Senate seats with a treasury of less than $50,000. Our campaign finance system today puts congressional seats on the auction block, and has been breeding apathy and mistrust in the American electorate for a long time.

I supported the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), but, as I

said at the time, it does not go far enough. I believed then, as I do now, that a Constitutional amendment may be necessary in order to achieve real reform – reform that would empower the Federal and state governments to limit campaign contributions and expenditures.

Because *Buckley v. Valeo* is a flawed decision, it has doomed the prospects for comprehensive reform by legislation. By equating campaign expenditures with speech, *Buckley* has forced the Congress to take an indirect approach to reform, which has resulted in a complicated and convoluted hodgepodge of laws that special interests continually find ways to circumvent. First Amendment rights are not absolute, and there is a compelling government interest in preventing corruption and preserving the trust of the American people in their democratic institutions.

I know that there are various legislative proposals being crafted in response to *Citizens United v. Federal Election Commission.* I encourage the Committee to examine how this decision may affect the ability of foreign corporations, as well as foreign countries, to influence elections in our nation. I also encourage the Committee to look at voluntary spending limits and public financing for congressional campaigns, as well as expenditure limits for non-candidates that will pass Constitutional muster and help to syphon the influence of money from the political process.

I hope the Committee will put forward a legislative proposal and report a bill to the

Senate in a timely manner.

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BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

February 1, 2010

The Honorable Charles E. Schumer
313 Hart Senate Building
Washington, D.C. 20510

Dear Senator Schumer:

The Brennan Center for Justice at New York University School of Law greatly appreciates the opportunity to provide information regarding possible Congressional responses to the recent U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission* on January 21, 2010. This letter will outline several of our proposals, highlighting our recently released policy proposal, *Corporate Campaign Spending: Giving Shareholder A Voice*, by Ciara Torres-Spelliscy.

The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. We extensively litigate in defense of public funding, disclosure and spending limit laws, including currently representing intervenors in cases now in federal court defending Connecticut's and Arizona's public funding laws.

In *Citizens United*, the Supreme Court gave an unequivocal green light for corporate money in elections, by outlawing under the First Amendment laws that heretofore banned corporate spending in elections. This radical decision defied more than 100 years of settled law. It rivals *Bush v. Gore* for the most aggressive intervention into politics by the Supreme Court in the modern era. Indeed, *Bush v. Gore* affected only one election – *Citizens United* will affect every election for years ahead.

The Court re-ordered the priorities in our democracy – amplifying special interests, and displacing the voices of the voters. It is true that there is already much money in politics. But the new ability of corporate managers to use funds from their treasuries to affect campaigns marks a breaking point: It is a difference in degree that has become a sharp difference in kind. As Justice Stevens powerfully warned, American citizens "may lose faith in their capacity, as citizens, to influence public policy" as a result.

To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses a four-step strategy to take back our democracy:

- Promote public funding of political campaigns
- Modernize voter registration
- Demand accountability
- Advance a voter-centric view of the First Amendment

We urge the Congress to take action to implement each of these four strategies.

Public Funding of Political Campaigns

Public funding is key to restoring confidence in American democracy and reducing the power of big money in elections. As the Court noted in *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976), such programs operate to "facilitate and enlarge public discussion and participation in the electoral process," thus furthering First Amendment values for all. The recent explosion of small donations points toward an innovative approach to public funding that would boost the speech of ordinary citizens. Ideally, public funding systems should be structured like that in New York City, which awards multiple matching funds for small contributions. *See* Frederick A.O. Schwarz Jr., *Public Financing of Races: If It Can Make It There...*, Roll Call (Jan. 28, 2010).[1] Multiple matching funds amplify the voices of actual citizens, and can be an effective counterbalance to unrestrained corporate spending. Moreover, by encouraging candidates to seek donations from a large number of voters, such programs encourage broad participation in the election process. Passage of the *Fair Elections Now Act*, introduced by Senators Durbin and Specter, as well as reform of the presidential public financing system, would go a long way toward countering the likely fallout from *Citizens United*; we urge the Senate to take up this legislation immediately as one response to *Citizens United*.

Voter Registration Modernization

One critical way to counter the flood of corporate money into our electoral process is to add millions of new voters by bringing our voter registration system into the 21st century. Attorney General Eric Holder, in noting his support for this important democracy reform, said that modernizing the voter registration system would "remove the single biggest barrier to voting in the United States." Remarks at the Brennan Center for Justice Brennan Legacy Awards Dinner on Indigent Defense Reform (Nov. 16, 2009).[2]

Under the system proposed by the Brennan Center and backed by a bipartisan coalition, as many as 65 million eligible Americans could join the electoral system permanently - while curbing potential for fraud and abuse. Such an approach would automatically and permanently register all eligible citizens who wish to be registered, and provide failsafe mechanisms to give voters the chance to correct their registrations before and on Election

[1] Available at http://www.rollcall.com/issues/55_83/ma_congressional_relations/42688-1.html.
[2] Available at http://www.justice.gov/ag/speeches/2009/ag_speech-0911161.html.

Day. A number of states have already implemented some or all of the recommendations for modernizing the voter registration system, and others are moving in that direction, because they realize improved registration will save substantial time and costs, reduce errors, and enable more eligible citizens to participate in our democracy. We commend you for your leadership and commitment to upgrading our voter registration system and urge this Committee to move forward with legislation as soon as possible.

Demanding Accountability

Under current laws regulating corporations, nothing requires corporations to disclose to shareholders whether funds are being used to fund politicians or ballot measures, or how the political money is being spent. With nearly one in two American households owning stock in publicly traded companies, the potential for increased corporate political spending could well impact shareholders' pockets. Mechanisms by which shareholders can hold corporations accountable for their political spending are imperative.

The Brennan Center has proposed a remedy in our recently-issued *Corporate Campaign Spending: Giving Shareholders a Voice* report.[3] We suggest two specific reforms: first, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require managers to report corporate political spending directly to shareholders. These requirements will increase corporate accountability in two important ways. First, the authorization provisions place the power directly in the hands of the shareholders, thereby ensuring that shareholders' funds are used for political spending only if that is how the shareholders want their money spent. Second, the disclosure requirement serves valuable information interests, leaving shareholders better able to evaluate their investments and voters better-equipped to deliberated choices at the polls.

With greater amounts of corporate money flooding the political process, corporate accountability is more important than ever in a post-*Citizens United* era. The attached report includes model legislation toward this end, and we urge the Committee to consider this legislation as soon as possible. A copy of the full report is attached to this letter.

Advancing a Voter-Centric Vision of the First Amendment

The *Citizens United* decision represents the furthest extreme the Court has ever reached on the spectrum which balances the First Amendment rights of speakers – candidates, parties, and special interests – against the countervailing First Amendment interests of the electorate. As the Court has long recognized, "constitutionally protected interests lie on both sides of the legal equation." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 590 (1957) (noting "delicate process" of reconciling labor union's rights with value in promoting "active, alert responsibility of the individual citizen in a democracy"). Our

[3] Available at http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice/.

constitutional jurisprudence incorporates a strong First Amendment tradition of deliberative democracy – recognizing that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate.

Accordingly, our constitutional system has traditionally sought to maintain a balance between the rights of candidates, parties, and special interests to advance their own views, and the rights of the electorate to participate in public discourse and to receive information from a variety of speakers. *See, e.g.*, *Shrink Missouri*, 528 U.S. at 390 (balancing candidate's and political committee's claims with threat that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"); *Federal Election Commission v. Mass. Citizens for Life*, 479 U.S. 238, 257-58 & n.10 (1986) (balancing nonprofit organization's interests with importance of protecting "the integrity of the marketplace of political ideas" neccessary for citizens to "develop their faculties"); *Federal Election Commission v. National Right to Work Comm.*, 459 U.S. 197, 560 (1982) (balancing corporate interests against the value of promoting "the responsibility of the individual citizen for the successful functioning of that process"). In *Citizens United*, the now ascendant conservative block of the Roberts Court threw that balance dangerously off-kilter by holding, in essence, that whatever interest is willing to spend the most money has a constitutional right to monopolize political discourse. In awarding such monopoly power to corporate speakers, the majority ignored any countervailing interest on the part of the electorate.

Unfortunately, *Citizens United* will not be the last word. An armada of constitutional challenges to state and federal reforms is advancing rapidly toward the Supreme Court. *See* David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. Times, Jan. 25, 2010, at A11.[4] These challenges include attacks on disclosure statutes, public financing systems, "pay-to-play" restrictions on government contractors and lobbyists, and "soft money" restrictions on political parties and political action committees. Challengers seek to use the First Amendment as a constitutional "trump card" to strike down any reform that attempts to restrain special interest domination of politics. The First Amendment ideology advanced in these challenges – if adopted by the Court – would enshrine in law special interests over citizens, monologue over dialogue, and secrecy over transparency. It is crucial that courts recognize this one-sided view of the First Amendment as a distortion – one which threatens to erode fundamental First Amendment values under the guise of protecting them.

Because the Court grounded its decision in *Citizens United* in the Constitution, legislative repair is extraordinarily challenging. Along with the proposals to enact public financing, voter registration modernization, and shareholder disclosure laws, the Brennan Center urges this Committee – perhaps jointly with other interested Committees – to hold hearings to create a record demonstrating how the Supreme Court's majority has distorted both the First Amendment as well as the political reality of how money in politics threatens to erode democratic values. Making such a record – and shining the public spotlight on the impact of the Court's radicalization of the First Amendment – would prove valuable for the defense of existing reforms and the enactment of new safeguards, for the development of constitutional doctrine, and for the public's understanding of this issue. While Congress

[4] Available at http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse.

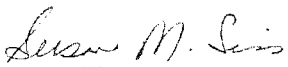
cannot directly repair the damage done by a case grounded in the Constitution, hearings like those we suggest could provide a critical forum to demonstrate the reach of this Court.

Conclusion

The Brennan Center stands ready to assist this Committee in its efforts to address the damage from *Citizens United*. We appreciate the opportunity to enter our views, and our report, into the record for the Committee's hearing on February 2, 2010.

Sincerely yours,

Michael Waldman
Executive Director



Susan Liss
Director, Democracy Program

BRENNAN
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CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE

Ciara Torres-Spelliscy

Brennan Center for Justice *at New York University School of Law*

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism.

A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measureable change in the public sector.

ABOUT THE BRENNAN CENTER'S CAMPAIGN FINANCE REFORM PROJECT

Campaign finance laws can be crafted to promote more open, honest, and accountable government and to bring the constitutional ideal of political equality closer to reality. The Brennan Center supports disclosure requirements that inform voters about potential influences on elected officials, contribution limits that mitigate the real and perceived influence of donors on those officials, and public funding that preserves the significance of voters' voices in the political process. The Brennan Center defends federal, state, and local campaign finance and public finance laws in court and gives legal guidance and support to state and local campaign finance reformers through informative publications and testimony in support of reform proposals.

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ABOUT THE AUTHOR

Ciara Torres-Spelliscy is Counsel for the Democracy Program at the Brennan Center, working on campaign finance reform and fair courts. Ms. Torres-Spelliscy earned her B.A. magna cum laude from Harvard. She earned her J.D. from Columbia Law School. She is the co-author along with Ari Weisbard of *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 Albany Gov't L.R. 194 (2008); *Electoral Competition and Low Contribution Limits* (2009) with co-authors Kahlil Williams and Dr. Thomas Stratmann; and *Improving Judicial Diversity* (2008) with co-authors Monique Chase and Emma Greenman, which was republished by *Thompson West Reuters in Women and the Law* (2009), as well as author of *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach* (forthcoming 2010). She has been published in the *New York Law Journal*, *Roll Call*, *Business Week*, *Forbes*, The Root.com, Salon.com, CNN.com and the *ABA Judges Journal*. She has also been quoted by the media in *The Economist*, *The National Journal*, Sirius Radio and NPR. She provides constitutional and legislative guidance to lawmakers who are drafting bills. Before joining the Center, she worked as a corporate associate at the law firm of Arnold & Porter LLP and was a staff member of Senator Richard Durbin.

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FOREWORD

In *Citizens United*, decided January 21, 2010, the U.S. Supreme Court gave an unequivocal green light for corporate money in elections, by outlawing under the First Amendment, laws that limit corporate spending in elections. This radical decision overturned more than 100 years of settled law. While it is difficult to know how distorting an effect on our democratic electoral processes this decision will have, it is reasonable to expect a significant increase in corporate expenditures.

Corporate law is ill-prepared for this new age of corporate political spending by publicly- traded companies. Today, corporate managers need not disclose to their investors – individuals, mutual funds, or institutional investors such as government or union pension funds – how funds from the corporate treasury are being spent, either before or after the fact. And the law does not require corporate managers to seek shareholder authorization before making political expenditures with corporate funds.

This report proposes changes in corporate law to adapt to the post-*Citizens United* reality. Two specific reforms are suggested: first, require managers to **report corporate political spending directly to shareholders,** and second, require managers to **obtain authorization from shareholders before making political expenditures** with corporate treasury funds. Modeled on existing British law, these changes will ensure that shareholders' funds are used for political spending only if that is how the shareholders want their money spent.

This report represents the first of several proposed "fixes" to the damage done to American democracy by the Supreme Court's *Citizens United* decision. The Brennan Center will also be releasing proposals to develop public funding systems that build on grassroots participation with matching funds. We will also be working to develop an alternative constitutional paradigm to the disastrous and radical view of the First Amendment adopted by a conservative majority of the Supreme Court. We will also continue working to repair voter registration systems through federal legislation that could bring millions more voters onto the registration rolls and reduce fraud and abuse. If our democratic system is permitted to be overrun with corporate spending, we can expect increased public cynicism about our institutions of government and further erosion in the public's trust in our democratic system.

Susan M. Liss
Director, Democracy Program
Brennan Center for Justice

EXECUTIVE SUMMARY

The Supreme Court has radically altered the legal landscape for politics with the 5-4 decision in the case *Citizens United v. FEC*, handed down on January 21, 2010. Turning back decades of statutory law, the Court has elevated the First Amendment rights of corporations to speak during elections, and has created a new paradigm for how political campaigns may be funded. The way that corporations "speak" is by spending money, usually to purchase advertisements that most individuals could not afford to finance.

Now that the Court has held that publicly-traded corporations have the same First Amendment protections as individuals, limitations on Congtess' ability to regulate their spending will be severely constrained. That means that corporate treasury money–including the funds invested by individuals, mutual funds, pension funds and other institutional investors–can be spent on politics without alerting investors either before or after the fact. Under current laws regulating corporations, there is nothing that requires corporations to disclose to shareholders whether funds are being used to fund politicians or ballot measures, or how the political money is being spent. Moreover, shareholders have no opportunity to consent to the political use of corporate funds.

This does not have to be the case. Britain has an alterarive approach. In the U.K., companies disclose past political expenditures directly to shareholders. And more importantly, shareholders must authorize corporate political spending before a corporation uses shareholder funds on political spending.

This report argues for the United States to change its securities laws in the wake of *Citizens United* to

(1) provide notice to shareholders of any and all corporate political spending and
(2) to require shareholder authorization of future corporate political spending.

INTRODUCTION

THE PROPER ROLE OF CORPORATE MONEY IN OUR DEMOCRATIC PROCESS

In *Citizens United*, the U.S. Supreme Court majority determined that the First Amendment protects the use of corporate money in elections.[1] Roughly half of American households own stocks, many through mutual funds or 401(k) retirement accounts.[2] "Corporate money" in a publicly traded company is in part made up of investments from shareholders. Thus, corporate spending is in reality the spending of investors' money.[3]

Political spending by corporations may raise the democratic problem of corruption or the appearance of corruption. For shareholders, the risk of corporate political spending attaches to the pocketbook.[4] Recent studies have shown that corporate political expenditures are symptomatic of problems with corporate governance and long-term performance. While these studies show correlation (and not causation) between political spending and poor firm performance,[5] it is worthy of worry that political spending may be indicative of risky corporate behavior.[6] Because of twin concerns about the protection of shareholders and the integrity of the political system, which may be corrupted by corporate dollars, a century's worth of American election laws have prohibited corporate managers from spending a corporation's general treasury funds in federal elections.[7] These prophylactic campaign finance laws[8] have protected shareholder interests by making corporate treasury funds off-limits to managers who might be tempted to spend this corporate money to support a personal favorite on the ballot.

THE *CITIZENS UNITED* DECISION MEANS THAT CORPORATIONS CAN SPEND CORPORATE MONEY TO DIRECTLY SUPPORT OR OPPOSE CANDIDATES IN FEDERAL ELECTIONS AS WELL AS IN ALL 50 STATES.

States' corporate law and federal securities law–for the most part–do not address the issues that will arise with the advent of unfettered corporate political spending by managers. For years, state courts enforcing state corporate laws have largely turned a blind eye to managerial decisions to spend corporate money on politics.[9] Using what is known as the "business judgment rule," state courts have allowed corporate managers to spend corporate treasury money on politics. Before *Citizens United*, in all states, corporations could use corporate treasury money on ballot measures, and in 28 states, corporations could use corporate treasury money on candidate elections. Now, the *Citizens United* decision means that corporations can spend corporate money to directly support or oppose candidates in federal elections as well as in all 50 states. Yet under state corporate

law, there are no clear standards about what corporate political spending would or would not be ultra vires or a waste of corporate assets. Furthermore, there are no federal or state laws or regulations requiring boards to report such spending to shareholders or requiring shareholders to approve political spending.

Should shareholders discover large or imprudent corporate political expenditures, they have very little recourse under current law. A suit for breach of fiduciary duty would likely be in vain. Shareholders would be faced with two unsatisfying solutions: either they could launch a costly campaign to vote out the board or they can sell their stock–possibly at a loss. Thus, under current U.S. law, shareholders cannot provide meaningful oversight of managerial whims to spend shareholder investments on politics.

This report will briefly lay out the issues presented by infusing corporate dollars into American politics, including the way disclosure of corporate political spending falls into a problematic regulatory gap between campaign finance law and corporate law, as well as how state corporate law and federal securities law fail to protect shareholders from managers' spending corporate dollars on elections.[10] Then this report will explore how the U.K. has approached the problem of corporate money in politics. Finally, this report will offer a concrete policy solution. Modeled on the British approach to corporate political spending, this report urges Congress to adopt a new law requiring publicly traded companies to provide two basic protections for shareholders: disclosure of past corporate political spending and consent to future corporate political spending.

CHAPTER 1. THE LEGAL LANDSCAPE AFTER *CITIZENS UNITED*

Citizens United v. FEC, which was decided on January 21, 2010, has allowed corporate treasury money into federal elections and elections in 22 states. Technically, *Citizens United* involved little more than a narrow question of administrative law: whether a 90-minute film entitled "Hillary: the Movie," which was highly critical of then-presidential candidate Hillary Clinton, and partially funded by for-profit corporate money, was covered by the elections law as a long-format, infomercial-style political ad.

But instead of focusing on this narrow question, the Supreme Court used *Citizens United* to give corporations the same political First Amendment Rights that an American citizen has. In doing so, the Court disturbed 63 years of law which barred corporate independent expenditures at the federal level and over a century of laws preventing corporate expenditures at the state level. *Citizens United* has dismantled campaign finance safeguards which used to address the problem of corporate managers using other people's money in politics.

Before the *Citizens United* decision, pre-existing federal laws required corporate managers to make political expenditures via separate segregated funds (SSFs), also commonly known as corporate political action committees (PACs), so that shareholders, officers and managers who wanted the corporation to advance a political agenda could designate funds for that particular purpose. This scheme limited corporate influence on elections since the amount of funds that can be raised and contributed by PACs are subject to strict limits (federal PACs can accept individual donations of $5,000 and can give a candidate $2,400 per election).

CITIZENS UNITED HAS DISMANTLED CAMPAIGN FINANCE SAFEGUARDS WHICH USED TO ADDRESS THE PROBLEM OF CORPORATE MANAGERS USING OTHER PEOPLE'S MONEY IN POLITICS.

These laws protected both the integrity of the democratic process as well as shareholders. Recognizing the wisdom of this approach, as of 2010, 22 states had followed suit with similar laws. In the 28 states that lacked federal-style election rules, corporations were able to give political donations to candidates directly from their corporate treasuries and they could make independent expenditures on behalf of such candidates using corporate funds.[11] This money could be used in such states to pay for expenditures in legislative, executive and judicial elections, all without consent from or notice to shareholders. Now, post-*Citizens United*, corporate money may be used by corporate managers to directly support or oppose candidates in all state and federal elections.

CHAPTER 2. THE PROBLEMS WITH CORPORATE POLITICAL SPENDING

A. The Democratic Problem

The democratic problem posed by unfettered corporate political spending is the risk that policymakers will base their legislative decisions on what's best for corporations instead of what's best for citizens and voters. There is ample reason to be concerned that there will be a new influx of corporate cash into elections, given the recent history of corporate political spending, and to worry about the impact on our democracy resulting from that new influx.

Despite the federal ban on the use of corporate treasury money to support or oppose candidates, corporate money has made its way into the electoral process through several different avenues–and has influenced elections for years. By any measure, corporate money is frequently used to try to influence ballot measures and to elect, re-elect and unseat candidates at the state, federal and even international level.[12]

In the 2008 U.S. federal election, which was marked by a lengthy presidential primary season, the grand total raised by all federal candidates was $3.2 billion. Money from corporate PACs comprised one out of every ten federal dollars contributed[13] and corporate PACs' contributions to Congressional races were one of every three PAC contributions between 1997 and 2008.[14] Although this report is not focused on corporate PACs, but rather on money that comes directly from corporate treasuries, it is nonetheless interesting to note since 2005, 173 corporate donors, "their Political Action Committees, executives and other employees have contributed, under campaign finance law limits, $180 million to federal candidates and political parties, an average of over $1 million per organization."[15]

Exactly how more corporate money in politics may affect American policy is hard to predict. Following on the heels of *Citizens United*, one risk is that politicians may change their behaviors based on real or perceived new threats of high corporate political spending.[16] An open question is: will elected officials refrain from supporting reforms that are hostile to big corporate donors and instead favor policies dictated by corporate donors?[17] And while it is difficult to document actual influence over policy, it is possible the influx of corporate money may result in a public perception that the government is for sale to the highest bidder, further damaging the public trust in our democratic system. It is this perception of corruption that is corrosive to democratic norms.[18]

THE DIFFERENCE BETWEEN A CORPORATE PAC AND THE CORPORATE TREASURY

A corporate PAC, or SSF, is a political action committee organized by a corporation to gather money that will be used in elections. The corporate PAC can solicit money from shareholders, executives, directors and certain high level employees and their families.[19] Everyone who gives to the corporate PAC does so voluntarily and is on notice that the money will be used on politics. Individuals may give $5,000 to a SSF every year and may give a maximum of $69,900 to all SSF, PACs and parties every two years.[20]

By contrast, **corporate treasury** money includes all the money from the corporation's business operations, and corporate treasury money in publicly-traded companies includes all of the money invested by shareholders.

B. OTHER PEOPLE'S MONEY

When managers of publicly-traded companies spend corporate treasury money on politics, they do so using other people's money–in part, money invested by shareholders.[21] Some studies have indicated that corporate contributions appear to be linked with windfalls for donating corporations.[22] But the narrative of political spending as an unmitigated good is not the only one available. For example, a recent study of 12,000 firms by Professors Aggarwal, Meschke, and Wang[23] revealed that despite corporate managers' attempts to influence public policy through spending on elections, corporate political spending correlates with lower shareholder value.[24]

Aggarwal and his co-authors suggest that high levels of political spending are a trademark of poor corporate management, and that "managers willing to squander small sums on political giving are likely to squander larger sums elsewhere."[25] Consequently, one potential risk posed by deregulation of corporate money in politics is that corporate managers who were restrained by the PAC requirement will spend much more money on politics—using the corporate treasury to support their personal political agendas.[26] Now that the Supreme Court has given its imprimatur to corporate political spending, new protections need to be implemented to protect shareholders from managers' potentially profligate spending on politics.

The Center for Political Accountability (CPA) has also done case studies of corporate political contributions linked to firm failure. The CPA found:

> Enron, Global Crossing, WorldCom, Qwest and Westar Energy each made corporate contributions a key part of their business strategies, enabling them to avoid oversight, engage in alleged illegal activities and gain uncharacteristic advantage in the marketplace–the combination of which led to their ignominious downfall at the expense of their shareholders.[27]

Enron, Global Crossing and WorldCom ended up in bankruptcy–at the time, these were among the biggest bankruptcies in U.S. history;[28] Qwest and Westar Energy came perilously close to bankruptcy.[29]

Furthermore, shareholders' own First Amendment interests could be trampled if their investments are used to support candidates and causes that they do not wish to endorse. As the European Corporate Governance Service explains:

> This is exactly why partisan political donations are such a bad idea for companies. Shareholders' views of which, if any, political party's program[] will benefit them most will vary dramatically. And many may conclude that any political expenditure is a waste of their money. The danger is... that shareholders' views are actually overlooked and management decides for itself to position the company as politically partisan. And this in turn may lead to reputational damage.... The safest option for both companies and shareholders is simply to avoid these types of corporate donations altogether.[30]

1. Poor Disclosure of Corporate Political Spending

According to Justice Kennedy, writing the lead opinion in *Citizens United*, the free flow of information empowers shareholders to protect their own interests. As Kennedy wrote, "Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative."[31] Unfortunately, this assumption that there is readily available information about corporate political spending appears to be based on a misunderstanding of the state of the law.

As U.S. law stands now, corporate managers can spend corporate money on politics without notifying shareholders either before or after the fact and they can make this political spending without any authorization from shareholders.[32] This is problematic because the political interests of managers and shareholders can and do diverge.[33] Unfortunately, currently, neither corporate law nor campaign finance law provides shareholders with accessible salient information about the total universe of corporate political spending.

a. Campaign Finance Law Reporting

Campaign finance disclosure laws vary from the federal to state level as well as from state to state. Corporate political spending can be underreported because the duty to report often falls on the candidate or party receiving the money and not the corporation giving the money. Furthermore, as will be discussed below, many states and the FEC simply have weak reporting requirements that do not capture the ways modern corporations spend money on politics.

AS U.S. LAW STANDS NOW, CORPORATE MANAGERS CAN SPEND CORPORATE MONEY ON POLITICS WITHOUT NOTIFYING SHAREHOLDERS EITHER BEFORE OR AFTER THE FACT AND THEY CAN MAKE THIS POLITICAL SPENDING WITHOUT ANY AUTHORIZATION FROM SHAREHOLDERS.

The Federal Election Commission (FEC) requires reporting from candidates, political committees and parties. Corporate SSFs report their spending directly to the FEC.[34] To track contributions by SSFs at the federal level, the public must know the exact names of the SSFs involved. Tracking spending becomes difficult when an SSF does not contain the "doing-business-as" name of the corporation at issue. A common tactic is for the corporate SSFs to give to benign sounding PACs which, in turn, give directly to federal candidates. For example, the Abraham Lincoln Leadership Political Action Committee, the Democracy Believers PAC, and the Freedom and Democracy Fund are largely funded by corporate SSFs.[35]

Federal spending is only one subset of political spending. Post-*Citizens United*, corporations may directly support or oppose candidates in every state election. And even before *Citizens United*, corporations could spend money on ballot initiatives in all 50 states. Spending in state elections is reported in that state, and not to a central location like the FEC. Each state has its own distinct disclosure requirements with its own definitional loopholes.

Reporting political expenditures under state campaign finance laws is particularly spotty, creating many opportunities for corporations to conceal their role underwriting politics. While most corporate political spending is technically reportable to state regulators (again, often by the candidate and not by the corporation), state laws are porous and may not capture the full universe of political spending. As the Campaign Disclosure Project has demonstrated, year after year, states fail to achieve meaningful disclosure or accessible databases.[36] To reconstruct the total amount of reported political spending, shareholders would have to comb through vast volumes of records at the federal and state level[37]—and perhaps even at the international level—to learn how much and to whom corporations contribute.[38]

Some political spending falls under the radar, so no matter how much due diligence a shareholder does, the spending remains unknown. For example, trade associations, such as the U.S. Chamber of Commerce, do not divulge the identity of those funding their political activities and most corporations do not divulge how much they have given to trade associations.[39] Increasingly, corporations are making anonymous contributions to trade associations and other tax-exempt organizations which are becoming "proxies for corporate political involvement."[40]

b. Corporate Law Reporting

Federal securities law also fails to require that shareholders receive information regarding corporate political spending. The Securities and Exchange Commission (SEC) has no rule or regulation requiring disclosure by publicly-traded companies of their political spending to shareholders or the investing public. Even for the political spending that is properly reported to a government agency, there is no legal duty to share this information directly with shareholders in an accessible way, such as in a Form 10-K annual report. Because political spending by corporate entities is not disclosed in a single place, discovering the full exrent of the political spending of any corporate entity takes copious research, to the extent that such spending is discoverable at all.

The problem of lack of full transparency of political spending is not a novel one. In the aftermath of Watergate, Congressional hearings and SEC investigations revealed that 300 American corporations had made questionable or illegal payments both domestically and to foreign governments—including campaign contributions. The result of these revelations resulted in the SEC's requiring voluntary disclosure by corporations of questionable foreign political payments and in Congress' passing the Foreign Corrupt Practices Act.[41] In a speech supporting the passage of the legislation, then-SEC Commissioner John R. Evans argued for the need for transparency and the risk posed to the soundness of the financial markets:

> Disclosures of illegal or questionable payments in connection with business transactions raises serious questions as to the degree of competition with respect to price and quality because significant amounts of business appear to be awarded not to the most efficient competitor, but to the one willing to provide the greatest personal economic rewards to decisionmakers. Such disclosures... also raise questions regarding the quality and integrity of professional corporate managers and whether they are fulfilling their obligations to their boards of directors, shareholders, and the general public.[42]

While the Watergate-era revelations included out-and-out bribes, many of the same concerns raised by Commissioner Evans echo today as shareholders often know very

little about the beneficiaries of corporate political expenditures made by corporate managers and any ensuing risks.[43] Furthermore, shareholders may unwittingly fund political spending at odds with their own political philosophies.[44] As Professor Jill Fisch has explained:

THIS BASIC ASYMMETRY OF INFORMATION BETWEEN A CORPORATION AND ITS BENEFICIAL OWNERS NEEDS TO BE ADDRESSED BY CHANGING FEDERAL SECURITIES LAWS TO BETTER INFORM SHAREHOLDERS.

> Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls. The lack of oversight makes it difficult for corporate decision makers and stakeholders to evaluate the costs and benefits of political activity.[45]

With boards in the dark about corporate political spending, shareholders have little hope of fully understanding the scope of companies' political expenditures.[46] This basic asymmetry of information between a corporation and its beneficial owners needs to be addressed by changing federal securities laws to better inform shareholders. As a leading corporate law firm advocated in a public memorandum:

> Shareholders have legitimate interests in information about corporate policies and practices with respect to social and environmental issues such as climate change, sustainability, labor relations and political contributions. These issues, many of which do not fall neatly within a line item disclosure requirement, bear on the company's reputation as a good corporate citizen and consequently, the perceived integrity of management and the board.[47]

2. The Lack of Shareholder Consent

In the *Citizens United* decision, Justice Kennedy, writing for the 5-4 majority, brushed aside the need for shareholders' protection because there was "little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy."[48] However, as will be discussed below, there are serious limitations to what shareholders can do in response to corporate political spending, especially for undisclosed spending.

One troublesome problem is that even if political expenditures are disclosed, the law does not require any meaningful shareholder consent to corporate political spending. In contrast to money that is given to a corporate PAC expressly for use in politics, shareholders do not generally invest in a corporation with the intent to make political state-

ments.[49] In fact, investor's money is being spent on politics without any requirement for explicit permission or authorization from shareholders.

State-based corporate law today does not adequately address the issue of managers' use of corporate money in politics. The 103 years of regulating corporate political money through the federal election laws has left a system of norms which are ill-suited for the new era ushered in by the *Citizens United* decision, when corporate treasury money will be widely available for large-scale political expenditures.

In fact, state courts have allowed corporate political spending under the business judgment rule. Instead of finding that such spending is ultra vires or a waste of corporate assets, so far, courts have used the permissive "business judgment rule" to allow corporate managers to spend corporate money on politics without meaningful restrictions.[50] Thus, shareholder suits alleging a violation of the board's fiduciary duty because of corporate political spending are likely in vain. Professor Thomas Joo elucidates:

> Shareholders must allege corruption or conduct approaching recklessness in order to even state a claim challenging management actions. This principle of deference is not limited to decisions regarding 'business,' narrowly defined. Courts have applied business judgment deference to...political spending on the ground that management may believe such decisions will indirectly advance the corporation's business.[51]

Now that the Supreme Court has stripped away the campaign finance protections requiring that corporations directly support or oppose candidates only through PACs, fundamental changes that would result in more internal corporate controls of political spending are needed.[52] One of those new internal controls should require managers to seek authorization from shareholders before making political expenditures with corporate treasury money under the U.S. securities laws.

A BETTER SYSTEM IS ONE IN WHICH THE SHAREHOLDERS KNOW ABOUT THE SPENDING AND AUTHORIZE IT BEFORE IT LEAVES THE CORPORATION'S COFFERS.

Some have argued that market discipline alone will prevent a corporation from spending an excessive amount on politics. For instance, at the *Citizens United* oral argument, Chief Justice John Roberts asked the Solicitor General Elena Kagan, "can't [shareholders] sell their shares" if they object to particular political spending by a given corporation?[53] But the theoretical ability to exit an investment is not a real solution to this problem. First, the ability to sell is highly constrained for many investors if they own their shares though an intermediary

like a pension fund or a 401k that is invested in mutual fund. In that case, the choice to divest from the individual shares lies with the fund manager. The only way a beneficial owner who holds stock through a fund can be sure they are not invested in an offending stock is by divesting from the fund entirely. Such actions may trigger adverse tax consequences and penalties.

Moreover, even for those who do own stocks directly, selling shares after a corporation has made an ill-advised or large political expenditure provides little remedy to the shareholder. The corporate money has already been spent, never to return to the corporate treasury, potentially deflating shareholder value. A better system is one in which the shareholders know about the spending and authorize it before it leaves the corporation's coffers.

CHAPTER 3. THE BRITISH MODEL

The current American model where corporate money flows into the political system through obscured channels need not be the notm. There is another way—the British system. The Btitish provide a useful and elegant legislative model that the United States should emulate now that the Supreme Court's *Citizens United* decision has overturned the federal law banning the use of corporate treasury funds for electioneering. The U.K. allows direct corporate donations[54] to candidates and political parties, yet it does so with much more transparency.[55] In 2000, the U.K. adopted an amendment to its Companies Act, which requires British companies to disclose political contributions to its shareholders as well as to seek consent from shareholders before political donations are made.[56]

Like the U.S., the U.K. has had its share of campaign finance scandals. As a researcher at the House of Commons explained the history of political funding before the 2000 U.K. reforms:

> The main objections to the [pre-2000] system, where party finances are largely free from any statutory regulation, revolve around suspicions that financial considerations can buy undue influence and improper access. ...There is now a great deal of support for more openness and transparency in the system. Among the issues perceived as causing most concern are: large donations from individuals and companies, and, more specifically, the correlation between donations and access to Ministers, influence on policy, favourable commercial considerations, and the receipt of honours or other personal appointments...[57]

These atmospherics contributed to the sense that reform was needed in the U.K. However, the 2000 changes in British law came about as a direct response to the Fifth Report of the Committee on Standards in Public Life.[58] Lord Neill, who chaired the Committee, explained the need for the new approach:

> Many members of the public believe that the policies of the major political parties have been influenced by large donors, while ignorance about the sources of funding has fostered suspicion. We are, therefore, convinced that a fundamentally new framework is needed to provide public confidence for the future, to meet the needs of modern politics and to bring the United Kingdom into line with best practice in other mature democracies.[59]

Consequently, the Committee recommended that a company wishing to make a donation to a political party should have the prior authority of its shareholders.[60] This reform was adopted by Parliament.

British law requires if a company has made a political donation of over £2,000, then the directors' annual report to the shareholders must include the name of who received the donation and the donation amount.[61] In England, the directors' report is equivalent to a company's 10-K annual report in the United States and £2,000 is roughly equal to $3,000 at current exchange rates.[62]

In addition to requiring disclosure, the British law goes further and requires shareholder consent for spending over £5,000 on political expenditures.[63] At current exchange rates, £5,000 is roughly $8,000. If shareholders in British companies do not approve a political donation resolution, then the company cannot make political contributions during the relevant period.[64] Also, directors of British companies who make unauthorized political donations are personally liable to the company for the amount spent plus interest, and must compensate the company for any loss or damage as a result of the unauthorized donation or expenditure.[65] The interest rate charged on unauthorized political expenditures is 8% per annum.[66]

How the British System Works

British shareholders do not approve each and every individual political donation. Instead the managers ask for a political budget for a year or longer for a certain amount of money (say £100,000). Shareholders then give an up or down vote. If management loses the vote, then managers cannot spend the money without subjecting themselves to liability.

In fact, British companies with American businesses actually report their American political expenditures to their British shareholders under the Companies Act.[67] British firms are among some of the biggest corporate donors in U.S. elections.[68] For a sample of such firms, please see ***Appendix A***. Thus, harmonizing American law with British law would not require any additional data gathering for companies which are already reporting American giving in the U.K.

A. The Apparent Drop in Corporate Political Expenditures

The effect of these legal changes in the Companies Act on the political behavior of British companies should be a matter of future study by political scientists. One British newspaper reported in 2008, "U.K. political donations, once commonplace for listed blue-chip companies, have almost disappeared ...."[69] The publicly-available data on pre- and post-2000 corporate political spending in the U.K. is incomplete. The available data show that, both before and after the reform, most corporate money went to the Conservative Party.[70] The Labour Party has historically received substantially less corporate monies.[71] For example, during the 1995-1996 fiscal year, there were only three corporate donations to the Labour Party totaling £98,000.[72] In contrast, that year, the Conservative Party received approximately £2.7 million from 145 companies.[73] Similarly, for the 1997-1998 fiscal year, there were 120 corporate donations worth a total of £2.88 million to the Conservative Party.[74] After the reforms, the total company donations to the Conservatives fell to £1.74 million in 2001 and £1.16 million in 2003.[75]

To be sure, not every British company has foregone large political expenditures.[76] Overall, however, spending by individual companies appears to have dropped after the 2000 reforms. A study of corporate donations from 1987-1988 showed 28 companies that had given £50,000 or more.[77] In contrast, a recent sampling of the biggest U.K. firms reveals that many of the same firms which used to give at the £50,000 level have decided to forego political spending altogether. Others are spending more modest amounts.[78] However, it should be clear that the choice of British companies to spend corporate monies in U.K. elections is firmly in the hands of the managers, once they have received shareholders' approval. As will be discussed below, neatly every resolution seeking shareholder approval of corporate political spending is approved. Whether the company goes on to use authorized corporate funds on politics is management's decision. Many British companies are choosing not to spend on politics even after gaining clear authorization from shareholders.

B. U.K. Proxy Votes to Authorize British Political Spending

The Brennan Center partnered with the Pensions and Investment Research Consultants Limited (PIRC), an independent British research and advisory firm that provides data on corporate governance to institutional investors, to gather a data set of proxy votes authorizing political spending by firms subject to the Companies Act. The data from PIRC includes resolutions dating back to January 1, 2002 for over 150 companies subject to the Companies Act—a total of 638 shareholder resolutions authorizing political corporate spending in eight years.

The PIRC data reveals that most British companies seeking authorization from their shareholders under the Companies Act seek modest political budgets ranging from £12,000 to £250,000 for a year or longer.[79] There were a few exceptions. For example, BP (formerly known as British Petroleum) sought and was granted an authorization for £400,000 for itself and an additional £400,000 for BP International Limited over a four year period.[80] British American Tobacco sought and was granted an authorization for £1 million over a four year period,[81] but these were outliers.

C. Disclosure of U.K. Corporate Political Spending

In terms of recent political spending, companies gave detailed accounts of how the money had been spent.[82] For example, ITV PLC made detailed accounts, reporting "[d]uring the year the Group made the following payments totalling £7,968 (2007: £9,110): Labour Party £3,920; Conservative Party £685; Liberal Democrat Party £2,086 and Plaid Cymru Party £1,277."[83]

A REVIEW OF THE RECENT ANNUAL REPORTS BY TOP BRITISH FIRMS REVEALS THAT MANY COMPANIES ARE REFRAINING FROM POLITICAL SPENDING AND HAVE A STATED POLICY AGAINST THE PRACTICE.

Most companies asked for a general authority from their shareholders to make political expenditures in the U.K. and Europe. However one company has indicated for several years in a row which political party it intended to benefit. Caledonia Investments PLC sought and was granted authorization to give £75,000 to the Conservative Party for two years.[84]

A review of the recent annual reports by top British firms reveals that many companies are refraining from political spending and have a stated policy against the practice. For example, British Airways states in its most recent annual report that:

> We do not make political donations or incur political expenditure within the ordinary meaning of those words and have no intention of doing so. The amount of political donations made and political expenditure incurred in the year to March 31, 2009, was £nil (2008: £nil).[85]

Many firms shared this policy of not making political contributions. For example, HMV, the music retailer, stated in its most recent annual report: "[i]t is Group policy not to make donations to political parties or independent election candidates and therefore no political donations were made during the period."[86] Burberry also shared this approach noting, "[t]he Company made no political donations during the year in line with its policy."[87]

Some of the same firms which have policies against political donations nonetheless have sought shareholder authorizations to avoid inadvertent violations of British law. As GlaxoSmithKline explains:

> GSK has adopted a global policy ending the provision of political contributions in any market in which the company operates....However, in order to protect GSK from any inadvertent violation of the U.K. law (where political contributions are defined very broadly) GSK will continue to seek shareholder approval for political contributions within the EU.[88]

Cadbury shared this precautionary approach:

> The Company has a long standing policy of not making contributions to any political party....neither the Company, nor any of its subsidiaries, made any donation to any registered party....However, the [U.K. Companies Act] contains very wide definitions of what constitutes a political donation and political expenditure. Accordingly, as a precautionary measure to protect the Company ..., approval will be sought at the 2009 AGM for the Company to make donations to political organisations ...of £100,000.[89]

D. Resistance to U.K. Corporate Political Spending

While some British pension funds are categorically opposed to corporate political spending and state so in their explanations of their voting philosophies,[90] shareholders generally approve the corporate political budgets requested by British firms.[91]

However, in at least one instance, shareholders have defeated a corporate political budget.[92] In 2004, for example, shareholders voted against a resolution to authorize £1.25 million in political spending by BAA PLC. This resolution was proposed by a shareholder who was angry at the revelation that BAA had given free airport parking passes to members of Parliament. The shareholder considered these free passes to be political donations, and thus he sought shareholder approval of the value of the passes.[93] The shareholders voted against this authorization.[94] It is not clear from this vote whether shareholders agreed with the motives of the shareholder proposing it or not. Nonetheless, after the shareholder vote, BAA stopped giving free passes to Parliamentarians.[95]

The BAA example shows the benefits of transparency in empowering shareholders. When a corporation spends a large sum on politics, shareholders can react to the disclosure by deciding to limit such spending in the future. British shareholders, like those invested at BAA, have this power, and so should investors in American companies.

POLICY PROPOSAL

CHAPTER 4.
SUGGESTED CHANGES TO U.S. SECURITIES LAW

The U.S. should adopt the British approach to political expenditures by
(1) requiring disclosure of political spending directly to shareholders,
(2) mandating that corporations obtain the consent of shareholders before making political expenditures, and
(3) holding corporate directors personally liable for violations of these policies.

This approach will empower shareholders to affect how their money is spent. It also may preserve more corporate assets by limiting the spending of corporate money on political expenditures. A section-by-section summary outlining one proposed legislative fix is attached as ***Appendix B***.

As explained in Chapter 2, currently, the disclosure of corporate political spending is inconsistent, keeping shareholders in the dark about whether their investment money is being used in politics. At the very least, Congress should require corporations to disclose their political spending, as many top firms have already volunteered to do. At the urging of the Center for Political Accountability, 70 companies, 48 of which are in the S&P 100, have agreed to disclose all of their political spending to shareholders.[96]

AT THE URGING OF THE CENTER FOR POLITICAL ACCOUNTABILITY, 70 COMPANIES, 48 OF WHICH ARE IN THE S&P 100, HAVE AGREED TO DISCLOSE ALL THEIR POLITICAL SPENDING TO SHAREHOLDERS.

To be useful, disclosure of political spending under this proposal should be frequent enough to notify shareholders and the investing public of corporate spending habits, and yet with enough of a time lag between reports so that corporations are not unduly burdened. To accommodate these two competing goals, disclosure of political expenditures should occur quarterly to coincide with company's filing of its Form 10-Qs with SEC. Because the political disclosure will be contemporaneous with the 10-Q filing, transaction costs can be minimized.

The Brennan Center is not alone in calling for more transparency in corporate political activity. The Center for Political Accountability,[97] Interfaith Center on Corporate Responsibility,[98] Common Cause,[99] and the Nathan Cummings Foundation,[100] to name just a few, have all pushed for better disclosure of political spending by corporations.

But disclosure alone is not enough. Congress should act to protect shareholders by giving them the power, under statute, to authorize political spending by corporations. The voting mechanics would work in the following way: At the annual meeting of shareholders (a.k.a., the "AGM"), a corporation that wishes to make political expenditures in the coming year should propose a resolution on political spending which articulates how much the company wishes to spend on politics.[101] If the resolution gains the vote of the majority of the outstanding shares (50% plus 1 share), then the resolution will be effective, and the company will be able to spend corporate treasury funds on political matters in the amount specified in the resolution. However, if the vote fails to garner the necessary majority, then the corporation must refrain from political spending until the shareholders affirmatively vote in favor of a political budget for the company.

THESE PROPOSED CHANGES TO U.S. SECURITIES LAW WILL PROVIDE ENHANCED SHAREHOLDER RIGHTS THROUGH GREATER TRANSPARENCY OF CORPORATE POLITICAL SPENDING AND WILL ENSURE THAT WHEN CORPORATIONS SPEND OTHER PEOPLE'S MONEY ON POLITICS, THAT THEY DO SO WITH FULL INFORMED CONSENT.

Finally, to ensure that this reform has teeth, another aspect of British law should be duplicated: personal director liability. Directors of U.S. companies who make unauthorized political expenditures using company funds should be personally liable to the company for the unauthorized amount.

Our support for the British model is grounded in concerns about administration and transaction costs. A system which puts every political action of a corporation to a vote would be costly and unwieldy to administer. By contrast, under this proposal, the corporation can simply add an additional question (on authorization of the political budget) to the list of items which are regularly subject to a shareholder vote at the annual meeting, alongside such traditional matters as the election of the board of directors or appointing auditors.

In summary, to improve American corporate governance, the U.S. should change its securities laws to mirror current British law in this area, and should require publicly-traded companies to:
(1) report their political spending directly to their shareholders on a periodic basis, and
(2) get shareholders' authorization before spending corporate treasury funds on politics.
In addition,
(3) any unauthorized political spending should result in personal liability for directors.

These changes should be made at a federal level to put all publicly-traded companies on an equal playing field.

Justice Kennedy's opinion in *Citizens United* is correct that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[102] But he was mistaken in thinking that the necessary transparency for shareholders and the investing public is already in place.

These proposed changes to U.S. securities law will provide enhanced shareholder rights through greater transparency of corporate political spending, and will ensure that when corporations spend other people's money on politics, that they do so with full informed consent. The net effect of similar laws in Britain appears to have curbed corporate political spending. These reforms could moderate the role of corporate money in American politics in a post-*Citizens United* world.

APPENDIX A

Sample of British/American Companies Reporting American Political Spending[103]

Company	*Website*	*US Giving Disclosed*
Astra-Zeneca	http://www.astrazeneca-annualreports.com/2007/business_review/governance/other_matters.asp http://www.astrazeneca-annualreports.com/2008/downloads/AZ_AR08_Full.pdf (page 95)	2006: $416,675 2007: $321,645 2008: $815,838 by US entities "to state political party committees, campaign committees of various state candidates affiliated with the major parties in accordance with pre-established guidelines"
GlaxoSmithKline PLC	http://www.secinfo.com/d139r2.s3h.htm#n4au	2008: £319,000; 2007: £249,000; Glaxo discontinued political contributions as of July 2009 but the GSK PAC continues to give: in 2008 it gave £539,359 and in 2007 it gave £522,172.
Lockheed Martin	http://www.lockheedmartin.com/investor/corporate_governance/PoliticalDisclosures.html	Has PAC, gives soft money to Democratic Governors Association & Republican Governors Association. Total expenditures in 2008: $82,375.
ExxonMobil Corporation	http://www.exxonmobil.com/Corporate/Imports/ccr2008/pdf/community_ccr_2008.pdf	Corporate political contributions—U.S. state campaigns and national 527s: 2005: $340,000 2006: $410,000 2007: $270,000 2008: $450,000
National Grid	http://www.nationalgrid.com/annualreports/2007/06_dir_reports/dir_report.html ; http://www.nationalgrid.com/annualreports/2008/ http://www.nationalgrid.com/annualreports/2009/directors_reports/index.html	2006-07: $100,000 fr. National Grid; $146,706 fr. National Grid PAC 2007-08: $70,000 fr. National Grid; $56,656 fr. PAC; Keyspan gave $37,015 2008-09: $180,000 fr. National Grid and subs to NYS PACs; $156,975 fr. National Grid PACs

APPENDIX B

A Summary of the Shareholder's Rights Act

SECTION 1. SHORT TITLE.

This Act may be cited as the "Shareholder's Rights Act of 2010".

SECTION 2. FINDINGS AND DECLARATIONS.

Describes the need for shareholder authorization of corporate general treasury funds for political expenditures.

SECTION 3. DEFINITIONS.

SECTION 4. SHAREHOLDER VOTE ON CORPORATE POLITICAL ACTIVITIES.

Amends Section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n) by adding at the end the following new subsection:

(1) ANNUAL VOTE – Requires that at an annual meeting of the shareholders there must be a vote to authorize use of corporate general treasury funds for political expenditures.

(2) SHAREHOLDER APPROVAL – Regulates the mechanism of seeking shareholders authorization for expenditures for political activities.

(3) DISCLOSURE OF SHAREHOLDER VOTES – Requires institutional investment managers subject to section 13(f) of the Exchange Act to report at least annually how they vote on any shareholder vote.

(4) DIRECTOR LIABILITY – Mandates that if a public corporation makes an unauthorized contribution or expenditure for a political activity, then the directors are liable to repay to the corporation the amount of the unauthorized expenditure, with interest at the rate of eight percent per annum.

(5) RULEMAKING – Directs the Securities and Exchange Commission to issue final rules to implement this subsection not more than 6 months after the date of the enactment of this Act.

SECTION 5. NOTIFICATION TO SHAREHOLDERS OF CORPORATE POLITICAL ACTIVITIES.

Amends the Securities Exchange Act of 1934 to create standards for notification and disclosure to shareholders of corporate political activities. Requires and sets standards for quarterly reporting by public corporations on contributions or expenditures for political activities. Requires that these quarterly reports be made part of the public record; and a copy of the reports be posted for at least one year on the corporation's website.

SECTION 6. PUBLIC DISCLOSURE OF CORPORATE POLITICAL ACTIVITIES BY THE SECURITIES AND EXCHANGE COMMISSION.

Amends Section 24 of the Securities Exchange Act of 1934 to regulate public disclosure of political activities by a public corporation to shareholders. Requires that a quarterly report be filed under this subsection be filed in electronic form, in addition other filing forms. Directs the Securities Exchange Commission to make the quarterly reports on political activities publicly available through the Securities and Exchange Commission's website in a manner that is searchable, sortable and downloadable.

SECTION 7. REPORT BY THE OFFICE OF MANAGEMENT AND BUDGET.

Directs the Office of Management and Budget to audit compliance of public corporations with the requirements of this Act; as well as the effectiveness of the Securities Exchange Commission in meeting the reporting and disclosure requirements of this Act.

SECTION 8. SEVERABILITY.

Provides that if any provision of this Act is ruled invalid, then the remainder of the Act shall not be affected.

ENDNOTES

1. *Citizens United* did not change the law on corporation contributions. Corporate contributions to U.S. federal candidates remain banned. However, corporate contributions to candidates are allowed in many state, local and international elections. *Citizens United* permits unlimited corporate independent expenditures in federal and state elections.

2. *See* JOINT ECONOMIC COMMITTEE, 106TH CONG., THE ROOTS OF BROADENED STOCK OWNERSHIP I (2000), www.house.gov/jec/tax/stock/srock.pdf; Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, 2 (2005), http://www.ici.org/pdf/fm-v14n5.pdf; THE INVESTMENT COMPANY INSTITUTE, 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009), http://www.icifactbook.org/pdf/2009_factbook.pdf ("Households are the largest group of investors in [investment] funds, and registered investment companies managed 19 percent of households' financial assets at year-end 2008.").

3. This report is limited in scope and is focused on a subset of corporate entities: *publicly-traded* corporations. This report does not address privately-held corporations, partnerships or sole proprietorships. Furthermore, this report is focused on corporate political spending. Here the phrase "political spending" is meant to include all spending by publicly-traded corporations to influence the outcome of any candidate election or ballot measure, including contributions independent expenditures and funding any electioneering communications. This includes contributions to intermediaries, such as political action committees (PACs), trade associations or nonprofits which are intended to influence the outcome of an election. "Political spending" does not include lobbying.

4. Press Release, Center for Political Accountability, *Shareholders See Risky Corporate Political Behavior As Threat to Shareholder Value, Demand Reform, CPA Poll Finds*, (April 5, 2006), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1267 (announcing a "poll found a striking 85 percent [of shareholders] agreed that the 'lack of rransparency and oversight in corporate political activity encourages behavior' that threatens shareholder value. 94 percent supported disclosure and 84 percent backed board oversight and approval of 'all direct and indirect [company] political spending.'").

5. Bruce F. Freed & John C. Richardson, THE GREEN CANARY: ALERTING SHAREHOLDERS AND PROTECTING THEIR INVESTMENTS (2005), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/920; Rajesh Aggarwal, Felix Meschke, & Tracy Wang, *Corporate Political Contributions: Investment or Agency?*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670; Deniz Igan, Prachi Mishra, & Thierry Tressel, *A Fistful of Dollars: Lobbying and the Financial Crisis*, IMF Working Paper, 4 (2009), http://www.imf.org/external/pubs/ft/wp/2009/wp09287.pdf ("Our findings indicate that lobbying [by financial service corporations] is associated ex-ante with more risk-taking and ex-post with worse performance… [a] source of moral hazard could be "short-

termism", whereby lenders lobby to create a regulatory environment that allows them exploit short-term gains."); *see also* Committee for Economic Development, *Rebuilding Corporate Leadership: How Directors Can Link Long-Term Performance with Public Goals* (2009), http://www.ced.org/images/library/reports/corporate_governance/cgpt3.pdf ("This report examines how these efforts to build public trust and long-term value have coalesced to encourage many large, global corporations to pay greater attention to their longer-term interests by striking a balance between short-term commercial pursuits and such societal concerns as the environment, labor standards, and human rights.").

6. GREEN CANARY, *supra* note 5 at 14 (arguing "political contributions can serve as a warning signal for corporate misconduct.").

7. *See* Marc Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT L. REV. 575, 639 (1989) (noting that concern over the role of corporations in American democracy has a long vintage, arguing "[C]oncern with corporate power over democratic processes in America grew sharply toward the close of the nineteenth century as concentrations of private capital, in the form of corporations and trusts, reached unprecedented size and power. These huge pools of capital raised the frightening prospect that candidates and elections might actually be bought in systematic fashion.").

8. *See* Daniel Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, 1055 (1998), http://ssrn.com/abstract=794785 ("Corporate speech, then, should be viewed with extreme suspicion. Corporate interference in the political sphere raises an omnipresent specter of impropriety, of a valuable institution stepping out of its proper sphere, of a tool of the people becoming its ruler.").

9. Claims for breach of fiduciary duty are state law claims. *See* WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 840 (2009) ("The determination of a director's or officer's fiduciary duty to the corporation and its shareholders is generally governed by the law of the state of incorporation, unless under the circumstances the corporation is deemed to be foreign in name only. In some jurisdictions, a statute articulates the fiduciary obligations of corporate directors and officers to exercise their powers and discharge their duties in good faith with a view to the interests of the corporation and of the shareholders with that degree of diligence, care and skill that ordinarily prudent person would exercise under similar circumstances in like positions.").

10. For a more in depth analysis of these issues, *see* Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach* (2009), http://www.brennancenter.org/content/resource/the_campaign_finance_case_for_shareholder_protection/.

11. *See* Robert S. Chirinko & Daniel J. Wilson, *Can Lower Tax Rates Be Bought? Business Rent-Seeking and Tax Competition Among U.S. States*, Federal Reserve Bank of San Francisco Working Paper Series (Dec. 2009) ("During the 2003 to 2006 period, $1.5 billion, or nearly $5 per capita, was contributed by the business sector...to candidates for state offices. Of this

$1.5 Billion, approximately 33% went to gubernatorial candidates (including lieutenant governor candidates), another 33% to state senate candidates, 21% to state house candidates, and the remaining 12% to candidates for other state offices (e.g., attorney general, state judges).") (However, this study did not distinguish between corporate PAC and treasury spending.).

12. *See* Center for Responsive Politics, Top National Donors Based on Combined State and Federal Contributions, 2007-2008 (2010), http://www.opensecrets.org/orgs/list_stfed.php?order=A (showing that top corporate donors gave at the federal and state level); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 American J. of International L. 1, 24 (1989) (noting "a U.S.-incorporated, foreign-owned company's PAC could serve as a conduit for foreign funds to U.S. electoral campaigns."); *see also* Electoral Commission, *Register of Donations to Political Parties* (2010), http://registers.electoralcommission.org.uk/regulatory-issues/regdpoliticalparties.cfm (listing American companies that had contributed to British political parties such as Microsoft, Northern Trust, Kerr Mcgee Oil, and Compaq Computers Ltd., among others).

13. Center for Responsive Politics, 2008 Election Overview, http://www.opensecrets.org/overview/index.php.

14. U.S. Census, *Table 415 Contributions to Congressional Campaigns by Political Action Committees (PAC) by Type of Committee*: 1997 to 2008, http://www.census.gov/compendia/statab/2010/tables/10s0415.pdf (PAC contributions to Congressional candidates were $387 million and $140 million were from Corporate PACs).

15. Press Release, Campaign Finance Institute, *Party Conventions' Financiers Have Spent Nearly $1.5 billion on Federal Campaign Contributions and Lobbying Since 2005* (Aug. 20, 2008), http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=203 (finding these same donors also spent over $1.3 billion to lobby the federal government).

16. Ruth Marcus, *'Judicial Activism' on Campaign Finance Law*, Real Clear Politics, (Aug. 3, 2009), http://www.realclearpolitics.com/articles/2009/08/03/judicial_activism_on_campaign_finance_law_97746.html (arguing "[w]e don't want Wal-Mart —at least I don't— using its purchasing power to buy elections, and we don't want Wal-Mart funneling money to a nonprofit proxy.").

17. Greenwood, *supra* note 8, at 1055, ("When [corporate] money enters the political system, it distorts the very regulatory pattern that ensures its own utility. When the pot of money is allowed to influence the rules by which it grows, it will grow faster, thus increasing its ability to influence—setting up a negative feedback cycle and assuring that the political system will be distorted to allow corporations to evade the rules that make them good for all of us (to extract rents, in the economists' jargon.").

18. *See McConnell v. FEC*, 540 U.S. 93, 143-44 (2003) ("Of 'almost equal' importance has been the Government's interest in combating the appearance or perception of corruption engendered by large campaign contributions. Take away Congress' authority to regulate the appearance of undue influence and "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.") (internal citations omitted).

19. 11 C.F.R. 100.6; Fed. Election Comm'n, SSFS and Nonconnected PACS (May 2008), http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml.

20. Fed. Election Comm'n, Contribution Limits for 2009-10 (2009), http://www.fec.gov/info/contriblimits0910.pdf.

21. *See FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (explaining "the [corporate treasury spending] ban has always done further duty in protecting 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'") (internal citations omitted).

22. Nicole Albertson-Nuanes, *Give to Get? Financial Institutions That Made Hefty Campaign Donations Score Big Bucks From The Government*, 1 (Mar. 19, 2009), http://www.followthemoney.org/press/Reports/GIVE_TO_GET_TARP_Recipients.pdf?PHPSESSID=fa738af7f3dba55d269db58a057e3f7a (noting 75 financial institutions that received TARP bailout funds had given contributions valued at $20.4 million to state level candidates, party committees and ballot measure committees in all 50 states over the 7-year study period.); Chirinko & Wilson, *supra* note 11, at 3 (Finding "the economic value of a $1 business campaign contribution in terms of lower state corporate taxes is nearly $4.").

23. The Aggarwal study conforms with international studies of the relationships between political connections and shareholder value. Mara Faccio, *The Characteristics of Politically Connected Firms* (Oct. 2006) (finding in 47 countries, companies with political connections underperform non-connected companies); Mara Faccio, Ronald Masulis & John J. McConnell, *Political Connections and Corporate Bailouts* (Mar. 2005) (finding in 35 countries politically-connected firms are significantly more likely to be bailed out than similar non-connected firms); Paul K. Chaney, Mara Faccio & David Parsley, *The Quality of Accounting Information in Politically Connected Firms* (Jun. 2008) (finding in 20 countries, quality of earnings reported by politically connected firms is significantly poorer than that of similar non-connected firms.); and Marianne Bertrand, Francis Kramarz, Antoinette Schoar & David Thesmar, *Politically Connected CEOs and Corporate Outcomes: Evidence from France*, 28 (2004) (In France "[w]e find that firms managed by [politically] connected CEOs have, if anything, lower rates of return on assets, than those managed by non-connected CEOs.").

24. *See* Aggarwal et al., *supra* note 5, which included corporate treasury money spent on politics pre-2002, the year McCain-Feingold was enacted closing the corporate soft-money loophole. Moreover, this study found that firms who make political donations have lower excess returns in the year following an election than firms that did not donate at all. *Id.* at 34 (revealing "[e]ven within the top five donating industries, including banking, financial trading, and utilities that have undergone deregulation during our sample period, donors have lower excess returns than non-donors."). Excess returns are defined as a firm's one-year buy and hold returns minus their expected return for the year as measured from the Wednesday following election day to the first Monday of November in the following year. *Id.* at 17. The study found that in the median firm a $10,000 political donation is associated with a loss of $1.73 million. Therefore, Aggarwal and his co-authors conclude "shareholder value could be hurt by such wasteful political spending." *Id.* at 18; *id.* at 23 (finding "the more a firm donates, the lower the excess returns."); *id.* at 3-4 (stating "[g]iven the magnitude of the destruction of shareholder value that we document, it is more plausibly the case that corporate political contributions are symptomatic of wider agency problems in the firm.").

25. *Id.* at 39.

26. Lance E. Lindblom, "The Price of Politics," PHARMACEUTICAL EXECUTIVE, (October 2004) ("Some [corporate political] contributions are intended to support the industry business model, while others simply back personal or managerial interests."); *see also* the webcast of a 2007 speech by Mr. Lindblom at Harvard available here: Andrew Tuch, *The Power of Proxies and Shareholder Resolutions*, HLS Forum on Corporate Governance and Financial Regulation (Oct. 19, 2007), http://blogs.law.harvard.edu/corpgov/2007/10/19/the-power-of-proxies-and-shareholder-resolutions/.

27. GREEN CANARY, *supra* note 5, at 5.

28. "Biggest Chapter 11 Cases," CNBC (Sept. 17, 2008), http://www.cnbc.com/id/26720522?slide=1; Al Hunt, "Enron's One Good Return: Political Investments," WALL STREET JOURNAL, (Jan. 31, 2002) (arguing Enron "played with funny money. But their political investment helped prolong the Ponzi scheme.").

29. "Qwest Isn't As Hale As It Looks," BUSINESSWEEK (Feb. 6, 2006), http://www.businessweek.com/magazine/content/06_06/b3970100.htm ("Four years ago, Qwest Communications International Inc. was on bankruptcy's doorstep"); "Executives Accused of Plan to Loot Utility," N.Y. TIMES (Dec. 5, 2003) (noting Westar was "pushed [] to the brink of bankruptcy with $3 billion in debt").

30. European Corporate Governance Service, *Blue-Wash* (undated), http://www.ecgs.net/news/story216.html.

31. *Citizens United v. FEC*, No. 08-205, slip opinion at 54 (2010).

32. Domini Social Investments, *Social Impact Update Forth Quarter 2004* (2004) ("Despite significant risks— to shareholder value and to the integrity of our political system —data on corporate political contributions remains extremely difficult to obtain.").

33. *See* Adam Winkler, *'Other People's Money': Corporations, Agency Costs, and Campaign Finance Law*, 92 Georgetown L. J. 871, 893-94 (June 2004); Jennifer S. Taub, *Able but Not Willing: the Failure of Mutual Fund Advisers to Advocate for Shareholders' Rights*, 34 J. of Corporation L. 101, 102 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066831 ("Approximately 77.7 million individuals in the United States invest in equities through stock mutual funds."); *id.* at 105 ("Investors who are the risk-takers are now pushed further away from the decisionmakers, and the agency problem is amplified.").

34. Independent spending and funding of electioneering communications are also reported to the FEC and the FCC, respectively. See Fed. Election Comm'n, Electronically Filed Independent Expenditures (2009), http://fec.gov/finance/disclosure/ie_reports.shtml; FCC, Electioneering Communications Database (ECD) (2009), http://gullfoss2.fcc.gov/ecd/.

35. Fed. Election Comm'n, *Contributions Received by Abraham Lincoln Leadership Political Action Committee*, http://query.nictusa.com/cgi-bin/com_rcvd/C00357095/; *Contributions Received by Democracy Believers Political Action Committee*, http://query.nictusa.com/cgi-bin/com_rcvd/C00382036/; *Contributions Received by Freedom & Democracy Fund*, http://query.nictusa.com/cgi-bin/com_rcvd/C00409987/.

36. *See* Campaign Disclosure Project, Grading State Disclosure (2008), http://www.campaigndisclosure.org/gradingstate/index.html.

37. Jonathan Peterson, "More Firms' Political Ties Put Online," L.A. Times (Mar. 20, 2006), http://articles.latimes.com/2006/mar/20/business/fi-donate20 ("Campaign contributions are a matter of public record, but getting a complete picture of a company's political giving is difficult because the donations can be scattered over scores of individual campaign finance reports at the local, state and federal levels.").

38. *Mutual Protection: Why Mutual Funds Should Embrace Disclosure of Corporate Political Contributions/Common Cause and Center for Political Accountability*, ALI-ABA Course of Study Materials 11 (Dec. 2005).

39. Bruce F. Freed & Jamie Carroll, Hidden Rivers: How Trade Associations Conceal Corporate Political Spending 1 (2006), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932.

40. *Id.* at 1-2 ("Trade associations are now significant channels for company political money that runs into the tens if not hundreds of millions of dollars. In 2004, more than $100 million was spent by just six trade associations on political and lobbying activities,

including contributions to political committees and candidates. None of this spending is required to be disclosed by the contributing corporations.").

41. S. Rep. No. 95-114, 95th Cong., 1st Sess. 1977, 1977 U.S.C.C.A.N. 4098, 1977 WL 16144 (noting "Recent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars. These revelations have had severe adverse effects. Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered.").

42. John R. Evans, "Of Boycotts and Bribery, and Corporate Accountability," *Securities and Exchange Commission News*, 9 (Oct. 5, 1976), http://www.sec.gov/news/speech/1976/100576evans.pdf.

43. Bruce F. Freed & John C. Richardson, *Company Political Activity Requires Director Oversight*, ALI-ABA Course of Study Materials, 3 (Dec. 2005).

44. *Id.* at 2-3; *see also* Victor Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 Yale L. J. 235, 237 (1981) (stating "[t]he use of that wealth and power by corporate management to move government toward goals that management favors—with little or no formal consultation with investors—is also a phenomenon that is generally undeniable."); *id.* at 239-40 (noting "unless investor approval is obtained, the funds of some investors are being used to support views they do not favor.").

45. Jill Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 Fordham L. Rev. 1593, 1613 (2006).

46. The lack of board approval is the norm. However two states (Louisiana and Missouri) do require board approval of political donations before they are made. See La. Rev. Stat. Ann. §18:1505.2(F); Mo. Ann. Stat. §130.029.

47. Ira M. Millstein, Holly J. Gregory & Rebecca C. Grapsas, Weil, Gotshal & Manges LLP, *Rethinking Board and Shareholder Engagement in 2008* (January 2008), http://blogs.law.harvard.edu/corpgov/files/2008/01/gregory_millstein_corporate-governance-advisory-memo-jan-2008.pdf.

48. *Citizens United v. FEC*, No. 08-205, slip opinion at 46 (2010).

49. An earlier Supreme Court acknowledged that investment is distinct from political engagement. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257-58 (1986) (citations omitted). ("The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability

of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.").

50. *Marsili v. Pacific Gas & Elec. Co.*, 51 Cal. App. 3d 313, 322 (Cal. Ct. App. 1975) (characterizing a corporate political contribution as a good faith business decision under the business judgment rule); *Simon v. Sw. La. Elec. Membership Corp.*, 267 So.2d 757, 758-59 (La. Ct. App. 1972) (rejecting plaintiff's claim because nonprofit corporation's political activities were illegal under state law rather than ultra vires).

51. Thomas W. Joo, *People of Color, Women, and the Public Corporation: Corporate Hierarchy and Racial Justice*, 79 St. John's L. Rev. 955, 959 (2005) (citation omitted).

52. Only Louisiana and Missouri corporations require board approval of political expenditures. See *supra* note 46.

53. Transcript of Re-argument at 57-59, *Citizens United v. FEC*, No. 08-205 (Sept. 9, 2009), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf

54. Under British law political donations include: "(a) any gift to the party of money or other property; (b) any sponsorship provided in relation to the party; (c) any subscription or other fee paid for affiliation to, or membership of, the party; (d) any money spent (otherwise than by or on behalf of the party) in paying any expenses incurred directly or indirectly by the party; (e) any money lent to the party otherwise than on commercial terms; (f) the provision otherwise than on commercial terms of any property, services or facilities for the use or benefit of the party (including the services of any person)." Political Parties, Elections and Referendums Act, c. 41 §§ 50 (2000), http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000041_en_1. And it goes without saying, Britain has a Parliamentary system so donations typically go to political parties.

55. Certain authors in Britain have argued corporations should not be able to make political expenditures. Austin Mitchell & Prem Sikka, Association for Accountancy & Business Affairs, Taming the Corporation (2005), visar.csustan.edu/aaba/TamingtheCorporations.pdf. (arguing "[c]ompanies should be banned from making any political donations to individual politicians or parties.").

56. Political Parties, Elections and Referendums Act, *supra* note 54, c. 41 §§ 139, 140, sched. 19; *see also* Explanatory Notes to Political Parties, Elections and Referendums Act (2000), c. 41, http://www.opsi.gov.uk/ACTS/acrs2000/en/ukpgaen_20000041_en_1. The Companies Act was amended again in 2006. As a result of the 2006 amendments, donations to trade unions are exempt. In addition, directors are jointly and severally liable for any unauthorized political expenditures plus interest. Companies Act c. 46, §§ 369, 374 (2006), http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf; *see also* Companies Act 2006 Regulatory Assessment (2007), http://www.berr.gov.uk/files/file29937.pdf.

57. Aileen Walker, Parliament and Constitution Centre House of Commons Library, *The Political Parties, Elections and Referendums Bill*–Donations, 9 (Jan. 7, 2000), http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf.

58. Home Department, THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM: THE GOVERNMENT'S PROPOSALS FOR LEGISLATION IN REPSONSE TO THE FIFTH REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE 1999-2000, http://www.archive.official-documents.co.uk/document/cm44/4413/4413-00.htm.

59. COMMITTEE ON STANDARDS IN PUBLIC LIFE, THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, iii (1998), http://www.archive.official-documents.co.uk/document/cm40/4057/volume-1/volume-1.pdf.

60. *Id.* at 86.

61. Political Parties, Elections and Referendums Act, *supra* note 54; *see also* ELECTORAL COMMISSION, GUIDANCE TO COMPANIES: POLITICAL DONATIONS AND LENDING (2007), http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0014/13703/Companies-Guidance-Final1_27776-20443__E__N__S__W__.pdf.

62. The original reporting threshold in the 2000 law was £200. The amount was later raised to £2,000 in 2007 under secondary legislation. See DEPARTMENT FOR BUSINESS ENTERPRISE & REGULATORY REFORM, GOVERNMENT RESPONSE TO CONSULTATION ON THE COMPANIES ACT 2006 – ACCOUNTING AND REPORTING REGULATIONS (2007), http://www.berr.gov.uk/files/file40480.doc.

63. Companies Act, *supra* note 56; *see also* Companies Act 2006: Explanatory Notes (2006), http://www.opsi.gov.uk/acts/acts2006/en/ukpgaen_20060046_en.pdf.

64. Political Parties, Elections and Referendums Act, *supra* note 54.

65. Companies Act, *supra* note 56, at § 369.

66. The Companies (Interest Rate for Unauthorised Political Donation or Expenditure) Regulations 2007, Statutory Instruments 2007 No. 2242 (July 25, 2007), http://www.opsi.gov.uk/si/si2007/uksi_20072242_en_1.

67. *See e.g.*, AstraZeneca, *Directors' Report: Business Review: Corporate Governance: Other Matters*, http://www.astrazeneca-annualreports.com/2007/business_review/governance/other_matters.asp (reporting "AstraZeneca's US legal entities made contributions amounting in aggregate to $321,645 (2006 $416,675) to state political party committees and to campaign committees of various state candidates affiliated with the major parties."); National Grid, *Directors' Report for the Year Ended 31 March 2007* (May 16, 2007), http://www.nationalgrid.com/annualreports/2007/06_dir_reports/dir_report.html (reporting "National Grid USA and certain subsidiaries made political donations of $100,000 (£52,289) during the year. National Grid USA's political action committees,

funded partly by voluntary employee contributions, gave $149,709 (£78,282) to political and campaign committees in 2006/07.").

68. Stephanie Kirchgaessner, "BAE Among Top Foreign Donors to US Political Candidates," FINANCIAL TIMES, August 22, 2006 (noting "BAE, the British defence group, has emerged as one of the most powerful corporate contributots to candidates in the current US election cycle, ranking number 18 in a list of the biggest corporate donors."); "U.S. Elections Got More Foreign Cash—PAC's of Overseas Companies Gave $2.3 Million in 1986 Congress Campaigns," N.Y. TIMES, A27 (May 24, 1987).

69. Patrick Hosking, "Business Big Shot: Peter Buckley of Caledonia Investments," THE TIMES, (May 30, 2008), http://business.timesonline.co.uk/tol/business/movers_and_shakers/article4029538.ece.

70. Press Release, Labour Research Department, *Tories Still Get Corporate Millions* (June 2, 2001), http://www.lrd.org.uk/issue.php?pagid=1&issueid=362 ("The Conservative Party has received a total of £1.74 million in company donations since the last election from 62 companies...just 12 corporate donations [went] to Labour totalling £191,500."); Labour Research Department, *Party Funding*, LABOUR RESEARCH 11 (Oct. 2003), http://www.lrd.org.uk/db/downloads/lr0310.pdf (Companies gave £1,161,644 the Conservative Party and £245,690 to the Labour Party in the 2002-2003 election cycle.).

71. Lisa E. Klien, *On the Brink of Reform: Political Party Funding in Britain*, 31 CASE W. RES. J. INT'L L. 1, 13 (1999).

72. COMMITTEE ON STANDARDS IN PUBLIC LIFE, *supra* note 58 (noting £47,000 from the Caparo Group, £30,000 from GLC Limited, and £21,000 from the Mirror Group for the Labour Party.).

73. *Id.* at 52, ¶ 597 (vol. 2 1998).

74. Press Release, Labour Research Department, *Tory Donations Take a Dive* (Nov. 19, 1998), http://www.lrd.org.uk/issue.php?pagid=1&issueid=330.

75. *See supra* note 70.

76. *See* The Co-operative Group, *Annual Report and Accounts 2008*, 36 (2008), http://www.co-operative.coop/Corporate/PDFs/Annual_Report_2008.pdf ("In 2008 an annual subscription of £476,000 (2007: £646,103) was made to the Co-operative Party.").

77. Michael Pinto-Duschinsky, *British Party Funding 1913-87*, PARLIAMENTARY AFFAIRS, April 1989, at 210 (listing as £50,000 or over donors: George Weston Holdings, British & Commonwealth Holdings, Taylor Woodrow, Rugarth Investment Trust, Hanson Trust, P & O, United Biscuits, Allied Lyons, Trafalgar House, Plessey, Whitbread, Consolidated Goldfields, Racal, Guardian Royal Exchange, Sun Alliance, Willis Faber,

Hambros, General Accident, Newarthill, Trust House Forte, Baring, British Airways, General Electric, Glaxo Holdings, Rolls Royce, Royal Insurance, Unigate, and Williams Holdings).

78. *See* companies listed *supra* note 77 as £50,000 or over donors. But when these companies are searched in the British Electoral Commission's database of campaign contributors from 2001-2009, only one donation from British Airways in 2001 for £1,450 is listed. Electoral Commission, *Register of Donations to Political Parties* (2010), http://registers.electoralcommission.org.uk/regulatory-issues/regdpoliticalparties.cfm.

79. For example, the resolution passed at AstraZeneca stated the company could "make donations to political parties; and make donations to political organisations other than political parties; and incur political expenditure; not exceed[ing] $250,000..." AstraZeneca, *AstraZeneca Notice Of Annual General Meeting 2009 and Shareholders' Circular*, 6 (2009), http://www.astrazeneca.com/_mshost3690701/content/resources/media/investors/2009-AGM/AZ_NoM_EN.pdf. Other companies had far more modest political budgets. *See e.g.*, 3i Group PLC, Notice of Annual General Meeting 2007, 2 (2007), http://www.3igroup.com/pdf/AGM_-_notice_of_AGM_2007.pdf (requesting a political budget of £12,000 for a subsidiary); Balfour Beatty, *Annual General Meeting 2009 and Separate Class Meeting of Preference Shareholders*, 4 (2009), http://www.balfourbeatty.com/bby/investors/shinfo/agm/2009/agm09.pdf (requesting a political budget of £25,000 for the coming year).

80. BP PLC, *Notice of BP Annual General Meeting 2007*, 10 (2007), http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/home_assets/IC_SHMV07_BP_notice_of_meeting_2007.pdf.

81. British American Tobacco, *Annual General Meeting 2009*, 5 (2009), http://www.bat.com/group/sites/uk__3mnfen.nsf/vwPagesWebLive/DO57YMK7/$FILE/medMD7QJMDX.pdf?openelement ("At its Annual General Meeting in April 2005, the Company was given authority to make donations to EU political organisations and incur EU political expenditure ... for a period of four years and was subject to caps of £1 million on donations to EU political organisations and £1 million on political expenditure during that period.").

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92. *See* West Midlands Pension Fund, *Corporate Governance Proxy Voting Activity*, 1-2 (2004), http://www.wmpfonline.com/pdfs/activity0604_0804.pdf .

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96. Press Release, Center for Political Accountability, *New Companies Bring Political Disclosure to Nearly Half of Trendsetting S&P 100*, http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/2636.

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98. Press Release, *Interfaith Center on Corporate Responsibility, Religious Investors Open Campaign to Press Drug Companies to Disclose Political Spending* (Dec. 9, 2004), http://www.iccr.org/news/press_releases/2004/pr_contribs120904.htm.

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100. Nathan Cummings Foundation, *Shareholder Resolutions & Corporate Engagement 2003-2009*, (undated), http://www.nathancummings.org/shareholders/shareholder_resolutions.html.

101. If particular candidates or ballot measures are known to the company at the time of the AGM, then those particular candidates and ballot measures should be mentioned in the language of the resolution.

102. *Citizens United v. FEC*, No. 08-205, slip opinion at 54 (2010).

103. The data in this chart comes from each company's respective annual report.

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FOR JUSTICE

At New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
www.brennancenter.org

Senator Charles Schumer, Chairman
U.S. Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington D.C., 20510

Statement of Sheila Krumholz, Executive Director of the Center for Responsive Politics
Before the U.S. Senate Committee on Rules and Administration
Regarding *Corporate America vs. The Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections*
February 2, 2010

Mr. Chairman, and members of the committee, thank you for allowing the Center for Responsive Politics to submit this written testimony to the U.S. Senate Committee on Rules and Administration regarding *Citizens United v. Federal Election Commission* and its impact on campaign finance.

My name is Sheila Krumholz. I am executive director of the Center for Responsive Politics, a nonpartisan, nonprofit research organization based here in Washington that monitors and analyzes campaign contributions in federal elections, as well as other forms of money and elite influence in U.S. politics. The Center is best known for our award-winning Web site, OpenSecrets.org, where we make freely available our analysis of publicly disclosed information about the role of money in politics.

Founded in 1983 by two former senators, a Republican and a Democrat, the Center's reason for existence is simple: to inform citizens about who is paying for federal elections and who is in the position to exercise influence over the elected officials who represent the public in our nation's capital. We can do this because the financing of federal campaigns is open to public scrutiny.

In late January, the U.S. Supreme Court affirmed that citizens should be able to see whether "elected officials are 'in the pocket' of so-called moneyed interests." As part of an 8-1 ruling in *Citizens United v. Federal Election Commission*, the majority of justices declared that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

But in *Citizens United*, the Court additionally struck down limitations on the political expenditures of for-profit and nonprofit corporations, and in doing so, raised new questions about potential influence-buying.

The Court's 5-4 decision to overturn these restrictions has brought us to an unprecedented situation: Corporations are now free to spend unlimited sums on independent expenditures, even in the closing weeks of elections.

No one knows exactly how this will play out. However, over the course of our 26-year history of monitoring the confluence of money and politics, we have seen time and time again that corporations and unions have the appetite to use their financial largess to wield control over politics and elections. It stands to reason that some, if not many, organizations will take advantage of this new loophole.

Before the Bipartisan Campaign Reform Act of 2002 was signed into law, many organizations contributed hundreds of millions of dollars directly to political parties via soft money donations. Between 1991 and 2002, organizations – not individuals – accounted for approximately two-thirds of all soft money donations, and they gave more than $1 billion in soft money contributions.

Soft Money from Organizations, 1991 - 2002

Cycle	Total	Dems	Repubs	% Dems	% Repubs
1992	$60,907,511	$25,439,223	$35,468,288	41.8%	58.2%
1994	$67,152,549	$31,781,295	$35,369,254	47.3%	52.7%
1996	$172,142,366	$74,464,702	$97,185,029	43.3%	56.5%
1998	$137,653,895	$51,828,344	$85,841,344	37.7%	62.2%
2000	$283,975,950	$130,531,845	$152,625,079	46.0%	53.7%
2002	$297,789,479	$124,351,208	$173,127,760	41.8%	58.1%
TOTAL	$1,019,621,748	$438,496,617	$579,406,454	43.0%	56.9%

source: OpenSecrets.org

Domestic subsidiaries of foreign corporations also have a history of spending both hard and soft money on U.S. elections. During the 1996 election, the Center for Responsive Politics identified 128 U.S. subsidiaries of 93 foreign-owned companies – from 16 countries – that contributed soft money and/or PAC contributions to federal candidates. In total, these companies contributed more than $12.5 million, with just over $8 million coming from soft money sources. During the entire 12 years in which soft money was disclosed to the Federal Election Commission, CRP conservatively estimates that at least $30 million came from U.S. subsidiaries of foreign-owned corporations. In the 2008 election cycle, PAC donations from U.S. subsidiaries of foreign companies rose to nearly $17 million.

After BCRA's enactment, corporations, trade associations and unions have continued to pour money into campaign war chests via political action committees. During the 2008 election cycle alone, PACs contributed some $465 million to federal candidates and party committees – with business PACs outspending labor PACs about four-to-one. Additionally, independent

expenditures by all PACs skyrocketed during the 2008 cycle; the $135 million spent on such advertisements represents an increase of 100 percent above 2004 spending levels.

In the wake of *Citizens United*, unions, trade associations and both for-profit and nonprofit corporations may pour even more money into independent expenditures. In addition, many are concerned that the rules prohibiting foreign national corporations from using their domestic subsidiaries to influence U.S. elections are not adequate now that corporations may make independent expenditures. Much of this corporate spending could potentially come in the eleventh hour of a campaign when the target may not be capable of an effective response, for want of time, funds or both.

Certainly, risk-adverse corporations may not wish to have their fingerprints on new, negative advertisements and may not opt to take advantage of this new loophole. And these corporations will continue to have the ability to use existing under-the-radar methods to sponsor issue advocacy through 501(c) organizations and other committees.

Furthermore, some corporations may simply opt to sponsor positive messages – explicitly encouraging fund-raising for specific candidates and committees. Such expenditures could become another vehicle for those who seek to gain access to the halls of Congress. What better way to move legislation than to demonstrate bundling prowess and rake in millions with a laudatory spot?

With new paths and potentially greater sums of money set to enter into the political bloodstream, transparency is now more essential than ever. Yet disclosure rules, as they currently exist, are not enough. Too often the picture gets muddied because of vague, incomplete and even non-existent reporting requirements. We want to see more timely, more complete and more effective reporting and disclosure.

First and foremost, the Federal Election Commission's rulemaking regarding donor disclosure requirements for independent expenditures is entirely insufficient. Under current statute (Section 434(c)(2)(C)), non-profit groups can raise money directly from corporations, unions and whatever other domestic sources and, as long as those contributions or dues were not made for the express purpose of making independent expenditures, they do not need to disclose those donors. The Supreme Court justices that affirmed the crucial role played by disclosure clearly did not examine the exact language of the FEC's rulemaking in this area. This provision has been read narrowly, resulting in relatively few people being reported to the Federal Election Commission as giving for the purpose of making independent expenditures. Congress should examine this issue and address it, ensuring the disclosure of all donors whose donations fund any portion of any independent expenditure. Strengthening disclosure requirements in order to close this loophole is urgently needed.

Contrary to the opinion of some people, the state of other aspects of campaign finance disclosure leaves much to be desired. For instance, Senate committees still file campaign reports on paper. In 2010, why must we still wait weeks and months after an election – long after we have been able to retrieve data for all other filers – to search, sort and download donations and expenses for

Senate committees? Especially in an age when senators are using Twitter while attending closed-door meetings, electronic filing of campaign reports should be mandatory. Senators should quickly adopt S. 482 – cosponsored by some of you here – to bring the Senate's disclosure methods into the 21st century.

Additionally, we can't leave it up to the campaigns to voluntarily disclose the names of their major fund-raisers. The public needs to be able to gauge for itself whether the people elevated to political appointments got there based on the merits or by virtue of their prowess as elite "bundlers." In 2007, then-Sen. Barack Obama proposed a bill that would require the disclosure of all bundlers who raise more than $50,000. The bill never made it past committee. This legislation should be revived – and passed.

Lastly, we've seen little improvement in expenditure transparency over the years. Currently, donors who want to know how their money was spent can't really tell, and watchdog groups fear that the vague and generic terms can mask conflicts of interest or cover up inordinate and inappropriate spending. The FEC should develop a list of acceptable descriptions so that one campaign's "flowers" are not another's "fund-raising expenses." Specific details must be required. And, again, senators and Senate candidates should make their expenditure records available electronically, so that the public can hold politicians accountable for any abuses.

Citizens need reliable information to participate effectively in a democracy, and democracy needs that citizen engagement to function as it should. It's a delicate balancing act, with the free flow of information to the public at its core.

The loophole created by this decision could turn into yet another means for unlimited dollars to flow into a system weighted in favor of monied interests over ordinary citizens. While we cannot predict with certainty how newly unfettered groups will respond, we *can* affirm that the existing disclosure requirements are wholly inadequate to deliver the transparency that citizens both need and deserve.

February 1, 2010

Senate Rules Committee
305 Russell Senate Office Building
Washington, DC 20510

Dear Senator Schumer, Senator Bennett and Members of the Committee,

The American people are experiencing a crisis in confidence in the ability of their elected government to act in the public's best interest. A new Wall Street Journal/NBC survey of voters found that 70% of voters think the government isn't working well, and 84% believe "the special interests have too much influence over legislation." And a national poll we commissioned last year found that 79% of voters believe large campaign contributions will prevent Congress from tackling the biggest issues facing the nation, like health care, climate change and the economic crisis. Americans are angry at the lack of progress in Washington.

Last month's decision from the U.S. Supreme Court in the *Citizens United* case will only make an already bad situation worse. The Court turned its back on 100 years of law and its own precedents to strike down federal prohibitions on independent political spending by corporations and unions, at the same time pulling the plug on similar laws in 24 states. That much we expected. But the Court also declared outright – beyond overruling *Austin* and *McConnell* – that corporate expenditures *cannot* corrupt elected officials and that appearance of influence *will not* undermine public faith in our democracy. We at Common Cause were stunned by the sweeping nature of these proclamations, made without any factual record on those issues for the Court to review.

This is judicial activism at its worst. The effect of the decision is likely to let loose a flood of corporate and union independent spending in the future elections, trigger a fundraising arms race by candidates fearful of that spending, and further reduce public trust in our democracy.

Just one week before the *Citizens United* decision, the U.S. Chamber of Commerce issued a press release threatening to spend an unprecedented amount of money in the 2010 elections to defeat Members of Congress who did not side with their agenda. Last fall, PhRMA announced a $150 million advertising campaign to support a health care plan (without a public insurance option) – more than the $140 million spent by all 55 winners of hot congressional races in 2008 combined. That's one trade association on one bill. Now imagine what America

looks like when powerful interests are free to tap their profits to influence elections, and decide to spend as much on campaigns as they do on lobbying.

Although the *Citizens United* decision will affect both corporate and union spending, there is no doubt where the advantage lies. In the last election cycle, corporations outspent unions 4 to 1 when it came to the highly regulated field of PAC spending, where money has to be aggregated from individuals in limited amounts. During the same period, corporations outspent unions 61 to 1 when it came to lobbying Congress ($5.2 billion for corporations, compared to $84.4 million for labor).

This Committee will likely hear a wide variety of legislative proposals to mitigate the impact of the *Citizens United* decision, and we encourage you to give them careful consideration. However, given this Court's narrow focus on *quid pro quo* corruption and its ideological approach to campaign finance law, there is very little you can do from a regulatory, limits-based approach to restore the status quo, let alone take meaningful steps to increase public confidence in Washington.

Common Cause supports a comprehensive package of reforms to address the effects of the *Citizens United* decision – and the preexisting condition of big money dominance in federal elections and the halls of Congress. We believe that a reform package should:

1. ***Prohibit political spending by foreign-owned domestic corporations.*** The *Citizens United* decision opens a loophole that would allow foreign-owned corporations chartered in the United States to spend unlimited amounts of money to influence our elections. That loophole must be closed.

2. ***Require shareholder approval of political expenditures.***

3. ***Prohibit political expenditures by corporations that receive federal government contracts, earmarks, grants, tax breaks or subsidies.***

4. ***Strengthen coordination rules, to ensure that "independent" expenditures are truly independent.***

5. ***Strengthen disclosure rules.*** Independent expenditures should be disclosed electronically within 24 hours in a manner accessible to candidates, the media and the public. CEO's should be required to "stand by their ads" just like candidates, and corporations that collect money for political expenditures should provide attribution for their top three donors, in order to prevent evasion of disclosure by "Astroturf" entities. FCC advertising logs should be made available on the Internet.

6. ***Pay-to-Play reforms.*** Congress should move quickly to dispel the public's perception of special interest dominance in Washington by enacting low contribution and solicitation limits for lobbyists and lobbyist employers, and banning earmarks for campaign contributors.

7. ***Fair Elections.*** Congress should enact a new system for 21st Century elections that allows candidates who agree to low contribution limits to run competitive campaigns on a blend of small donations and limited public funds.

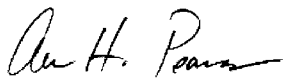
The best defense is a good offense. We urge you to seize this moment to lay the groundwork for a new generation of elections that raise up the voices of American voters and free elected officials from their dependence on wealthy special interests. If what we are witnessing is a return to the "Wild West" of American elections, then allowing candidates to run vigorous campaigns on a blend of small contributions and limited public funds becomes an even more attractive alternative than it is now. In a world where there are no practical limits on political spending by organized wealthy interests, the Fair Elections Now Act (S. 752 and H.R. 1826) offers a floor for competitive campaigns and matching funds to ensure that concentrated wealth cannot drown out the voices of Main Street.

The problem is not so much the amount we spend on political campaigns – columnist George Will likes to remind us that we spend more on potato chips than elections each year – as it is who pays for them, what they get in return, and how that distorts public policy and spending priorities. Keeping our elected officials dependent on the very same wealthy special interests they are supposed to regulate undermines public confidence in their government and its ability to tackle the tough issues that face the nation. And letting the interests who stand to gain from billions in federal spending and bailouts give politicians campaign cash undermines public faith in government's ability to spend money wisely.

Common Cause urges you to make the Fair Elections Now Act part of any reform package.

Thank you for rapid attention to this pressing crisis in American democracy, and for this opportunity to share our views with you.

Sincerely,



Arn H. Pearson, Esq.
Vice President for Programs

JONATHAN COCKS
3205 Walker Drive
Richardson, Texas 75082
(972) 690-3552

February 11, 2010

Committee on Rules and Administration
United States Senate
Washington, DC

RE: Corporate America vs. The Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections

Mr. Chairman:

I am a certified public accountant. For the past twenty years the primary focus of my practice has been small and family owned businesses in north Texas.

Before beginning my remarks I want to define what I mean when I use the word "small business." My definition of a "small business" is an entity employing fewer than 125 people that is owned by a small number of individuals (usually fewer than 50) and whose equity interests and debt instruments are not traded on any established public market. By my definition, the primary sources of capital and financing for a small business are the owners' savings, the business' accumulated earnings, trade credit and financial institutions.

Throughout my lifetime I have admired the United States Supreme Court's ability to rationally and equitably arbitrate disputes between our citizens. The Court generally gets it right. However, their January 2010 decision regarding campaign spending concerns me as a citizen and terrifies me as a small business owner. After thinking "they did what" and "why would they do that," my next thought was more pragmatic. Specifically, how does a small business compete with that?

Let's be honest, all businesses have their fair share of challenges. It's not easy for any business to consistently stay competitive, much less remain viably profitable. Larger businesses, especially those with ready access to the public capital markets, do have one key advantage over small businesses, cash. Cash, or better stated the ready access to cash, confers a unique competitive advantage, specifically the ability to survive and weather the inevitable ups and downs of the competitive marketplace.

Given the Court's recent decision, business entities now have the opportunity to become much more visible and formidable players in the federal election "marketplace" and political process. I fear the Court's decision confers a greater potential benefit on large businesses, at the expense of small businesses. Any business that avails itself of this new opportunity will use this tool as a means to confer or increase its competitive advantage

in the marketplace. The use of political advertising by business entities will inevitably lead to market distortions and disruptions and create new competitive dynamics. As if it wasn't already hard enough, it will now be even more difficult for small businesses, the true engine of our nation's economic growth and innovation, to effectively compete.

Traditionally, I have not been a fan of government regulation. However, given the potential magnitude of the Court's decision I urge this Committee to enact legislation regulating political speech by business and non-profit entities. Specifically, I urge this Committee to consider the following:

1. In connection with the annual proxy process require business entities with publicly traded equity or debt instruments to seek advance shareholder approval for a maximum dollar amount of combined political expenditures that can be incurred by the registrant, its subsidiaries and affiliates for the upcoming year. The United Kingdom already has such a requirement for its corporate entities.

2. Require business entities with publicly traded equity or debt instruments to disclose the detail of all combined or consolidated political advertising transactions greater than or equal to $25,000 in their quarterly and annual reports as well as their annual proxy statements.

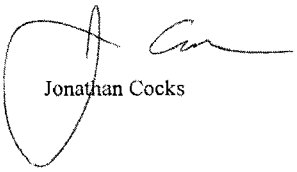
3. Similar requirements should also be imposed upon all business and non-profit entities who are suppliers or contractors to the federal government above a certain annual dollar limit as well as all business or non-profit entities that are the recipients of federal grant dollars.

4. The identification of the corporate parent should be required to be predominately present or included in any political advertising placed by a business or non-profit entity, not just in the fine print or "fast talk" at the end or conclusion of an advertisement.

I am happy to answer any questions the Committee or its staff might have as well as provide any additional assistance.

Thank you for the opportunity to express my views regarding this important subject.

Respectfully submitted,



Jonathan Cocks

ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

Organization for International Investment ("OFII")
Written Statement for the Record of the Senate Rules Committee Hearing on

Corporate America vs. The Voter:
Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections

February 2, 2010

The Organization for International Investment ("OFII") supports the Committee's goal of restricting foreign influence in United States elections. Nevertheless, we are troubled by the tenor of the debate around foreign influence triggered by the Supreme Court's historic decision in *Citizens United v. FEC* and object to attempts to address such influence by mischaracterizing U.S. subsidiaries of companies headquartered abroad and the important role they play in the American economy. That approach both unfairly maligns the millions of Americans employed by companies which insource jobs in the U.S., and fails to address other business situations which could provide even greater and more direct opportunities for foreign influence. In short, we urge the Committee to focus its efforts on preventing actual foreign influence in American elections, without making unwarranted distinctions between similarly-situated multinational corporations in light of the realities of today's global economy.

I. Nature of Insourcing Companies in the United States

As illustrated in the attached membership list, and by the facts below, the U.S. operations of companies based abroad, or "insourcing" companies, play a major role in our nation's economy, providing critically important jobs (and the associated tax base) in communities across the country.

Some salient facts about insourcing companies:

- U.S. subsidiaries employ 5.5 million Americans — 4.6% of total U.S. private sector employment;
- U.S. subsidiaries account for 6% of total U.S. GDP;
- U.S. subsidiaries support an annual payroll of $403.6 billion — with average compensation per worker of $73,124, which is 34.7 percent higher than compensation at all U.S. companies;
- U.S. subsidiaries heavily invest in the American manufacturing sector; with 29 percent of the jobs at U.S. subsidiaries in manufacturing industries;
- U.S. subsidiaries manufacture in America to export goods around the world — accounting for nearly 18.5 percent of all U.S. exports, or $215.6 billion;
- U.S. subsidiaries have a larger percentage of workers covered by a union collective-bargaining agreement than other U.S. companies — 12.4% of employees at U.S. subsidiaries compared to just 8.2% at other U.S. firms.

In New York, insourcing companies employ 389,300 Americans, more than 5% of state's private-sector workforce. These include 53,500 manufacturing jobs, over 9 % of the New York's total manufacturing workforce. U.S. subsidiaries employ 34,600 Utahans – an increase of 13.8% over five

years – and nearly 30% of these jobs are in manufacturing industries. Manufacturing companies tend to have a strong "multiplier" effect on the economy—stimulating a substantial amount of activity and jobs in other sectors through their demand for inputs from other suppliers. Insourcing companies also employ 572,500 Californians, 19,900 West Virginians, 243,100 Illinoisans, and 91,000 Kentuckians alongside millions of other Americans nationwide.

The significant contributions insourcing companies bring to the U.S. economy are a direct result of the U.S.'s open investment environment, which treats these companies and the Americans they employ on a level playing field with their domestic competitors. At a time when too many American jobs are at risk, Congress should take particular care not to unfairly distort this playing field, thereby disincentivizing insourcing companies and the billions of dollars they invest in our nation, our economy, and our workers.

II. Current law has already addressed any risk of foreign influence through US subsidiaries for decades

Too much of the recent attention to this issue has disregarded the separate legal restriction on expenditures by foreign nationals that was not at issue in *Citizens United*, and which therefore remains fully in effect despite the scope of that decision. That statute, now codified at 2 U.S.C. §441e, in fact has been policed rather aggressively by the Federal Election Commission throughout the Commission's existence. Some of the FEC's largest enforcement matters have involved the foreign national prohibition, even in recent years when many other issues have triggered deep ideological differences among the Commissioners about the implementation of campaign finance law.

Furthermore, since the foreign national prohibition also covers state and local elections, the FEC has had the opportunity to promulgate regulations and flesh out a long line of Advisory Opinions precisely addressing the question of contributions or expenditures from U.S. subsidiaries in those states and localities where such corporate expenditures were not prohibited. The first of the FEC's relevant advisory opinions was issued in 1977, shortly after the Commission was founded, and the most recent such opinion was issued last year. In short, these opinions establish two related principles which have restricted foreign influence in those non-federal elections for decades without serious controversy.

First, these advisory opinions made clear that any corporation must prevent any foreign nationals from taking part in the decision-making process around corporate political expenditures. This is not necessarily disqualifying for a typical U.S. subsidiary, which can empower a subset of its board, made up only of U.S. citizens or permanent residents, to oversee the company's political activities. Second, the company must ensure that only U.S.-derived revenue is used to fund the company's contributions or expenditures. This is not only a paperwork requirement despite the fungibility of corporate treasuries, since any domestic subsidiary which generates no revenue from U.S. operations cannot make contributions or expenditures in the U.S. at all.

Indeed, if domestic subsidiaries actually did present a serious risk of bringing foreign political influence into American elections, it would not be unreasonable to expect that influence to have manifested itself in the decades since the FEC's first opinions on this topic in the late 1970's. In fact, Congress itself implicitly acknowledged the appropriateness of the FEC's approach to political activities of U.S. subsidiaries, since even while broadening the scope of the foreign national prohibition in the Bipartisan Campaign Reform Act in 2002, it made no direct change to the rules on domestic subsidiaries.

Accordingly, we urge the Committee to note the success of the approach adopted by the FEC in 1977 and left in place by Congress in 2002. For decades, this approach has effectively balanced Congress' interest in ensuring that American elections are conducted by and among Americans against the rights of the millions of American workers employed in domestic subsidiaries, and it deserves the Committee's close attention.

III. *Citizens United* makes clear that any expenditure prohibition will be held to strict scrutiny, and accordingly must be narrowly tailored

As an expenditure prohibition, any new law which would broaden the scope of 441e to apply categorically to all U.S. subsidiaries clearly would be subject to strict scrutiny under the Supreme Court's standards as most recently articulated in *Citizens United* and *Wisconsin Right to Life*. As noted above, OFII raises no issue with the nature of Congress' interest in preventing foreign influence in U.S. elections, but we urge the Committee to appreciate the critical importance of narrowly tailoring whatever remedy or remedies it chooses to address that interest.

First, any broad prohibition on expenditures by US subsidiaries would have to be premised on a hypothetical level of foreign control over American political activities that is already illegal and, whether consequential to that prohibition or not, simply shouldn't be presumed to exist between a U.S. subsidiary and its foreign parent. We suggest that any such prohibition on expenditures by U.S. subsidiaries *per se* would be plainly overbroad, particularly in the absence of an appropriate legislative record indicating that such domestic companies actually have served as conduits for foreign influence on American elections.

Second, applying such a prohibition to U.S. subsidiaries alone, without similarly addressing other multinational corporations, would be simultaneously under-inclusive, since it would omit the wide range of other business arrangements which raise at least the same degree of concern over potential foreign influence. In today's global economy, U.S. headquartered companies have business locations and manufacturing operations all over the world, they have foreign nationals in senior executive positions and they often contract with a broad range of foreign governments. Consequently, a U.S.-headquartered parent corporation that is highly subsidized by a profitable overseas subsidiary, for example, or a U.S. joint venture partner that is deeply leveraged into a foreign investment could be beholden to foreign interests as a matter of pragmatism to an even greater degree than a U.S. subsidiary might be as a matter of corporate structure. Especially given the Court's new focus on the equal speech rights of all speakers, any new legislation in this area would be difficult to defend as narrowly tailored if it does not also address these situations.

We also urge the Committee to follow Justice Kennedy's invitation in *Citizens United* to view disclosure as a less restrictive alternative to broad prohibitions. Requiring all corporations to confirm their compliance with existing law, for example (by certifying that no foreign funds were used in any expenditures funded by that corporation and that no foreign nationals were involved) would serve the same goals as a categorical prohibition singling out U.S. subsidiaries without imposing the profound burdens of a prior restraint against political expenditures on people and companies who in fact pose little or no risk of bringing foreign influence into American elections.

IV. Conclusion

OFII neither endorses nor opposes the *Citizens United* decision as such, nor do we take a position regarding the free speech rights of corporations generally. Rather, we offer testimony today to

strongly oppose any effort to discriminate against insourcing companies based on the flawed premise that U.S. subsidiaries are "foreign" rather than "American." Insourcing companies have the same obligations and rights as any other American company. Moreover, their contributions to the U.S. economy and workers should ensure that they are not treated as second class corporations. And, most importantly, millions of insourcing workers are American citizens, voters and taxpayers – whose political rights and patriotism should not be called into question.

We suggest that if the Committee seeks to address the risk of foreign influence on U.S. elections it should do so by imposing broadly-applicable rules for all multinational corporations, or for any corporations which employ foreign nationals or do business outside the United States. This would recognize the realities of corporate ownership and management and would strengthen the argument that any new legislation in this regard was narrowly tailored to address the Congress' compelling interest in protecting the integrity of American elections.

We appreciate the opportunity to share these perspectives with the Committee and would be happy to address any questions or provide additional information to the Committee as it considers these critical issues.

ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

OFII is the only business association in Washington D.C. that exclusively represents U.S. subsidiaries of foreign companies and advocates for their non-discriminatory treatment under state and federal law.

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XL Global Services
Zausner Foods Corporation
Zurich Insurance Group

February 1, 2010

The Honorable Charles Schumer, Chairman
The Honorable Robert Bennett, Ranking Member
Senate Rules and Administration Committee
305 Russell Senate Office Building
Washington, DC 20510

Re: Submission to Senate Rules and Administration Committee for Record of the Hearing, February 2, 2010, "Corporate America vs. The Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections"

Dear Chairman Schumer and Ranking Member Bennett:

On Thursday, January 21, in the case of *Citizens United v. FEC,* 2010 U.S. LEXIS 766, involving Section 441b of the Bipartisan Campaign Reform Act of 2002 (BCRA), the U.S. Supreme Court in a 5-4 decision made a radical about-face and reversed long-standing precedent that had previously upheld the constitutionality of the federal law that restricts independent corporate spending in elections.[1]

In the majority opinion written by Justice Kennedy, the Court reversed its decades-old decision in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), which upheld a Michigan state law's restriction on the independent expenditure of funds from a corporation's general treasury for political speech. Essentially, the Court ruled that governmental restrictions on corporate spending in elections are invalid and unconstitutional[2] and declared for the first time that "the Government may not suppress political speech on the basis of the speaker's corporate identity" and "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United* at *93.

The underlying premise of the majority's long-awaited opinion is, simply put, an astounding and outrageous new principle of law: Corporations – which are artificial creations of state law designed solely for economic purposes – are guaranteed the same free speech rights as real people under the First Amendment. Justice Stevens' dissent in the case, which will likely be quoted for decades to come, is the most succinct and scouring refutation of that premise:

> "In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters."

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[1] As amended by *§* 203 of BCRA, *§ 441b* prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. *2 U.S.C. § 441b.*

[2] Although Kennedy's majority opinion suggests an exception for extending its decision to invalidate the direct contribution ban on corporations, the *Citizens United* Court's rationale for holding restrictions on corporate independent expenditures unconstitutional could likely be used to invalidate the ban on direct contributions to candidates by corporations, which is the only remaining restriction, other than disclosure requirements, on election-related corporate spending. *See Citizens United* at *60.

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Id. at *143. Stevens also pointed out that the Framers "had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." *Id.* at *205.

Yet despite the undeniable truth of Justice Stevens' arguments, the majority resolutely set down a new interpretation of the Constitution that perverts the First Amendment and opens the door to millions of dollars of corporate special interest money in our elections. A corporation's CEOs and management are now free to spend funds from its general treasury to support or oppose any candidate that they believe will affect the profitability of the company. The amount of corporate spending allowed in elections as a result of the *Citizens United* decision is now quite literally unchecked, and, given their overwhelming financial resources, the public debate on the fitness or suitability of any particular candidate may now be drowned out by the bottomless pockets of big business.

The threat to this country's democracy cannot be overstated. On behalf of hundreds of thousands of members across this nation, People For the American Way (PFAW) calls on Congress to fix the damage done by an ideological majority of the Court.

First, Congress should enact legislation to minimize the most flagrant effects of the *Citizens United* decision. For example, the majority's conclusion that Government may not regulate political speech regardless of the identity of the speaker, has opened the door to foreign influence in our elections,[3] a matter that previously had been fully foreclosed by federal laws.[4] To that end, PFAW supports the American Elections Act of 2010 introduced by Senator Al Franken (S. 2959), which, among other things, would ban election contributions and spending by corporations that are controlled or highly influenced by foreign nationals, including foreign governments, companies and persons.

In addition, PFAW supports the Fair Elections Now Act, introduced by Senator Durbin (S. 752) and Representative Larson (H.R. 1826), which seeks to address the amount of money raised in federal elections from large donors and special interests. Specifically, the Fair Elections Now Act would enact public financing of federal elections and give candidates the option to run for office on a mixture of small contributions and limited public funds. This process would highly incentivize grassroots fundraising and help candidates run highly competitive campaigns without relying on large contributions from corporate special interests.

PFAW also supports other efforts to limit corporate political spending through legislation requiring shareholder approval of political expenditures, more stringent disclosure requirements and restrictions on the ability of corporations who receive federal contracts, bailout monies, or the benefit of any other public resource to engage in political spending in federal elections. We urge Congress to explore these and other options.

However, these statutory fixes will do little to restore the First Amendment to what was intended by the Framers and ultimately will be inadequate against the unfettered influx of corporate election

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[3] Indeed, Justice Stevens recognized the threat when he wrote: "[The majority's rationale] would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans. . ." *Id.* at *198.

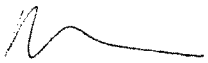
[4] Previously, BCRA prohibited, among other things, direct contributions by foreign nationals and indirect contributions in the form of independent expenditures by corporations in federal elections. Although the ban on direct contributions by foreign nationals remains in effect, because *Citizens United* now allows corporations to engage in unlimited independent expenditures in federal elections, foreign corporations with U.S. subsidiaries would now be able to do so as well. The *Citizens United* majority specifically declined to make an exception in its ruling for corporations controlled by foreign entities to close this loophole. *Id.* at *88.

spending. For example, private equity firms with hundreds of millions of dollars at their disposal are not beholden to a group of shareholders and would still be free under *Citizens United* to spend an unlimited amount of money to change the outcome of our elections, as would many other companies. Only a constitutional amendment can restore the American people's authority to regulate corporate influence in our elections and restore our democracy.

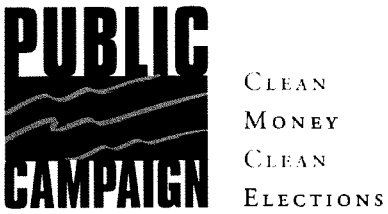
As an organization dedicated to defending the Constitution and, especially, the First Amendment, we understand that a constitutional amendment is not an endeavor that is to be taken lightly or without great care to protect the rights and liberties of individual Americans. But the Supreme Court's decision to disregard the voice of the American people by invalidating restrictions on corporate spending in elections is such that a constitutional amendment is the only appropriate and direct response. In *Citizens United*, the Supreme Court has created a situation in which the free speech rights of individual Americans are degraded by the speech of companies. Although enacting a constitutional amendment is difficult, it is both necessary and achievable.

In the months and years to come, People For the American Way urges you to consider all the tools at your disposal, including a constitutional amendment, to correct the wrongs of the *Citizens United* decision and ensure that ours is truly a government of, by and for the people.

Very truly yours,



Michael B. Keegan
President



February 2, 2010

Senate Rules Committee
305 Russell Senate Office Building
Washington, DC 20510

Dear Senator Schumer, Senator Bennett and Members of the Committee,

The issue that you are considering this morning during the Committee hearing, "Corporate America vs. The Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections," is extraordinarily important to our political process and to the American public. In its decision in *Citizens United v. FEC,* the Supreme Court eviscerated common sense restrictions on corporate spending in elections, making an already untenable campaign financing system even worse.

Even before this decision, the unsustainable rise in the cost of running for office affects who can run and who politicians must turn to in order to raise enough campaign cash to remain competitive. Elected officials are forced to run to the open arms of well-heeled special interests, big money bundlers, and elite political donors in order to keep up with their competition. Today, we have a never-ending chase for the campaign dollar with officials spending more and more time raising money in order to pay for escalating campaign costs. Now faced with the threat of unregulated retaliation in the form of millions of dollars in independent expenditures, the fundraising pressure will only worsen.

This non-stop rise in the cost of political campaigns places Members of Congress in a constant state of fundraising. And they are also in an awkward position. Instead of being able to focus on the work their constituents elected them to do, elected officials are compelled to spend vast amounts of time dialing for dollars and shaking hands in pursuit of the cash they need to retain their seat, lending an ear to the interests who can give the maximum contributions allowable under current law.

Who are these people writing these checks? They are a micro demographic within the 300,000,000 people who live in this country. The average American can't afford to give a candidate 4,800 dollars—the maximum allowed for an individual - 2,400 for the primary and 2,400 for the general election. According to the Center for Responsive Politics, less than one-half of one percent of the American public donated $200 or more to federal candidates or political action committees in 2008.

In this political system of bundlers, where many lobbyists and others who give money expect favors in return, how do we level the political playing field? How do we shut down the money chase and allow our legislators to spend their time pursuing their constituents' interests? How do we turn the current incentive system upside down and drive elected officials and candidates to the voters they want to serve instead of towards the big check writers at the next fundraiser? And how do we blunt the impact of the Supreme Court decision on our political process?

Fortunately there is a common sense answer that will refocus elections on voters and volunteers instead of campaign cash and political bundlers and provide candidates for Congress the support they'll need to respond to an influx of spending due to the recent Supreme Court decision. Sponsored by Senator Dick Durbin (D-Ill.) and Representatives John Larson (D-Conn.) and Walter Jones (R-N.C.), the Fair Elections Now Act (S 752 and HR 1826) puts everyone in our country on an equal footing and provides candidates for Congress a way to run without joining in the campaign money chase.

Under Fair Elections, Senatorial candidates would qualify for Fair Elections funds by crossing two thresholds: (1) gathering 2,000 in-state contributions between $5 and $100 plus an additional 500 for each congressional district in the state and (2) raising 10 percent of the grant amount that the candidate would receive for the primary should the candidate be certified for Fair Elections. In New York, for example, a candidate would need to collect 16,500 in-state contributions between $5 and $100 for a minimum of $510,000 to qualify for the funding. Once qualified, candidates receive a primary grant, which is 67 percent of the general election grant. Candidates also receive a 4:1 match for each dollar raised from in-state donors in each election (primary, general, or runoff), subject to a cap equal to 200 percent of the grant for that election. Candidates are also able to raise money out of state, but only in-state contributions are eligible for the 4:1 match up to the cap.

The system is constitutional within the *Buckley v. Valeo* framework. It expands political speech, ensuring that those without access to wealth can speak with a forceful voice during the campaign season.

The cost of Fair Elections is relatively small—about one thirtieth of one percent of the federal budget. In fact, there were nearly $20 billion in earmarks in 2009 while Fair Elections would cost us less than one billion dollars.

It may seem counterintuitive for an incumbent to support a bill like this. After all, each Member of Congress won their election using the current system, many on repeated occasions. Yet I know that many Members are deeply troubled by the current unbounded private financing set-up and a good number also find campaign fundraising their least favorite part of being an elected official.

Clean Elections, as it is known at the state level, has changed the faces of democracy where it has been implemented. It opens up the possibility of running for office and

winning to a more broadly diverse range of candidates. In Maine, for example, Deborah Simpson, a low wage worker, single mom, and grassroots civic activist is now a member of the state legislature, where she pays particular attention to policies that affect children living in poverty. She credits the Clean Elections system as her successful entry ticket into the political arena.

To date, publicly financed elections are the law for at least some offices in a handful of states—Arizona, Connecticut, New Mexico, North Carolina, and Maine—and three cities—Albuquerque, New Mexico, Chapel Hill, North Carolina, and Portland, Oregon. Hundreds and hundreds of candidates have run successfully using the system, In Maine, 84 percent of statehouse seats are occupied by publicly financed elected officials. And in Arizona, eight out of the current 10 statewide elected officials were elected under a public financing system. Homeland Security Secretary Janet Napolitano used the system twice for her successful gubernatorial bids.

The public is strongly behind the idea of this alternative. In February 2009, Public Campaign and other campaign reform organizations commissioned Lake Research Partners, a Democratic firm, and The Tarrance Group, a Republican firm, to do a nationwide poll on publicly financed elections. They found that 67 percent of voters support a proposal for voluntary public funding of federal elections. Support for public financing of Congressional elections cuts across party lines. Sixty nine percent of Democrats, 66 percent of Independents, and almost two-thirds of Republicans support this reform. There is strong support across gender lines, age groups, and geographic regions.

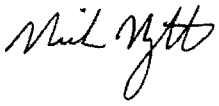
Why do people like this idea? This same polling found that four out of five voters believe that large contributions prevent Congress from tackling our nation's challenges. That lack of faith in our political system hasn't gotten any better. According to a national survey conducted by the University of Texas in November, nearly 60 percent of voters believe that the source of a candidate's campaign contributions are a factor in how they vote. Survey respondents rank themselves last as a consideration when Congressional lawmakers vote.

Voters are disillusioned by the current political process and I think that is why we've seen tremendous growth in support for publicly financed elections. Outside Congress, it's not just the good government and reform-oriented groups, like Americans for Campaign Reform, the Brennan Center for Justice. Change Congress, Common Cause, Democracy Matters, Democracy 21, Public Citizen, and USPIRG, that have taken up the cause of the Fair Elections Now Act. At the bill's introduction, some of the most established and respected organizations in our country, representing tens of millions of Americans also supported this measure, including AFSCME, NAACP, SEIU, the Sierra Club, the Dolores Huerta Foundation, and the League of Women Voters. And there are business leaders on board as well; people like former Seagrams CEO Edgar Bronfman, New Yorker Alan Patricof, often referred to as the "father" of venture capitalism, former Stride Rite CEO Arnold Hiatt, and former Nixon administration official and founder of the Blackstone Group, Pete Peterson.

It is possible to change politics for the better. And we must do to it together. Working alongside each other we can leave behind the unsustainable money chase and its negative side effects. The Supreme Court didn't create the perception of undue influence in our political process, but it made the situation worse. As Justice John Paul Stevens wrote in his dissent, the "Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."

Just last week, after the *Citizens United v FEC* decision was handed down by the Supreme Court, an NBC/Wall Street Journal poll found that 84 percent of Americans were concerned about the influence of special interests in Washington, D.C. Congress must respond forcefully to this decision and ensure voters that they are in charge of our elections, not deep-pocketed special interests. The need to change the system has never been greater, and the stakes have never been higher.

Sincerely,



Nick Nyhart
President and CEO
Public Campaign

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

Feb. 3, 2010

The Hon. Charles Schumer
Chairman
The Hon. Robert Bennett
Ranking Member
Committee on Rules and Administration
U.S. Senate, SR-305
Washington, D.C. 20510

RE: Testimony submitted on behalf of Public Citizen on *Citizen United v. FEC*

Dear Chairman and Ranking Member:

Public Citizen is pleased that the Senate Committee on Rules and Administration is holding a hearing in recognition of the danger to our democratic form of governance posed by the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*. We respectfully submit testimony to the Committee on the scope of the problem and on appropriate legislative and constitutional responses to the Court's decision.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen played an important role in the Supreme Court proceedings in *Citizens United*, with Public Citizen attorney Scott Nelson serving as co-counsel for the key congressional sponsors of the Bipartisan Campaign Reform Act (BCRA) as amicus curiae.

Background on *Citizens United*

On January 21, 2010, the Supreme Court unleashed a flood of corporate money into our political system by announcing, contrary to long-standing precedents, that corporations have a constitutional right to spend unlimited amounts of money to promote or defeat candidates.

The court explicitly overruled two existing Supreme Court decisions. In *Austin v. Michigan Chamber of Commerce*, the Court held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. *McConnell v. Federal Election Commission* applied that principle to uphold BCRA's restrictions on "electioneering communications," that is, corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. *Citizens United* overrules *Austin* and *McConnell*. The *Citizens United* decision also effectively negates parts of the Court's 2007 ruling in *Wisconsin Right to Life v. Federal Election Commission*.

By overruling these decisions, the Court has opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

There is nothing judicious about this decision. Reversing well-established laws and judicial precedents barring direct corporate financing of elections is a radical affront to American political culture and poses grave dangers to the integrity of our democracy.

A Massive Influx of New Corporate Money in Elections

It is impossible to predict how much corporate money will flood into our elections in a virtually unregulated system; the country has never faced a similar situation. Nevertheless, it is reasonable to assume that the amount will be very substantial indeed – and possibly overwhelming in races of particular interest to the business or labor communities.

Special interest groups funded primarily by corporate money spent, by conservative estimates, about $50 million on TV ads promoting or attacking federal candidates in the last two months of the 2000 election, up from $11 million just two years earlier. Corporations and unions chipped in another $500 million in "soft money" contributions in each of the 2000 and 2002 election cycles, due to a loophole in federal election law.

These loopholes were largely closed in 2002 with passage of BCRA, which added two powerful provisions to the campaign finance laws: First, broadcast ads that mention a candidate, target the candidate's voting constituency and air within 60 days of a general election could not be paid for by corporate or union funds. Second, soft money contributions to parties and federal candidates are prohibited.

Although the Rehnquist Court upheld BCRA almost in its entirety in 2003, the Roberts Court began to whittle away at the law in its 2007 decision in *Wisconsin Right to Life*. That decision resulted in another $100 million in corporate spending on TV electioneering ads in the last two months of the 2008 election.

Corporations have long shown a willingness to spend and contribute hundreds of millions of dollars each election through loopholes in the law. Now that the Court has invalidated restrictions on corporate political spending, expect a flood of new money into the 2010 congressional campaigns, state candidate campaigns, state judicial elections, and the 2012 presidential election.

Three Powerful Ways to Curb Excessive Corporate Spending in Elections

Several options for reining in the damage caused by the Court in *Citizens United* are under consideration. Many of these legislative responses – such as prohibiting foreign nationals from funneling money into American elections through U.S. subsidiaries of foreign corporations, strengthening the anti-coordination rules to prevent corporations from hiring as campaign

consultants the same people hired by the candidates, and enhancing transparency requirements of corporate entities financing ads – will mitigate the expected corporate onslaught and are worthy of consideration.

Three other means for curbing excessive corporate political spending deserve special consideration by Congress. We discuss these options below.

1. Public Financing of Elections

Public financing of elections is the single most effective legislative remedy for unlimited corporate spending. The public financing plans now under consideration have been designed specifically to overcome the barriers imposed by the courts on campaign finance laws, as well as to embrace the new small donor phenomenon seen in the 2008 election. The Fair Election Now Act creates a congressional public financing system with the following features:

- Qualified candidates are provided with ample public funding—more money than nearly all winning House or Senate candidates have raised from private sources—giving candidates the resources necessary to respond to attacks from corporate spenders.

- Participating candidates are not bound by contribution ceilings, which enables those who are the targets of excessive corporate spending to continue raising funds in small donations and to spend those funds without limit.

- In-state small donors who give $100 or less to a candidate have their contributions matched four-fold with public dollars, making small donors very important players in financing campaigns.

The Fair Elections Now Act (S. 752 and H.R. 1826) was introduced in the Senate by Sens. Dick Durbin (D-Ill.) and Arlen Specter (D-Pa.) and in the House of Representatives by Reps. John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.). The House bill has more than 130 cosponsors and should be passed now to provide congressional candidates with an alternative to corporate-funded elections in 2010.

It is critical that we modernize the presidential public financing system in advance of the 2012 presidential elections. Public financing is also key to addressing the corrosive influence of corporate spending in elections for local, judicial, and state candidates.

2. A Shareholder Protection Act and Other Legislative Remedies

Corporate executives should not be able to use other people's money - corporate funds from investors and shareholders, including funds that people invest into retirement accounts - to further their own political agendas without shareholders' consent or even knowledge.

In 2000, the United Kingdom adopted a shareholder protection act that requires CEOs to receive shareholder approval for political contributions to parties or candidates.

We need shareholder protections for the United States that are tailored to the American context and made considerably stronger than the UK law. One such proposal (H.R. 4537) has been introduced in the House by Rep. Michael Capuano (D-Mass.). Specifically, the Shareholder Protection Act of 2010 would do the following:

- Require majority approval by shareholders for corporate political expenditures over $10,000, including expenditures for campaign ads, electioneering communications, issue advocacy and ballot measure campaigns at the state and federal levels.

- Provide that brokers of other people's money cannot vote on behalf of their investors.

It is important that the language in the bill is clarified to establish clearly that it also requires mutual funds to receive consent from their own shareholders for any vote on a corporate political expenditure, and pension funds to obtain consent from beneficiaries. A critical weakness of the UK system is that it allows institutional investors to vote on behalf of shareholders. As a result, only one resolution for corporate political expenditures has ever been rejected by UK shareholders since inception of the shareholder protection law in 2000. An effective shareholder protection act for the United States, where corporations have shown a far greater willingness to spend to influence politics, must close this loophole.

- Create public records, available on the Internet, that fully inform shareholders and the general public of the specific candidates, parties, or issues subject to corporate political spending.

Public Citizen supports other legislative measures to mitigate the damage from Citizens United, as well, including proposals to prohibit government contractors, corporations receiving specific benefits from the government (e.g., TARP recipients) and lobbyists from making political expenditures.

3. A Constitutional Amendment

Corporations are not people. They do not vote, and they should not have power to influence election outcomes. We should end the debate about the freedom of speech of for-profit corporations by amending the Constitution to make clear that First Amendment rights belong to natural persons and the press and do not apply to for-profit corporations.

Public Citizen does not take amending the Constitution lightly. The proposition requires careful deliberation. But the Roberts Court 5 justice majority has interpreted the First Amendment in a way that does grave harm to our democracy, and the Court shows every sign of extending the damage further. A constitutional amendment is the only way to overcome with finality the profound challenges to our democracy posed by the *Citizens United* decision.

As a starting point for deliberating an appropriate constitutional remedy, Public Citizen is proposing the following language:

Amendment XXVIII

The freedoms of speech and the press, and the right to assemble peaceably and to petition the Government for the redress of grievances, as protected by this Constitution, shall not encompass the speech, association, or other activities of any corporation or other artificial entity created for business purposes, except for a corporation or entity whose business is the publication or broadcasting of news, commentary, literature, music, entertainment, artistic expression, scientific, historical, or academic works, or other forms of information, when such corporation or entity is engaged in that business. A corporation or other artificial entity created for business purposes includes a corporation or entity that, although not itself engaged in business pursuits, receives the majority of its funding from other corporations or artificial entities created for business purposes.

The proposed amendment would clarify that the First Amendment rights guaranteed to human beings do not apply to for-profit corporations and other entities primarily funded by for-profit corporations. Members of the media would retain full First Amendment rights when engaged in publishing, broadcasting, and similar activities. Like other for-profit corporations, however, media organizations would not have the right to sponsor campaign ads or make campaign contributions.

Conclusion

Congress must move swiftly and decisively to mitigate the damage to our democratic system of governance posed by the *Citizens United* decision. Unlimited corporate spending will give wealthy special interests an overwhelming advantage in affecting election outcomes, further reduce the role of citizens and small donors in the election process, and contribute to the alienation of citizens from their government. Just as damaging will be the impact a corporation can have on the legislative process, with lawmakers keenly aware that their decision to support or oppose legislation of particular interest to a given corporation or business association may seal the lawmaker's fate in the next election.

Several steps must be taken to respond to Citizens United. The most significant include a strong shareholder protection act, robust public financing of elections, and a constitutional amendment declaring that for-profit corporations are not entitled to First Amendment protections.

Sincerely,

Robert Weissman, President, Public Citizen

David Arkush, Director, Public Citizen's Congress Watch

Craig Holman, Government Affairs Lobbyist, Public Citizen

ANDREW L. STERN
International President

ANNA BURGER
International Secretary-Treasurer

MITCH ACKERMAN
Executive Vice President

MARY KAY HENRY
Executive Vice President

GERRY HUDSON
Executive Vice President

ELISEO MEDINA
Executive Vice President

BRUCE RAYNOR
Executive Vice President

DAVE REGAN
Executive Vice President

TOM WOODRUFF
Executive Vice President

SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW, CLC

1800 Massachusetts Ave NW
Washington, DC 20036

202.730.7000
TDD: 202.730.7481
www.SEIU.org

Statement of Anna Burger, International Secretary-Treasurer, Service Employees International Union on the *Citizens United* Decision

U.S. Senate Committee on Rules and Administration
Chairman Charles E. Schumer

Chairman Schumer:

Corporate executives are on a roll, and the rest of us are paying a steep price. The most recent case in point is the Supreme Court's decision in *Citizens United*, which has overturned a century of federal law, and the law in half of the states, and given the green light to unlimited corporate spending on political campaigns. What this means is that corporate CEOs are now free to raid the corporate till at will and spend their shareholders' money to advance a personal and corporate political agenda which has seen multi-million dollar bonuses for the select few, and continued unemployment, inadequate health care, and a host of other socials ills for everyone else. Congress needs to act quickly to mitigate the harm caused by this decision.

The rules thrown out by the Supreme Court were hardly perfect, but they at least attempted to impose some accountability on the system. My own union provides a good example of how the rules were working. SEIU's 2.2 million members do not include corporate CEOs or bankers. Our members are nurses, janitors, government employees and other service employees. They want their voices heard, and they understand that the only way that is going to happen is if they act as a group. That is why SEIU, like most other unions, created what the law calls a Separate Segregated Fund, or a Political Action Committee, which allows our members voluntarily to contribute to an account for the specific purpose of engaging in politics. Let me stress: our independent expenditures are funded by *voluntary* contributions knowingly contributed to advance our members' political goals, and by law we solicit only our own members and administrative personnel to participate in the Fund.

Moreover, regulations require that we fully disclose to our contributors and the general public how we spend these voluntary contributions, and SEIU's PAC is proud to identify itself as the sponsor of its ads. The Supreme Court majority mocks these regulations as

typical burdensome government regulations, but in the end of the day what they required is that people and groups report how they are spending their money.

Compare that to what corporations can do after *Citizens United.* Our member who voluntarily contributes $5 out of her paycheck to SEIU's political action committee may also direct another $5 to her 401K account for her retirement. Most of that money ends up in publicly traded stocks, which is to say it is indirectly funding publicly-traded corporations. When a CEO then chooses to make an independent political expenditure, he is using that $5 or contributions like it. The difference between this contribution and the union member's voluntary PAC contribution could not be more stark: Unlike the union member, the stockholder has no interest in funding this political speech. Indeed, the stockholder has no way of even *knowing* she is funding this political speech. The corporation has no obligation to report to its shareholders that it intends to, or has, made this expenditure. Instead, massive amounts of money are collected by corporations for reasons wholly unrelated to the shareholders' political preferences, and then dumped into the political process with no accountability whatsoever.

This is not about citizens being able to act collectively, even through corporations. Shareholders already had the right to engage in politics through the corporations in which they own shares. Just like union members voluntarily contribute to union PACs, corporate shareholders contribute to corporate PACS. Indeed, during the last election cycle, corporations spent hundreds of millions of dollars through their PACs – more than unions were able to spend.

But the five activist judges on the Supreme Court evidently decided that the playing field needs to be substantially *more* tilted in favor of big money. Now corporations don't have to *ask* their shareholders to contribute to electoral politics. They can just take as much of their money as they want, without seeking their shareholders' permission, and without even telling their shareholders what they are doing. And that includes money from foreign shareholders that had no right to contribute to electoral politics under the law that was overturned by the Court. That's *Citizens United.*

The only fully adequate solution is to have it made clear that the First Amendment was never intended to give corporations the same free speech rights as living, breathing citizens. But we should not let the perfect be the enemy of the good. There are important steps that the Congress can and should take immediately to minimize the damage caused by *Citizens United.* We have proposed legislation to toughen up disclosure rules, so that corporate shareholders, and the public at large, know the details about how CEOs are raiding the corporate till to advance their personal political preferences. Better disclaimer rules, so that when corporations set up front groups to hide their true identity with anodyne names like "Citizens United," the public knows where the money supporting the

ads is really coming from. And since the Court has said that shareholder democracy can assure that corporate money is not spent heedlessly, let's require those corporations that choose to spend their shareholders' money on politics to adopt some democratic practices. Shareholders shouldn't have to support the political preferences of CEOs of companies in which they own stock, when they have no practical ability to stop that corporate spending. Corporations should not be the only "people" to have First Amendment rights. Congress should give shareholders a right to object to the funding of electoral politics through their stock ownership, and give them a refund to account for a corporation's political expenditures made over their objection. Finally, SEIU has long supported public financing of elections. These limited measures by themselves won't stop corporate money from overwhelming our political system. But they will at least restore some fairness to the political process after *Citizens United*.

We appreciate the opportunity to share our views with the Committee.

Sunlight Foundation

Testimony of Ellen S. Miller, Executive Director

The Sunlight Foundation

Before the Committee Rules

United States Senate

Mr. Chairman, Senator Bennett, members of the Committee, thank you very much for the opportunity to submit testimony on behalf of the Sunlight Foundation. My name is Ellen Miller and I am the co-founder and executive director of the Sunlight Foundation. The mission of the Sunlight Foundation is to use cutting-edge technology to make government transparent and accountable.

Before founding Sunlight, I was deep in the campaign finance trenches. First, as a founder of the Center for Responsive Politics, the nation's première money and politics data crunching organization. Later, I created Public Campaign, a nonprofit that pioneered the concept of a system of full public financing.

Given my background, you can imagine my interest as I read the Supreme Court's decision in Citizens United v. the Federal Election Commission. There is no doubt in my mind that this case opened the floodgates for corporate and union spending in elections.

In dismantling 100 years of prohibitions against corporate treasury funds being used to elect candidates, the Court put a great deal of faith in the idea that disclosure will remove the taint of corruption from the new influx of cash. The majority opinion observed that the Internet is becoming the best way to hold politicians and influencers accountable. And I agree that robust disclosure is a first step in addressing the multitude of problems the decision created.

But for online transparency to perform the functions ascribed to it by the Citizens United ruling, Congress has to create new laws that reflect both the new reality of expanded independent spending, as well as the existing array of money-driven influences on public officials.

Reliance on the status quo will doom disclosure to fail. The current disclosure system relies on a hodgepodge of reporting requirements that result in some information filed on paper, some online. Relevant data about money in politics is scattered across many government bodies and incompatible databases so that it can't be combined in meaningful way. Where it is required to be disclosed, information about money, access and influence is not available in real time and is often delayed until well after it is meaningful to the public. And much information is simply not disclosed at all.

Without an immediate update to the disclosure laws, the public will be unable to see this new spending as it occurs and won't be able to understand the new kind of leverage lobbyists and top corpotate and union officials will have over politicians.

The only deterrent to widespread arm-twisting of public representatives by private interests may well be timely disclosure. Now more than ever, our entire system of puhlic disclosure for election-related contributions and expenditures needs to be upgraded to keep pace with the influences it is designed to track. And in the 21st century this

means that everything must be filed online, in real time.

Sunlight has developed a multi-point disclosure regime that takes full advantage of technology to create robust, rapid transparency. An effective disclosure regime will include the following:

- Congress must create a powerful independent expenditure reporting system
- Shareholders must have timely data about corporate political expenditutes
- Lobbyists must be required to file more substantive, timely reports
- There must be more disclosure about who is paying for independent political ads
- Reporting by political candidates must be strengthened
- Enforcement of all disclosure rules must be strengthened to ensure compliance
- Once infotmation is reported, the databases into which the information goes must be interoperable

These recommendations play an important role in giving the public insight into the ecosystem of money and politics. Moreover, each contributes to revealing coordination or undue influence. The remainder of my testimony will detail the recommendations outlined above.

Congress must create a powerful independent expenditure reporting system

It should go without saying that in light of Citizen's United, Congress needs to quickly create a robust system by which corporations and unions disclose their independent expenditures. New disclosures are necessary both because the American people have the right to know how much money corporations and labor unions spend to influence elections, and to reveal whether corporate and union contributions are being channeled through straw organizations or middlemen.

An effective system will ensure that independent expendirure reports are filed electronically, within 48 hours of making the expenditure. If an expenditure is made 60 days before an election, those electronic reports should be filed within 24 hours.

The independent expenditure report must include the name and address of the entity making the independent expenditure as well as the date and amount of the expenditure. The report must describe the purpose of the expenditure, the medium, (whether it is a radio ad, direct mail, etc.) and it musr name the candidate supported or opposed by the expenditure. It must also identify the office for which he or she is running.

In addition, any organization making an independent expenditure must identify the name and address of any entity that provided contributions to that organization over $200 that were used to fund the independent expenditure. The report must also certify, under penalty of perjury, that there was no coordination between the organization and the candidate.

The FEC shall ensure that all independent expenditure reports are online immediately upon receipt and shall create a searchable, sortable database of independent expenditures.

Shareholders must have timely data about corporate political expenditures

Our second recommendation, providing shareholders with timely data about corporate political expenditures, addresses the fact that after Citizens United, corporate CEOs can spend general treasury funds—in essence, money belonging to shareholders—on political activities. Shareholders are entitled to know immediately how their money is being spent.

The current "8-K" reporting system of the Securities and Exchange Commission (SEC), by which

corporations are required to file a separate report to announce major events about which shareholders should be aware, should be updated so that spending on political activities, including in-kind contributions as well as contributions, membership dues or other payments to organizations that engage in political activities, is reported each time aggregate spending totals $10,000. These reports should be filed electronically, within 48 hours.

Corporations should file reports with the SEC identifying all senior management responsible for approving political expenditures, and the company must promulgate and disclose its guidelines for political spending. The SEC must make this information publicly available through its disclosure database.

In addition, In addition to filing the above information with the FEC, all of this information should be immediately included on the home page of the company's Web site, in a manner that draws shareholders' attention to it.

The Department of Labor must require unions to similarly disclose their political activities in a searchable, sortable, downloadable database, and the information must be made available on the unions' home pages.

Lobbyists must be required to file more substantive, timely reports

Lobbyist reporting, already riddled with loopholes, becomes even more important in the wake of Citizens United, because it will be a key component to demonstrate that corporate or union independent expenditures are not made in coordination with candidates. The current 20 percent exemption for lobbyist reporting must be eliminated so that, with very limited exception, anyone who lobbies reports all significant contacts—by phone, in person or electronic—in which a request is made for a government action. Corporate and union heads, anyone who bundles campaign contributions or other influential insiders must be subject to the Lobbying Disclosure Act (LDA) rules for disclosure.

Meaningless rules that require lobbyists to report only whether they have lobbied the House, Senate or executive branch must be replaced so that the name of the official being lobbied is reported.

Lobbyist disclosure reports must also include a summary of the action requested and the name of the lobbyist's client or employer. Only individuals who are able to make a good faith estimate that their income or expenditures related to lobbying fall below a certain threshold would be exempt from disclosure requirements.

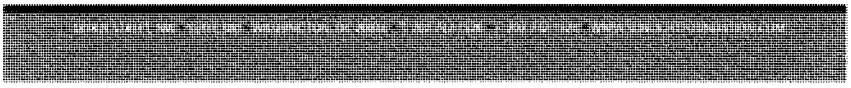
Lobbyist disclosure reports must be filed electronically within 24 hours. To facilitate filing and disclosure, the House Clerk and the Senate Office of Public Records shall develop an online and mobile tool for collecting lobbying disclosure reports. Lobbyists should be required to use unique identifier for themselves and their clients or employer to streamline filing and disclosure.

All reported lobbying contacts must be made available to the public in a searchable, sortable, machine-readable format.

Disclosure of contacts by executive branch officials – currently limited to requests for Troubled Asset Relief Program (TARP) or stimulus funds – should be reworked so that all significant contacts in which a specific government action is requested are reported in real time and online.

There must be more disclosure about who is paying for independent political ads

When the public is exposed to an independent expenditure campaign, they should know who paid for it. Just as candidates are required to "stand by their ads," disclaimers on independent expenditures should require a corporate or union spokesperson to state the name of the entity that paid for the ad, as well as the organization's approval of the message. In addition, the entity's address or Web site must be included in the advertisement.



An online database of paid political advertisements should be created, and should include the text or video of the ad. It should identify where and when the ad was placed, the cost to run the ad and the name of the organization that paid for it.

Reporting by political candidates must be strengthened

To foster greater trust in government, it is imperative to demonstrate that there is no coordination between the corporation and the candidate. Timelier electronic reporting of campaign disclosure statements, including better reporting of bundled contributions, will aid in demonstrating independence. Campaign finance reports should be filed monthly instead of quarterly, and all campaign finance reports– candidate, PAC and party – should be filed electronically with the FEC so that contribution information is available online, in a searchable, sortable, machine-readable format immediately after the reports are filed.

It is also crucial that the FEC be directed to rewrite its regulations regarding bundled contributions. A recent investigation by the Associated Press found that as of September 2009, only about two-dozen lawmakers had reported lobbyists bundling contributions. This is starkly at odds with a finding by Sunlight's own Party Time project, which identified lobbyists as hosts on at least 195 congressional fundraising invitations. Bundlers who have significant contacts with members of Congress or executive branch officials should be required to register and report under the LDA.

Strengthen Enforcement of All Disclosure Rules

To ensure compliance with the new disclosure regime, the Justice Department, the FEC and the SEC must be armed with strong civil and criminal sanctions that can be imposed upon any organization or individual who knowingly breaks or recklessly disregards these disclosure rules.

To fund the new disclosure and enforcement mechanisms, filing fees for corporations making independent expenditures must be imposed on a sliding scale: The greater the independent expenditure, the larger the filing fee.

Ensure Interoperability of the Data

All information to be reported under this regime must be reported electronically and available online in real time, in a searchable, sortable, downloadable and machine-readable format. The FEC, SEC, Secretary of the Senate, Clerk of the House and any other agency charged with collecting and disseminating campaign finance data must be required to develop a system to create a common data format standard. The format should be open and nonproprietary.

All of these pieces are critical to effective disclosure. Tinkering around the edges of the disclosure current system will fail to address the real impact of massive amounts of money that will soon flood our political system. Only significant improvements to the substance, timeliness and accessibility of our disclosure laws will begin to address what the Citizens United case has wrought.

U.S. PIRG
Federation of State PIRGs

218 D Street SE,1st Floor
Washington, DC 20003
www.uspirg.org • info@uspirg.org

Phone: (202) 546-9707
Fax: (202) 546-2461

February 2nd, 2010

Senator Charles Schumer
Chairman, Committee on Rules and Administration
United States Senate
Washington, D.C. 20510

Dear Chairman Schumer and Ranking Member Bennett:

We write to offer our perspective on the Committee on Rules and Administration hearing, **"Corporate America vs. The Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections."** We ask that this letter be included in the record of the hearing.

In his 2010 State of the Union address, President Obama expressed his commitment to protecting the public from the egregious overreach made by the Supreme Court in *Citizens United v. FEC.* Now the burden falls to Congress to follow the administration's lead and act decisively to pass a legislative solution which will stop corporations from buying the next election.

It is clear that the courts have left us room to do so, and do so in time to impact the 2010 elections.

On January 21st, the Supreme Court turned our political system on its head with the Citizen's United decision. With a shocking lack of respect for judicial modesty and precedent, the court granted corporations virtually unfettered influence over federal elections.

In addition, in reaching this decision, the court not only turned back the clock on over 60 years of precedent, but also endowed corporations—artificial entities created by people for economic activity--the same right to influence campaigns as you and I.

A corporation is not, nor has it ever been, a person with voting rights. The idea that they can now channel their immense wealth to advocate directly for or against a federal candidate is abhorrent.

To put this in perspective, total spending on federal elections in 2008 was more than $3 billion from political parties, outside groups, candidates, and PACs. While that is a lot of money, Exxon Corporation alone made over 45 Billion dollars in profit in 2008, which can now be directed at our federal candidates.

For any given Congressperson, the threat of tens of millions of dollars of attack ads will make it far more challenging to vote their conscience on the issues that matter to the public.

A strong package of statutory reforms as a practical short term solution to this problem is imperative. We ask that the members of this committee work to support and strengthen the legislative solutions bill which will be introduced shortly with the support of the administration.

The reforms we need immediately in the wake of this decision are *stronger disclosure laws, tough limits to the spending power of federal contractors and foreign corporations, required shareholder approval of political expenditures by corporations, and increased coordination limitations between party and corporate spending.*

Shareholders and the public have a right to know exactly how corporations are spending their funds to influence elections and causes, and should have to gather express approval of their individual public shareholders prior to spending political money. Foreign corporations, and those that take large amounts of government money, should not be allowed to influence elections at all.

U.S. PIRG
Federation of State PIRGs

218 D Street SE,1st Floor
Washington, DC 20003
www.uspirg.org • info@uspirg.org

Phone: (202) 546-9707
Fax: (202) 546-2461

The Supreme Court's decision in this matter shows a deplorable lack of respect for precedent and represents a dark day for democracy in America. Once we've stopped the worst consequences of this decision, our attention must be turned to systemic reform, to creating a system for our elections which is wholly free of corporate money.

U.S.PIRG urges you and the committee members to support the package of legislative solutions that will soon be introduced, as well as to seek to make them as strong and punitive as possible to stop the flow of corporate money into our federal elections system.

Sincerely,
Lisa Gilbert
U.S.PIRG Democracy Advocate

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Co-Chairs ~ Sen. Bill Bradley • Sen. Bob Kerrey • Sen. Warren Rudman • Sen. Al Simpson

SUBMITTED FOR THE HEARING RECORD

Senate Committee on Rules and Administration
February 2, 2010

Written testimony of former U.S. Senators Bill Bradley (D-NJ), Bob Kerrey (D-NE), Warren Rudman (R-NH), and Alan Simpson (R-WY), Co-Chairs of Americans for Campaign Reform

We commend the Senate Committee on Rules and Administration today for taking up one of the most challenging and urgent issues before the Congress: the impact of private contributions and expenditures in U.S. elections and its corrosive effect on public confidence in our democracy – particularly in light of the disappointing decision in *Citizens United v. FEC*.

We write to you as Chairs of Americans for Campaign Reform, a bipartisan initiative to strengthen American democracy through citizen-funded Fair Elections. Our purpose is simple: to free elected leaders from the mounting pressures of raising campaign funds by supporting the passage of small donor-driven public campaign finance. The Fair Elections Now Act would accomplish that goal.

We have all seen how rising campaign costs and the influx of big money in politics undermines public confidence in our democracy and places undue burdens on elected officials. As we look back on our many years in Washington, it is hard to imagine how many hours were devoted to attending fundraisers and calling strangers for campaign contributions. Today, as you well know, the problem has gotten much worse. In 2008, the average House and Senate incumbent raised $1.3 million and $7.5 million, respectively—nearly twice the amounts raised just ten years ago. That means that you and your colleagues must collect thousands of dollars a day throughout your term in office--time spent away from doing the real work you came to Washington to do.

We know of only one way to fundamentally address this problem: small donor-driven campaign finance reform. A Fair Elections system of matching small donations would ensure that hard-working candidates who accept only small checks from their constituents and show broad-based

public support, have access to sufficient funding to mount a credible campaign. It combines what works in our current finance system—citizen small donations—with matching funds to ensure an open debate. And it rejects what does not work: big money from lobbyists and special interest groups which undermines public confidence and distracts from the business of governing.

Consistent with the First Amendment, the program is voluntary; it cherishes political speech by enabling more voices to enter the debate without added regulation. Funding would come from a revenue-neutral allocation of 10% of future broadcast spectrum auctions for House elections.

In seven states and numerous cities from Arizona to Maine, citizen funded Fair Elections are ushering in a new kind of politics, where candidates spend more time with the voters they seek to represent in place of large contributors. Three-fourths of candidates across party lines voluntarily participate in the state programs, bringing a new culture of accountability, and the chance to now bring meaningful reform to Washington in the 111th Congress has never been greater.

We urge the Committee on Rules and Administration to refer this urgent legislation and to the full Senate for consideration and passage this year. The integrity of our democratic institutions depends on such reform.

Sen. Bill Bradley
New Jersey

Sen. Bob Kerrey
Nebraska

Sen. Warren Rudman
New Hampshire

Sen. Al Simpson
Wyoming

215 E Street, NE • Washington, DC 20002
office: (202) 736-2200 • fax: (202) 736-2222
www.campaignlegalcenter.org

February 1, 2010

The Hon. Charles Schumer
Chair, Senate Rules Committee
Russell 305
Washington, DC 20510

Dear Chairman Schumer:

The Campaign Legal Center is pleased that the Senate Rules Committee will hold a hearing on the effect of the U.S. Supreme Court's decision in *Citizens United v. FEC*. We appreciate the opportunity to share with the Committee our thoughts regarding appropriate legislative responses to the Court's decision, which we regard as an extreme example of radical judicial overreach that arbitrarily overturns decades of precedent, and undercuts the ability of the legislative branch to regulate elections. We respectfully request that this letter and the accompanying attachment be included in the official record of the Rules Committee.

As you know, the 5-4 decision in *Citizens United* struck down the 60-year-old federal restriction on corporate expenditures in candidate elections. To reach this holding, the majority opinion written by Justice Kennedy effectively overruled three earlier Supreme Court decisions that upheld the constitutionality of restrictions on corporate expenditures: part of *McConnell v. FEC* (2003), *Austin v. Michigan Chamber of Commerce* (1990); and *WRTL v. FEC* (2007). Justice Stevens dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. Eight of the Court's nine justices, however, joined in upholding the electioneering communications disclosure provisions that were enacted as a part of the Bipartisan Campaign Reform Act (BCRA).

The *Citizens United* case began as a challenge to BCRA's "electioneering communications" corporate funding restriction and disclosure requirements as applied to plaintiff's film entitled *Hillary: The Movie* and its advertisements promoting the film. On July 18, 2008, the district court granted the FEC's motion for summary judgment, holding that the film was the "functional equivalent of express advocacy" and therefore could be constitutionally subject to corporate funding restrictions. Citizens United appealed to the Supreme Court.

In its opening brief filed with the Court, Citizens United first argued that the Court's 1990 decision in *Austin v. Michigan State Chamber of Commerce* should be overruled. Instead of deciding the case on statutory grounds or on narrow constitutional grounds, the Court, on June 29, 2009, took the rare step of ordering re-argument on the question of whether the Court should overrule its past decisions affirming the constitutionality of restrictions on corporate electoral expenditures. After hearing oral argument on this broader question on September 9, 2009, the Court rendered its decision.

The Legal Center filed two *amici* briefs — on June 29 and July 31, 2009—with the Court, and previously had filed an *amicus* brief with the district court on June 6, 2008.

By empowering corporations to use their enormous wealth and urge the election or defeat of federal candidates, what the Court majority did in *Citizens United* was to unleash unprecedented amounts of corporate "influence-seeking" money on our elections and create unprecedented opportunities for corporate "influence-buying" corruption. This corporate cash will buy even more power over the legislative process and government decision making. As a result of this decision, for-profit corporations and industries will be able to threaten members of Congress with negative ads if they vote against corporate interests, and to spend tens of millions of dollars on campaign ads to "punish" those who do not "knuckle under" to their lobbying threats.

More than a century's worth of federal and state laws and policies restricting corporate campaign activity in federal elections has been undermined by the Court's irresponsible decision in *Citizens United*. What makes this glaring case of radical judicial activism even more striking is the fact that the Court chose to decide this case contrary to its own settled principles of *stare decisis*. As Chief Justice John Roberts testified in his confirmation hearings:

> I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the court has emphasized this on several occasions —it is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question, it just poses the question. And you do look at these other factors, like settled expectations, like the legitimacy of the court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis*.[1]

Unfortunately, the Chief Justice and the other four Justices who comprised the majority in *Citizens United* failed to apply these factors in this case. After all, the *Citizens United* decision immediately de-stabilized the law, not only because the Court overturned decades of laws restricting corporate spending in our elections, but it also effectively invalidated or cast doubt regarding state election laws in over twenty states where corporate spending is restricted. These circumstances certainly had created an atmosphere of "settled expectations" that corporate spending restrictions would remain in place. That is especially true since the Court upheld those restrictions in the 2003 *McConnell* decision and refused to strike them down in the 2007 *WRTL* decision. Moreover, the restrictions on corporate spending had not proven to be unworkable or "eroded by subsequent developments."

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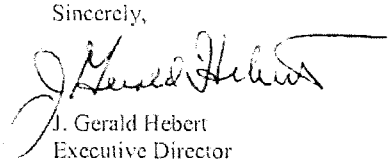
[1] Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, S. Hearing. 109-158. Serial No. J-109-37. p. 144 (2005). *Available at: http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html*

Most irresponsibly, the narrow Court majority chose to take this radical step without even the benefit of a record from the lower courts, and in a case where there were several opportunities to decide the issues without overturning Acts of Congress or its own precedents. This case has all the hallmarks of the very judicial activism that conservatives usually criticize. Lacking an even vaguely authoritative set of facts in the case, the Court chose to act not upon relevant facts in a fully developed record, but rather based on its gut instinct in a gesture of disturbing condescension toward Congress and the American people. In this case, five Justices assumed the role of legislators, and actively reached out to decide matters better left to the expertise of Congress. The fact that they used the First Amendment as constitutional cover for their policy decision that corporate America has the same free speech rights as ordinary citizens only deepens the perversion of this ruling.

Given this outcome, it is critical that Congress move expeditiously to mitigate the damage inflicted by this decision. Attached is a list of areas the Legal Center has identified that Congress should consider as it attempts to limit the damage to our democracy caused by this decision. We encourage this Committee to move quickly to put together a package of reforms and to ensure that the dangers presented by *Citizens United* are dealt with effectively.

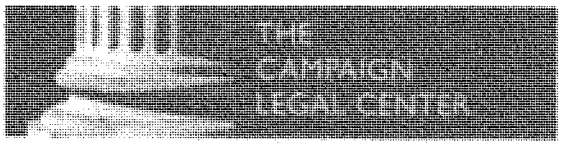
The Campaign Legal Center looks forward to the hearings and stands ready to be of assistance as the Committee considers specific legislation.

Sincerely,



J. Gerald Hebert
Executive Director

Attachment



A LEGISLATIVE RESPONSE TO *CITIZENS UNITED*

The astonishing and radical outcome of the *Citizens United* case has opened new and troubling venues for a flood of special-interest money to pour into elections at all levels of government. The decision did not leave much room to repair the damage it will cause. But some actions can and should be taken immediately at the federal level—before the mid-term elections—to mitigate the damage the decision could bring.

Below is a list of issues that Congressional leaders should consider when putting together a legislative response package.

- **Strengthen Statutory Language on What Constitutes Coordination**
  The Supreme Court's view in *Citizens United* that corporate expenditures would not corrupt federal elections hinged on its view that the expenditures would be made "independently" of candidates and political parties. Current Federal Election Commission (FEC) regulations defining what constitutes coordinated vs. independent expenditures are very narrow and too weak. Past FEC efforts to write coordination regulations have been rejected twice by courts as insufficient. There was an effort during consideration of the Bipartisan Campaign Reform Act (BCRA) to strengthen the statutory definition. That effort should be revived immediately. Congress should enact statutory restrictions defining coordination, especially since the FEC has shown itself incapable of writing them.

- **Enact Ways to Provide Candidates Sufficient Access to the Publicly Owned Airwaves**
  Before the recent ruling, candidates faced the daunting prospect of raising large amounts of money to purchase time on the publicly-owned airwaves simply to communicate their message to voters. With corporations—and unions—now allowed to use treasury funds to run advertisements seeking to influence election outcomes, the problem has become worse. Candidates will need resources to help ensure that voters can hear their message and judge for themselves the relative value of a candidate. Over time, the statute that requires broadcasters to provide candidates the opportunity to purchase time at the lowest unit rate (also called lowest unit charge) has become severely weakened. Air time sold at the lowest unit rate is generally pre-emptible, thus forcing candidates to buy the more expensive, non-pre-emptible time to

THE CAMPAIGN LEGAL CENTER
215 E St. NE, Washington, DC 20002
www.campaignlegalcenter.org, 202-736-2200

ensure they reach the targeted demographic. A new statute should ensure that once again the lowest unit rates for candidates are meaningful. In the longer term, Congress should consider providing candidates with broadcast vouchers to match small-dollar contributions. In addition, the Federal Communications Commission (FCC) should, as part of their on-going proceedings on public interest obligations of digital broadcasters, also look at ways to ensure that candidates have access to the publicly-owned airwaves so their messages are not drowned out by a political cacophony among many special interest players.

- **Strengthen Shareholder Protections to Ensure Accountability**
  Corporate shareholders have a right to know how that corporation is spending its treasury funds. To improve accountability, corporations should be required to disclose more information about their expenses that are not deductible as a business expense under IRC 162, *i.e.* political activities. Also, corporate entities whose major activity is influencing elections should be regulated as "political committees" under federal campaign finance laws. The FEC has in recent years refused to regulate many such groups as political committees. Federal statutes should be strengthened to require regulation by the FEC.

- **Strengthen Requirements for Disclosure of Corporate Spending for Political Purposes**
  A major concern raised by *Citizens United* is that corporations will evade disclosure of their electoral spending by laundering money through third-party organizations, such as a chamber of commerce. The Court, by a vote of 8-1, upheld the electioneering communications disclosure requirement. However, the FEC has already weakened this disclosure requirement by requiring third-party organizations to disclose only those donors that specifically designate their contributions for the organization's electioneering communications. The FEC rules thus create a roadmap for evasion of the law. Legislation should ensure that *all* sources of funds used by third-party groups for electoral spending are disclosed, especially any spending for advertising in mass media.

- **Revise Statutes Dealing with Disclosure of "Electioneering Communications"**
  Current law requires disclosure of any broadcast, cable or satellite advertisement that: (1) references a clearly-identified federal candidate, (2) is targeted to the relevant electorate, and (3) is aired 30 days before a primary election and 60 days before a general election. Once a person or group spends over $10,000 in a year for electioneering communications, they must report to the FEC, including disclosing all their donors who contributed $1,000 or more to fund the ads. Now that corporate independent expenditures are permissible, there is no need for these narrow 30- and 60-day windows. Any

electioneering communication should be disclosed whenever it occurs. Also, current law requires that independent expenditures be reported to the FEC in a filing with a statement certifying that the expenditure was not coordinated with any candidate or party. Electioneering communication disclosures should also include this same self-certification.

- **Strengthen Pay-to-Play Restrictions for Government Contractors**
  Current law prohibits federal contractors from directly or indirectly making any contribution of money or other things of value to any political party, committee, or candidate. A new statute, based on the same constitutional rationale as the Hatch Act, should prohibit corporate federal contractors from making independent expenditures in support of or opposition to federal candidates. Other pay-to-play restrictions (*e.g.*, hiring of lobbyists and certain types of corporations such as public utility companies) should also receive consideration.

- **Ensure that Corporate Independent Expenditures Do Not Become a Means to Evade Current Statutory Restrictions on Foreign Nationals' Roles in U.S. Elections**
  In the aftermath of this decision, Congress should review the law to ensure that foreign controlled funds do not enter U.S. elections as a result of the *Citizens United* case. The FEC currently has rules governing the role of U.S. subsidiaries of foreign-owned companies that prohibit foreign funds being spent by U.S. corporations in U.S. elections, and forbid the involvement by foreign nationals in the decision-making process about such political spending. Congress should ensure that these rules are being adhered to, and can be enforced. Congress should also look at laws in states such as Hawaii that have dealt with the issues of foreign nationals.

Dangers to be Avoided in a Legislative Response: What NOT to Do

- **Do not reopen the soft money loophole for parties**
  With the prospect of corporations making large independent expenditures, there is pressure to reopen the soft money loophole to allow political parties to accept unlimited corporate and union treasury funds which can be spent in a variety of ways to impact the outcomes of targeted races. But the answer to the potential influx of corporate spending is not to encourage more potential corruption. The extensive record in *McConnell v. FEC*, as well as the U.S. Supreme Court decision upholding BCRA, clearly demonstrated the corrupting influence of soft money contributions. That disturbing record should not be repeated by reopening the loophole.

- **Do not significantly increase contribution limits to candidates and parties**
  Another reaction that has surfaced in the wake of *Citizens United* is to allow candidates and parties to accept significantly larger contributions. The U.S. Supreme Court has upheld contribution limits as established by Congress as a

legitimate and constitutional means to fight corruption and the appearance of corruption. Significantly increasing those limits will allow even greater influence-buying and influence-seeking access.

What About Public Financing?

Public financing remains an attractive alternative to financing modern federal campaigns. However, the *Citizens United* ruling will require supporters of public financing to attract candidates to participate in such a system when they fear facing large independent expenditures by a corporation or union — potentially late-in-the-election cycle when there is little opportunity to offset the disadvantage. Previous public financing models relied on triggers to allow participating candidates to get larger matches or accept larger contributions if they faced such expenditures. But the Roberts Court, in *Davis v. FEC*, cast doubt on the constitutionality of such triggers.

The public financing measures introduced this Congress by Senator Dick Durbin (D-IL) and Representative John Larson (D-CT), as well as a new proposal put forth by the Campaign Finance Institute, avoid this potential constitutional problem. Yet, these proposals face an uphill battle to pass in the current fiscal and political environment in Congress. In addition, some candidates may have concerns about whether they will have the ability and time to raise sufficient funds to respond effectively to late-cycle corporate or union independent expenditures in the wake of *Citizens United*.

What About a Constitutional Amendment?

Proposals for a constitutional amendment to override the Court's ruling in *Citizens United* are likely to be introduced in Congress as well. Among the forms these proposals could take include targeting the issue of treating a corporation as a person/individual, or restricting the ability of corporations to use their treasury funds for electioneering activities. The path to ratification for a constitutional amendment is very long and difficult. Also, there are many people who may disagree with the Court's ruling who are uncomfortable with altering the First Amendment. In the meantime, there are important steps to be taken to mitigate the damage caused by the opinion, and to muster the political support to fight off attempts in Congress to cause further erosion of laws that protect against corruption and the appearance of corruption, as well as access- and influence-buying.

ATTORNEY GENERAL
STATE OF MONTANA

Steve Bullock
Attorney General

Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

March 5, 2010

The Honorable Mark Pryor
United States Senate
255 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Pryor:

Thank you for your continued interest in legislative solutions that will protect the integrity of American elections in the wake of the U.S. Supreme Court's ruling in the *Citizens United v. Federal Election Commission* case.

Following last month's historic hearing in the U.S. Senate's Committee on Rules and Administration, you posed questions to panelists. My views on those questions are below.

> **In my state, we have judicial elections. What are the ramifications of this decision on that electoral process?**
>
> The affliction of corporate political corruption extended to judicial races too. One Copper King won the election of two district judges allied to his mining interests who, "in a burlesque of judicial dignity ... found in [his] favor with monotonous regularity."[1] In the so-called "Smoke Wars" litigation to end deadly pollution of forest and farmlands by the mining company's smelter, President Roosevelt's Solicitor General expressed concern about the ongoing corruption of public officials by the competing mining interests. He called it simply the "Montana Situation."[2]
>
> **Do you agree with Justice O'Connor's statement that this decision will likely create, "an increasing problem for maintaining an independent judiciary?"**
>
> Just last year the United States Supreme Court recognized that independent expenditures can have a "significant and disproportionate influence" in corrupting the administration of justice.[3] Supreme Court justices in Montana campaign on as little as $100,000, far less than the stakes in the cases they are asked to decide.[4] As Justice O'Connor has recently observed in reaction to *Citizens United*, corporate spending can poison judicial elections.[5]

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[1] Toole at 199; *see also* Malone *et al.* 224-29.
[2] Donald MacMillan, *Smoke Wars: Anaconda, Copper, Montana Air Pollution, and the Courts, 1890-1920*, 173 (Mont. Hist. Soc. 2000).
[3] *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264-65 (2009).
[4] National Institute on Money in State Politics, *State Overview: Montana 2008*, Table 1 (Candidates).
[5] Justice at Stake, http://www.gavelgrab.org/?p=7352 (Jan. 26, 2010).

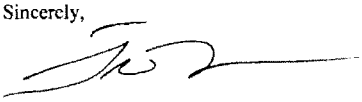
TELEPHONE: (406) 444-2026 FAX: (406) 444-3549 E-MAIL: contactdoj@mt.gov

Do you believe corporations will be allowed to receive favorable tax treatment for campaign expenditures by writing them off as business expenses? If so, do you believe Congress should try to address how political spending would be treated for tax purposes?

The challenge for Congress and state legislatures is to ensure that corporations can not benefit from their unique status in receiving favorable tax treatment for not only the direct expenditures, but also for the indirect costs of making those expenditures, including staff salaries, overhead, and other corporate resources. Both Congress and state legislatures ultimately decide corporate tax policy, and will need to thoroughly consider these issues in remedying any distorting effects of the tax treatment of corporate campaign expenditures.

Please don't hesitate to contact my office if you should have any further questions.

Sincerely,



STEVE BULLOCK
Attorney General

Response to Questions
in connection with the hearing of February 2, 2010
before the United States Senate Committee on Rules and Administration

Edward B. Foley
Director, *Election Law @ Moritz*, &
Robert M. Duncan/Jones Day Designated Professor in Law
The Ohio State University, Moritz College of Law

Senator Pryor has asked all panelists at the February 2, 2010 hearing to address these questions:

1) In my state, we have judicial elections. What are the ramifications of this decision on that electoral process?

2) Do you agree with Justice O'Connor's statement that this decision will likely create, "an increasing problem for maintaining an independent judiciary?"

3) Do you believe corporations will be allowed to receive favorable tax treatment for campaign expenditures by writing them off as business expenses? If so, do you believe Congress should try to address how political spending would be treated for tax purposes?

Here are my responses:

1. Potential ramifications of *Citizens United* on judicial elections

The First Amendment right announced in *Citizens United*—that corporations may spend their general-treasury funds on campaign ads, including those that expressly advocate the election or defeat of an candidate—applies to elections for judicial as well as legislative or executive office. The Court so indicated in *Citizens United* itself. See 130 S.Ct. at 910.

Even so, it might be possible to argue that a statute carefully tailored specifically to demonstrated problems of corporate spending in the context of judicial elections would pass muster under strict scrutiny, notwithstanding *Citizens United*. Such an argument would need to be premised on the point that *Citizens United* involved an across-the-board ban on all corporate spending in any federal election (a point I emphasized in my testimony at the hearing), and therefore did not address the specific issue of corporate spending in the context of judicial elections. In my judgment, for this kind of argument to have any chance of success in the Supreme Court in the foreseeable future, the statute would need to be extremely circumscribed: it would have to set a generous ceiling, rather than be a complete ban; it would need to be limited to only certain categories of corporations with a track record of spending on judicial elections that raises the risk of

corrupting the integrity of the judicial process; and it would be need to be applicable only with respect to those judicial elections that previously have experienced the problem of potential corruption associated with corporate spending. It would still be an uphill battle for this kind of argument to prevail, even assuming the statute was carefully and narrowly tailored in this way. The reason is that the Supreme Court majority in *Citizens United* signaled that recusal is an available alternative in the event that corporate spending presents the risk of judicial corruption (or the appearance of judicial corruption).

Nonetheless, it is at least theoretically possible that a state might be able to develop an evidentiary record that recusal is not an available or sufficient option in some circumstances. Perhaps, for example, if a single corporation or industry trade association has spent heavily on all judicial races in a state, there would be no "untainted" judges available for cases involving the regulation of that corporation or industry. Or perhaps evidence might be developed that campaign spending to win one seat on a state's supreme court affects the ability of other members of the same court to adjudicate impartially. (Something along these lines was raised in connection with the disputed election for Alabama's Chief Justice in 1994.) My point here, which is quite tentative, is merely to say that because *Citizens United* did not itself involve judicial elections, it technically remains an open question of federal constitutional law how that precedent would apply in that particular context—and when and if the time comes for the Court to apply the precedent in that context, the Court's judgment would be affected by the strength of the evidence developed in support of arguments to distinguish that precedent as well as how carefully and narrowly a statute was drawn in relation to that distinction and the supporting evidence. (It is also conceivable, however, that any effort to limit corporate spending in the context of judicial elections would be doomed in the eyes of the Court's majority by the possibility that a state is always free to choose an appointed, rather than elected, judiciary as a means to promote judicial independence and integrity.)

I should add, however, that I think it may be necessary for state legislatures, rather than Congress, to consider whether or not to adopt any legislation that attempts to limit, by direct regulation, the amount of corporate spending on a state's judicial elections. Quite apart from *Citizens United* and the First Amendment, I see potential obstacles given the current Supreme Court's federalism jurisprudence concerning the Commerce Clause, the Tenth Amendment, and section five of the Fourteenth Amendment if Congress were to enact this kind of statute. Insofar as the current majority of the Supreme Court viewed the regulation as directed at the state's electoral process, the Court majority *might* consider the regulation beyond the scope of Congress's regulatory power. (In the previous sentence, I emphasize "*might*" because the current Court's federalism jurisprudence is widely recognized as murky, in development, and thus unpredictable.)

In my judgment, any such federalism concerns would diminish if the relevant congressional legislation were viewed as regulating corporate governance generally, rather than state judicial elections specifically. In other words, some of the legislative proposals that have surfaced in the immediate wake of *Citizens United* have included disclosure rules, shareholder notice or voting provisions, and the like—rather than direct

regulatory constraints on corporate spending for campaign advocacy. Insofar as these various *indirect* measures encompass spending on state judicial elections as part of an overall effort to monitor corporate activity, in the interest of shareholders and potential purchasers of shares, and assuming such *indirect* measures do not run afoul of the First Amendment under *Citizens United* and related precedents, there would seem to be considerably less risk of a potential federalism problem. But, as was mentioned in the original hearing on February 2, Congress would be well advised to consult experts on corporate governance law, in addition to constitutional law, in considering what might be appropriate in this context and how any such legislative measures should be tailored.

2. Justice O'Connor's statement concerning "an independent judiciary"

I have no basis or reason to question Justice O'Connor's statement and believe that she is in a much better position than I am to make this kind of predictive judgment. The ultimate effect of corporate campaign spending on judicial elections will depend not only on the volume of such spending in the future, but also on how state judiciaries respond, including by means of increased recusals (as indicated above). Of course, if as Justice O'Connor and others have urged, states move from elected to appointed judiciaries, then this particular problem would disappear.

The only thing I should add is that during the past decade there was litigation in Ohio concerning corporate spending on judicial elections. (I was involved in that litigation as counsel to some of the parties.) In the 2000 election, there was a particularly infamous ad, called the "Lady Justice" ad, designed to defeat the then-incumbent Justice Alice Resnick. This ad depicted "Lady Justice" peeking out from under her blindfolds as a result of campaign contributions, and then crumbling into pieces. As I recall, the tag line of this ad was "Is Justice for Sale?" The litigation resulted in a determination that ads of this character were off-limits for the purposes of corporate spending under the then-prevailing precedent of *Austin*. That determination has now been superseded by *Citizens United*, and thus, based on the last decade in Ohio, one can expect renewed corporate campaign spending of the kind that occurred in the "Lady Justice" ad. It is perhaps noteworthy, therefore, that Ohio's current Chief Justice, Thomas Moyer, like Justice O'Connor, has called for a change from elected to appointed judges in Ohio. See Joe Hallett and James Nash, *Moyer: End Election of Ohio Justices*, Columbus Dispatch (March 3, 2010).

3. The Tax Treatment of Campaign Expenditures

I do not believe I am qualified to address this tax question. Donald Tobin, my colleague on the faculty of the Moritz College of Law at the Ohio State University (and our Associate Dean), is an expert on this particular topic, and I encourage you to contact him if you wish to consider the topic further.

Supplemental Testimony of Professor Heather K. Gerken

J. Skelly Wright Professor of Law

Yale Law School

Submitted to the United States Senate Committee on Rules and Administration

March 5, 2010

Senator Pryor has asked for supplemental testimony on the following questions:

1) In my state, we have judicial elections. What are the ramifications of this decision on that electoral process?

2) Do you agree with Justice O'Connor's statement that this decision will likely create, "an increasing problem for maintaining an independent judiciary?"

3) Do you believe corporations will be allowed to receive favorable tax treatment for campaign expenditures by writing them off as business expenses? If so, do you believe Congress should try to address how political spending would be treated for tax purposes?

1. The Ramifications of *Citizens United* for judicial elections.

Citizens United applies to judicial elections, just as it applies to nonjudicial elections. Some had thought the Supreme Court might limit its holding to nonjudicial elections in light of *Caperton v. A.T. Massey Coal*, 558 U.S. ___ (2009), a recusal case involving large independent corporate expenditures in a judicial election. The Court, however, declined to limit its holding in this fashion: "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." Thus, efforts to places restrictions on independent corporate expenditures on judicial elections would be presumptively unconstitutional if they are inconsistent with *Citizens United*.

2. Will *Citizens United* undermine judicial independence?

Whetber *Citizens United* is likely to undermine judicial independence depends on three things: (1) whether the decision opens the floodgates of corporate spending, (2) whether the states take steps to limit the influence of corporations on judicial elections, and (3) whether the courts provide adequate recusal rules when corporate spending threatens to influence judicial decision-making. I address each in turn.

First, it is an open question whether corporate spending will increase dramatically in the wake of *Citizens United*. On the one hand, since *Federal Election Commission v. Wisconsin*

Right to Life, 551 U.S. 449 (2007), corporations have had great leeway to engage in political spending, yet we have not seen the floodgates open. As Nate Persily has observed,[1] this suggests that *Citizens United* will not have a significant effect on corporate spending. On the other hand, loopholes sometimes take a while to be exploited. For instance, the soft money loophole existed well before soft money abuses occurred. It may be that, now that *Citizens United* has been so widely publicized, many more firms will take advantage of the opening the Court's recent decisions have provided. If *Citizens United* prompts firms to pour massive amounts of money into the system for nonjudicial elections, I would expect the same dynamic to occur for judicial elections.

Second, even if corporate spending on judicial elections were to increase, the states can reduce the effectiveness of that spending. Corporate money is most likely to influence the outcome of judicial elections if it can be funneled through shell organizations with appealing names. If the states were to enact robust disclosure and disclaimer rules to prevent corporations from hiding behind shell organizations, the likelihood of corporations' exercising undue influence on judicial elections will be reduced. That is because citizens are likely to view political advertisements with greater skepticism when they are sponsored by corporate interests, thus reducing their effectiveness. As I noted in my original testimony, the constitutionality of disclaimer and disclosure rules is well established.

Third, even if corporate money affects who gets elected to the judiciary, a broad recusal rule might nonetheless suffice to protect judicial independence. Justice O'Connor's worry is that corporations will leverage their influence over elections into influence over a judge's decisions once elected. If judges were forced to recuse themselves whenever a corporation spent heavily on a race, the likelihood that corporate expenditures would undermine judicial independence would be much reduced.

Whether Justice O'Connor's worry is well-founded depends on how lower courts (and future Supreme Court decisions) interpret *Caperton v. A.T. Massey Coal*, where the Supreme Court held that a judge must recuse himself from a case "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." The standard itself is fairly narrow and likely to remain so. This was the Supreme Court's first foray into this area of judicial ethics. Given prior case law and the Court's prior practice, I would not expect a significant expansion of this standard until the lower courts have had some success in applying it. Nonetheless, if this standard were interpreted more broadly, it should help protect judicial independence, because any judge who received substantial help from a corporate donor in getting elected will be recused from the case. (Indeed, a broad interpretation of *Caperton* would likely deter corporations from thinking it is worth their while to

[1] http://balkin.blogspot.com/2010/01/citizens-united-preview-to-post-mortem_21.html

spend the money in the first place). As I noted, however, I do not expect such a broad interpretation in the coming years. As a result, for the reasons noted above, the best hope for preserving judicial independence lies in enacting robust disclosure and disclaimer rules for corporate spending in judicial elections.

3. Tax law implications of *Citizens United.*

Because I am not an expert in tax law, I will leave the question about the current tax treatment of corporate expenditures to those with the requisite expertise to answer it. As a constitutional matter, however, if Congress chooses to regulate in this area, it must be attentive to the types of First Amendment concerns I outlined in my original testimony.

Response of Allison R. Hayward, George Mason University School of Law to

Questions from Senator Pryor

1. In my state, we have judicial elections. What are the ramifications of this decision on that electoral process?

ANSWER: With the caveat that I am not an expert in Arkansas politics or campaign finance, I doubt that *Citizens United* alone will make much of an impact, especially in those jurisdictions where corporate expenditures have been legal.

2. Do you agree with Justice O'Connor's statement that this decision will likely create, "an increasing problem for maintaining an independent judiciary?"

ANSWER: I am not sure what to make of Justice O'Connor's statement. It would seem to me that if a state has chosen to select state judges through popular election, then implicit in that choice is a decision that judges should not be "independent" from popular opinion or review – at least in the way we think of appointed federal judges with life tenure as independent.

3. Do you believe corporations will be allowed to receive favorable tax treatment for campaign expenditures by writing them off as business expenses? If so, do you believe Congress should try to address how political spending would be treated for tax purposes?

ANSWER: With the caveat that I am not a tax expert, as I read IRC Section 162(e)(1)(B), there is no tax deduction for political expenditures, including independent expenditures. Specifically, that statute disallows deductions for "participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office . . ." I do not think *Citizens United* calls this statute into question at all.

Response of Fred Wertheimer to Questions from Senator Mark Pryor for the Record in the Senate Rules Committee Hearing on the Supreme Court Decision in the *Citizens United* Case

February 22, 2010

Response to Question 1

I believe the ramifications for state judicial elections that will flow from the *Citizens United* decision are extremely damaging. Judicial elections are already faced with serious problems caused by the potential role of campaign contributions influencing judicial decisions and creating the appearance of influencing such decisions.

The *Citizens United* decision now opens the door to that becoming a far greater problem in judicial elections, as corporations and labor unions have been given a license to make unlimited expenditures to influence judicial elections and, thereby, to influence judicial decisions affecting their interests.

Response to Question 2

I absolutely agree with Justice O'Connor's statement. The *Citizens United* decision means that corporations and labor unions have been given powerful tools for creating obligations and indebtedness from individuals running for judicial positions. The more judicial candidates face the potential of huge expenditures for or against them, the harder it will be for them to maintain their independence.

The problem is just as serious when it comes to judges losing the *appearance* of independence because of huge expenditures taking place in their races. Citizens are likely to assume that the decisions of judges have been influenced by huge amounts of money spent to elect or to defeat them and that in turn is going to lead citizens to believe that the judges are not making independent-minded decisions.

Response to question 3

Campaign expenditures are not deductible as business expenses and therefore this should not be a problem. I do not know, however, whether it is necessary to make this clearer as a result of the *Citizens United* decision by strengthening the language in the tax code that applies to the non-tax deductibility of campaign expenditures. Senator Pryor may want to take a look at whether more needs to be done on this in the tax code.

NOMINATION OF STEPHEN T. AYERS, AIA, LEED, AP TO BE ARCHITECT OF THE CAPITOL

THURSDAY, APRIL 15, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The Committees met, pursuant to notice, at 10:03 a.m., in Room 301, Russell Senate Office Building, Hon. Mark L. Pryor presiding.

Senators Present: Schumer, Pryor, Bennett, and Cochran.

Staff Present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Staff Director; Jason Abel, Chief Counsel; Josh Brekenfeld, Professional Staff; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Justin Perkins, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Abbie Platt, Republican Professional Staff; Trish Kent, Professional Staff; and Rachel Creviston, Republican Professional Staff.

Senator PRYOR. I will call the Rules Committee to order. I want to thank everyone for being here today. Mr. Ayers, I especially want to thank you for being here and I am going to chair the hearing today but I would like to turn it over to the real chairman of the hearing who has to slip away because of his schedule. Senator Schumer.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Thank you. Well, I want to thank you. First, I want to thank Senator Pryor for chairing the hearing. I told Mr. Ayers he is the guy you have got to pay attention to around here. And I certainly want to thank my friend and colleague and just a fine man and outstanding senator, Senator Bennett, for being here as well.

And of course, I want to welcome you, our nominee Stephen Ayers. Mr. Ayers has been serving as the Acting Architect to the Capitol for three years and is here to be confirmed to a ten-year term as the Architect of the Capitol. He's been joined today by his family: his wife Jennifer, his daughter Stephanie, his son Nick, his parents Ben and Jane, parents-in-law Chuck and Shirl.

brother Ben, sister Jennifer. Welcome to you all.

The history of the Office of the Architect to the Capitol is as old as the building itself. Individuals who have held the title, have been instrumental in shaping our nation's Capitol from its early beginnings into the working symbol of democracy as we see it today. William Thornton is recognized as the first Architect to the Capitol because his design of the Capitol was chosen by Washington in 1793. So we have a lot of history here.

Throughout the 1800's, four men were hired to oversee the Capitol's construction, creating much of the structure we still use and occupy today.

Today the Architect to the Capitol employs over 2,600 staff and manages a budget of $600 million a year. Mr. Ayers' nomination by the President came after a rigorous bipartisan and bicameral selection process that began in the Fall of 2006, three and a half years ago.

The nomination was approved by the President Pro Tempore of the Senate, the Speaker of the House, the Majority and Minority Leaders of both houses, the Chairman and Ranking Member of the Committee on House Administration, the Chairman and Ranking Members of the House and Senate Appropriations Committee, and of course, by the Chairman and Ranking Members of this committee.

And I do want to say this; Mr. Ayers has had wide acclaim. Just about everybody wanted to see him become the Architect to the Capitol so there was very little controversy. It was a long and rigorous process with other candidates but Mr. Ayers came through with flying colors. This wasn't a situation where there were three candidates and each one had its strengths and weaknesses. Mr. Ayers was all strengths.

Senator Pryor will go over Mr. Ayer's career history. I'll just end by welcoming him and thanking him for being. I look forward to his being confirmed as Architect to the Capitol and to working with him in the years to come.

Senator Pryor1.

Senator PRYOR. Thank you.

Chairman SCHUMER. And I apologize to everybody. I have to get on my way.

Mr. AYERS. Thank you Mr. Chairman.

Senator PRYOR. Thank you very much for your leadership. Senator Bennett, would you like to make an opening statement?

OPENING STATEMENT OF SENATOR BENNETT

Senator BENNETT. Thank you very much. As Chairman Schumer has indicated, this has been a three year job interview. The process started and I was new to this position on the Rules Committee and we did indeed start out with a fairly long list of candidates and we would come to a conclusion this is what we think it ought to be and then the House would say, no we don't like that one and then members of this committee would say well, we prefer this one to that one and we would settle on somebody and then someone else would not like it.

And the one steadying influence through all of that turmoil was the fact that Stephen Ayers as Acting Architect was keeping the doors open, the lights on and things going forward. And it emerged out of all of that experience that we had a very competent Architect to the Capitol and why were we looking around? And why didn't we stay with what we had?

It took a little while to convince everybody that that was the thing that we should do, but it became very clear that that is the thing that we should do. So this is turning into a testimonial rather than a hearing, I almost said roast, but it is not.

[Laughter.]

Senator BENNETT. Not that kind of thing. The thing that I would like to put in the record, is that during this three year long job

interview and in the period prior to that when Stephen Ayers was the Deputy Architect to the Capitol it was not a time of calm and serenity around here. It was a time of great controversy as we were involved in the largest addition to the Capitol in the history of the Capitol.

The Capitol Visitor Center added more square footage to the Capitol than any other change in the Capitol in its history and it was controversial for a variety of reasons, some of them political, some of them financial, some of them aesthetic and a steady hand as I say to keep the thing moving along intelligently was necessary.

Alan Hantman, who was the Architect to the Capitol deserves credit for the work he did there, but his Deputy was a very, very important part of keeping the thing online and going forward in a legitimate fashion and then when Mr. Hantman stepped down, taking over the responsibility of making sure that it opened in an intelligent fashion. And we can look back on it now as often happens in history, when you look back on things that were controversial and say, Boy, we're really glad we did it. We're really glad that this was handled in such a way and that kind of erases the historical memory of how difficult it was to do it.

But we now have the statistics that show that visitors to the Capitol have increased by over a 100 percent and I am sure the visitor experience has gotten better, particularly as we are coming into the summer by far more than a 100 percent, because I remember the lines in the heat with people waiting for hours standing in line to get into the Capitol with the possibility of any kind of problem. The security challenge after 9/11 of having crowds out on the plaza with no physical protection and a huge target for a terrorist attack.

Now all of that is gone. The plaza is back looking better than it did before and the square footage of the Capitol Visitor Center accommodating twice as many visitors in a secure area, air-conditioned, plenty of rest rooms, all of the other things which future generations will take for granted as part of the Capitol Visitor's experience and have no memory of how difficult things used to be.

And yes, those who came before him made a very significant contribution to that but Stephen Ayers played a very significant role in seeing to it that we got what we have and it is only fitting now that we have it, that he be continued for another ten years so that when the plumbing starts to leak he will know where to go to fix it. And I am happy to join with the Chairman and Stephen in welcoming you here. Telling you this appointment is long overdue and adding my endorsement to the assignment.

Senator PRYOR. Thank you Senator Bennett. Senator Cochran, do you have an opening statement?

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. Mr. Chairman, thank you. I am glad to be able to come by and congratulate Stephen Ayers for his nomination and his imminent confirmation as Architect of the Capitol. This has, as my good friend from Utah said, it has been a long and arduous journey, but I am glad to see that it has turned out as it has and that we are going to be able to have a full fledged, con-

firmed Architect of the Capitol finally and to thank him for his patience in his demeanor throughout all of this.

I think the changes that we have seen in the Capitol over the last few years are just enormously impressive for many reasons. Those of us who have been on the Rules Committee for awhile and have attended a lot of the hearings and engaged in a lot of conversations, not just about who should be the Architect, but the redesigning of the Capitol. A huge job.

And I think Mr. Ayers deserves our accolades and compliments on a successful completion of that work as well. So that is why I am here Mr. Chairman and I am glad to join you and Senator Bennett in the work of this committee and the confirmation of this outstanding new Architect of the Capitol. You can strike out the word 'acting' now.

OPENING STATEMENT OF SENATOR PRYOR

Senator PRYOR. Thank you. Thanks Senator Cochran. I do have a longer statement for the record, but let me just say a few words here. If confirmed Mr. Ayers will become the 11th Architect of the Capitol. He graduated from the University of Maryland with a bachelor's degree in Architecture and received his Masters degree in Systems Management from the University of Southern California.

Mr. Ayers served as an officer in the U.S. Air Force, was promoted to Captain and received the Meritorious Service Medal for his five years of military service.

The nominee is no stranger to the Architect's organization. In 1997 he joined the Office of the Architect of the Capitol as an Assistant Superintendent of the Senate Office Buildings and was later promoted to Deputy Superintendent. His next job took him across the street to the Library of Congress where he assumed the position of the Superintendent of the Library Buildings and Grounds in 2002. He was named Deputy Architect of the Capitol in 2006 and in 2007 he became Acting Architect to the Capitol.

Since that time Mr. Ayers successfully negotiated a settlement with the Office of Compliance addressing asbestos and hazard mitigation in the Capitol Power Plant's utility tunnels and improved the Agency's performance-based Strategic Plan for fiscal years 2007 through 2011.

When Mr. Ayers assumed the role of Acting Architect, there was no projected date for completing the construction of the Capitol Visitor Center. He set and met a date for the substantial completion of this building. Under his leadership the Architect's office successfully completed the Fire and Life Safety Systems Testing, which was required before the facility could open. On December 2, 2008 the long awaited Capitol Visitor Center opened its doors to the public.

Under the nominee's leadership as Acting Architect and in his previous role as Deputy Architect/Chief Operating Officer, the Agency improved cost accounting procedures and internal controls and has received five consecutive clean financial audits.

And, again, I have a longer statement for the record, but I say those things just to demonstrate that this is the right person for this job and we are so happy to have you with us today and what

I will do now is ask you to stand and raise your right hand and I will administer the oath.

Do you swear that the testimony you are to provide is the truth, the whole truth and nothing but the truth, so help you God?

Mr. AYERS. I do.

Senator PRYOR. Please be seated.

I have just a few questions, but I would like to hear your opening statement first, please.

TESTIMONY OF STEPHEN T. AYERS, AIA, LEED AP, TO BE ARCHITECT OF THE CAPITOL

Mr. AYERS. Well, thank you so much Mr. Chairman, Senator Bennett and Senator Cochran.

It is an honor and a real privilege for me to be here today as the Presidential Nominee for the position of Architect to the Capitol and I would like to first extend my sincerest thanks and gratitude to all of the members of the Nominating Committee for recommending me to President Obama to serve as the 11th Architect to the Capitol.

I truly appreciate the trust that the Congress and the President have placed in me.

As the Chairman noted, I am joined here today by my wonderful family and it is because of their love and support that I have been able to pursue a career in public service. I really appreciate them being here today to continue that supportive role.

As the Chairman noted I have served as Acting Architect since 2007 and in this role I think I have been able to combine two important skill sets. First of course, that of being a licensed architect and second, the ability to focus on business management and to bring best business management practices to the table.

The stewardship of the Capitol Complex is important to me, it is important to the Congress, and it is important to the Nation and it is equally a very unique challenge. This challenge is amplified by the historic significance and iconic nature of our buildings, the landscape, and aging physical infrastructure, as well as the day-to-day requirements of the Congress.

Chief among these challenges is the significant backlog of deferred maintenance and capital renewal projects totaling today in excess of $1.5 billion over the next ten years, as well as security, life-safety, accessibility, and environmental requirements. To assist us in our efforts to address this backlog of projects, we have successfully developed and implemented a robust and balanced process to prioritize projects based on a facility's condition assessment and the level of maintenance required in any given building.

This process uses several tools including Facility Condition Assessments, the Capitol Complex Master Plan, and Jurisdiction Plans, among other criteria.

The component that provides us and the Congress with the big picture, the 20-year look ahead that queues up priorities and investments and projects, is the Capitol Complex Master Plan. The Master Plan and the other prioritization tools provide Congress with concrete, practical assessments of our infrastructure and by using these tools, Congress can make wise investments in the Capitol Complex in the future.

Mr. Chairman, great organizations are made up of great people and to ensure that the AOC is an employer of choice, I have set out to invest in our most valuable assets, our employees. And it is my responsibility to provide them with the right tools, the right equipment, and the right training to allow them to build on our successes and to be the best of the best. In that regard, I have implemented a number of workforce programs to provide greater flexibilities including a telework program, a flexible work schedule program, and a student loan repayment program among many other initiatives that they so richly deserve.

And I am committed to using sustainable design practices whether we are building a new facility or maintaining one that is over 200 years old. With the support of Congress we have implemented a number of programs and projects designed to save energy and conserve our natural resources.

Last year we entered into energy savings performance contracts for the Senate, the House, and the Capitol buildings that include $93 million in planned facility energy-related upgrades. These are really important public/private partnerships that will help us and the Congress achieve its energy reduction goals.

To ensure that we continue to see a reduction in energy consumption, we are evaluating proven technologies that can be implemented in our continued effort to increase energy efficiencies across the Capitol campus. Among the options being considered is co-generation, which simultaneously generates both electricity and heat, as well as the use of biofuels in the Capitol Power Plant. Moving in a more sustainable direction will enhance our efforts to meet energy reduction mandates as well as provide higher energy system security and reliability with lower overall costs.

This year, the agency will be updating our Strategic Plan to set new goals and priorities that will drive our organization for the next five years.

Consistently an overwhelming majority of our customers have said that they are satisfied or very satisfied with the services the Architect provides in our annual surveys. However, as one of my favorite authors, Jim Collins, points out the challenge before us is not to let good get in the way of great. And I will not be satisfied until we are able to achieve a 100 percent satisfaction rating.

And should this committee recommend that I be confirmed by the full Senate, I will be honored to continue to work beside the very talented men and women that make up this great team of the Architect of the Capitol. Thank you, and I would be happy to answer any questions you may have.

[The prepared statement of Mr. Ayers follows:]

Senator PRYOR. Thank you. Let me start with one question: in 2003 Congress directed the Architect to the Capitol to complete a 20-year Capitol Complex Master Plan.

Could you give us a status report on that and tell me if it is not completed when it will be completed?

Mr. AYERS. Well, certainly Mr. Chairman, the Capitol Complex Master Plan is a really important tool, not just for the Architect, but for the Congress as a whole. It provides a road map of the facilities for the next 20 years. It is so important for us to look ahead so that we can ensure that we provide the facilities necessary for

the Congress to conduct its business and we do not get ourselves in the situation where we have to close a building or we are so overcrowded that the Congress cannot effectively conduct its business. So that is really the overarching purpose for the plan.

Today, we are nearly finished with the plan. The Capitol Complex Master Plan is made up of nine individual plans—one for the Senate and one for the House and Capitol and the Library and the Supreme Court, among others. And among those, two of those nine plans have been approved. Three of them are before the Congress awaiting approval. And four of them we are still working on and nearing completion. I suspect it will be at least another year before we are able to complete those and gain the approval and imprimatur of the Congress.

Senator PRYOR. I notice that the AOC budget request for FY2011 included a 25 percent increase over the FY2010 funding levels. Senator Nelson, Chairman of the Legislative Branch Subcommittee on the Appropriations Committee, has said that he wants a flat budget for FY2011.

If confirmed, how do you plan to move the agency forward if you have a flat budget?

Mr. AYERS. A flat budget for us, Senator Pryor, is a cut of $155 million out of our FY2011 budget request. So a cut that significant, I think, is going to take strong leadership, it is going to require tough decisions, and it is going to take partnership with the Congress. We have laid out a plan to do that and have submitted that to Chairman Nelson.

I think we have taken a good approach. We first looked at the money that Congress has already provided the Agency and we were able to drive $15 million out of that to apply towards the FY2011 budget request. Similarly, we looked carefully at our Operations as the Architect's budget is really made up of our Operations piece—salaries and expenses—and then at our projects. So we were able drive another $14 or $15 million out of our Operations request.

The rest of the budget is simply projects that must be deferred or projects that have to be broken down into smaller pieces and phased. I think we have laid out a smart plan to be able to do that if that is the way that our 2011 budget turns out.

Senator PRYOR. This will be my last question, because I want to hear from my colleagues, I do not want to revisit all of the details of the planning and construction of the Capitol Visitor Center, but as you know, it started out as a $265 million building. It was supposed to be ready for the January 2005 Presidential Inauguration. Over time it became a $600 million building and it was finally opened in December of 2008.

I know that you have another big project on the horizon, the complete renovation of the Cannon House Office Building. Are there lessons learned from the CVC and that whole process that we can apply to the Cannon remodel and what would those be?

Mr. AYERS. I think there are, Mr. Chairman. I think that is a really important point that to be a great organization, we have to be able to look at ourselves in the mirror, be our own worst critics and learn from ourselves and ensure that we have a system of continual learning and continual improvement.

I am really proud of the fact that I believe that we as an organization do have that mantra. We have looked very carefully at the Capitol Visitor Center and taken it apart piece-by-piece to understand where those cost overruns and where those time delays happened. I think they really come down to a couple of overarching themes.

One, of course, is we have to be tenacious about defining the scope of a project up front before we start construction and we are setting out to do that with the Cannon Building renovation. Secondly, we have to have a rigorous change management process in place so that when we are asked to make changes on a construction project while we are in construction, we effectively communicate to the Congress the cost and schedule impacts. We need to communicate to the highest levels of Congress the cost and schedule impact of changes while we are in construction.

I think those are the two overarching lessons learned. We have got a great document that we have partnered with the Government Accountability Office to develop on other lessons learned, but I think those are the two most important that I take away from that project.

Senator PRYOR. Senator Bennett.

Senator BENNETT. Thank you very much Mr. Chairman.

In my experience dealing with these issues now, yes we have to keep the lights on and the function going, but you have two areas that are unique to this architectural situation that you do not find in a typical office building or college campus or whatever you may want to compare this to. And they are historic preservation and security.

There are some places where you simply say this building does not fit our needs anymore so we will tear it down and build a new one. You cannot do that with the Capitol. The necessity for historic preservation is there and we have to keep using it even as we are preserving a building that is as old as this one.

And then the second one that came home to us very dramatically after 9/11 was security. So I would like to talk a little bit about both of those areas and let's start with security. I have become a bit of a nag on the issue of the Capitol Police and the unification of the Capitol Police Service so that it includes the Library of Congress and other things. And I would like an update on where you think that is going and how it is working.

And particularly, let's talk about the Capitol Police Radio Project, which I understand is to be completed by March of 2011. And are we on track for that? And what are we going to get out of that in terms of increased security for the campus?

Mr. AYERS. You mentioned two things. The first is the integration of the Library of Congress Police Force with the United States Capitol Police Force, and obviously I sit with the Senate and House Sergeant of Arms on the Capitol Police Board and have been responsible with the Chief to pull those forces together. I think it has been a good process and quite frankly, better than we expected it to be. And they are fully integrated now and it really seems to be working well. The three of us on the Board stay in very close contact with the Chief on this particular issue and the Chief is very

comfortable with the integration of those new officers into the United States Capitol Police.

The second issue you mentioned, Senator Bennett, is this very, very important radio project for the Capitol Police. The current radios with the Capitol Police are not secured and secondly, they are not able to join in with other local and federal law enforcement officials on their network.

So we are working, the Architect's Office is working very closely with the Capitol Police on the implementation of a new digital, encrypted radio system for the United States Capitol Police. And our portion of that work is to assist in managing the technical design aspect, as well as the installation of that radio system whether it is exterior building antennas or interior building antennas throughout the Capitol Complex.

So that process is going smoothly. We do not see any delays or cost overruns on that job. It is being effectively managed and we are very, very carefully watching where the designers are placing their antennas both inside and outside to ensure that we do not do any harm to any of the historic or historically significant portions of any of the buildings across the Capitol Complex, not just the Capitol building.

Senator BENNETT. Yeah. Can you talk about the dome renovations and rehabilitation?

It seems like the dome is always being rehabilitated. The whole I have been here there has been work on the dome, but where are we with respect to that?

Mr. AYERS. We have got a couple of things that we know we need to do to the dome. Just this year we are doing interim painting and caulking and that is to buy another two or three years before, we believe, we are going to have to take the paint off of the dome and completely repaint it and fix many of the deteriorating architectural elements that are part of the dome.

That has not happened since the East Front Extension, which I believe was completed in the early '60s. There are some great photographs of the dome showing how it looked with just its red rust preventative coating back in the '60s. We need to do that again. Our plans are to do that within the next three to four years; take all of that lead-based paint off of the Capitol dome, repaint it, and reseal it. That is a significant project to the tune of maybe $100 million that needs to be invested back into the Capitol dome.

But obviously it is our symbol of representative democracy and the most recognizable symbol in the world and I am confident, together with the Congress, we will make the appropriate investments there.

Senator BENNETT. Thank you. Thank you Mr. Chairman.

Senator PRYOR. Did you have any other questions? Are you sure?

Let me ask one last question about the greening of the Senate Office Building. I know that there an Energy Savings Performance Contract that you have entered into and it sounds like that you are ahead of your goal in terms of reaching your energy savings goal for the Senate.

Will that continue? Will we continue to exceed that goal? Or once we hit the goal will we stop doing what we are doing? Or do we

always try to become more efficient and save taxpayer dollars and greenhouse gas emissions?

Mr. AYERS. Thank you Mr. Chairman. Our legislative mandate with the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007 requires us to reduce energy intensity three percent per year for a total of ten years; a total of 30 percent reduction in the Senate office buildings. We are on track to do that. For the first four years of that program we have met or exceeded our goals. We expect the next year or two to be under our goal, but ultimately, to come back and meet our goals for the rest of the duration. And at the end of that ten year period, we will have met or exceed that 30 percent reduction.

Our biggest effort to increase sustainability are the energy savings performance contracts and we are implementing those right now in the House, Senate and Capitol. As those construction efforts take place, energy reduction will dip a little bit until those construction projects are complete and, once they are complete, they will begin to save more energy. Ultimately, will then exceed our goal and meet our 30 percent reduction goal. And we are very confident that we will be able to do that.

Senator PRYOR. Great. Senator Bennett, you do not have any other questions?

Well, I want to thank you on behalf of the Rules Committee for your testimony this morning. The record will remain open for five business days for additional statements. The Committee plans to consider this nomination in a timely manner so the Senate can confirm Mr. Ayers as the next Architect of the Capitol.

Since there is no further business before the Committee, the Committee is adjourned subject to the call of the chair.

Mr. AYERS. Thank you.

Senator PRYOR. Thank you.

[Whereupon, at 10:36 a.m., the committee recessed, subject to the call of the Chair.]

APPENDIX MATERIAL SUBMITTED

STATEMENT OF STEPHEN T. AYERS, AIA, LEED AP
Nominee for Architect of the Capitol

Before the Committee on Rules and Administration
United States Senate

April 15, 2010

Mr. Chairman, Senator Bennett, members of the Committee, it is a wonderful honor and privilege for me to be here today as the Presidential nominee for the position of Architect of the Capitol. I want to extend my sincerest thanks and gratitude to all of the Members of the Nominating Committee for recommending me to President Obama to serve as the 11th Architect of the Capitol. I am deeply honored, and I truly appreciate the trust that the Congress and the President have placed in me.

I am joined here today by my wife, Jennifer, and my terrific children, Stephanie and Nick, as well as my parents, Ben and Jane, my brother, Ben, my sister, Jennifer, and mother- and father-in-law, Chuck and Shirl. It is because of their love and support that I have been able to pursue a career in public service, and I appreciate their taking the journey with me, and being here today to continue that support.

I have wanted to be an architect all of my life. As I made my way through school, I focused on this goal and graduated with a Bachelor of Science degree in Architecture from the University of Maryland. After graduation, I joined the U.S. Air Force and attended Officers Training School. My service in the military was extremely rewarding both personally and professionally. I learned valuable lessons in leadership, integrity, loyalty, and service, which have benefitted me throughout my career. At this time, I also studied Management at the University of Southern California, receiving a Master of Science degree in 1988.

After five years as an active duty military officer, I joined the Voice of America as a General Engineer, and led design and construction efforts at several Voice of America sites in Greece and Germany. In 1997, I joined the Office of the Architect of the Capitol (AOC) as Assistant Superintendent for the Senate Office Buildings. I moved up the ranks over the next several years, and in March 2006, I became Deputy Architect and Chief Operating Officer. In February 2007, I became the Acting Architect of the Capitol.

It is in this role that I have been able to combine my two most important skills sets – that of being a licensed architect and experience using business management best practices. This position of Architect of the Capitol is about more than drafting blueprints. It's more akin to managing and maintaining a small city comprised entirely of iconic buildings, a rich history, and a notable infrastructure. As proud steward of the Capitol complex, the Architect protects the past by preserving the historic integrity of the U.S. Capitol. We are boldly working today to provide a safe and sustainable workplace, and we continue to build a legacy of professionalism and service for generations to come.

Over the past few years, our team has had a number of important achievements including the opening of the Capitol Visitor Center in December 2008, supporting the 56th Presidential Inaugural Ceremony in January 2009, and digging out after the historic blizzards in February. On a daily basis, we carry out numerous projects designed to save energy, provide modern facilities, and preserve the historic buildings and national treasures entrusted to our care.

Stewardship of the Capitol complex is important to me, the Congress, and the nation, and it is a unique challenge. This challenge is amplified by the historic significance and iconic nature of our buildings and landscape, aging physical infrastructure, and day-to-day operational requirements.

One of our most important challenges is a significant backlog of deferred maintenance and capital renewal projects – totaling in excess of $1.5 billion over the next 10 years -- as well as security, life-safety and accessibility, and environmental requirements. Although every project on the list is necessary, we realize that not all can be funded in these fiscally-challenging times. We have begun addressing a number of deferred maintenance projects over the past few years, for example, the Utility Tunnel improvements; Dirksen Building infrastructure improvements; Rayburn Building roof replacement; Independence Avenue repaving; House Underground Garage repairs, and elevator modernization and high-voltage switchgear replacement campus-wide. However, these projects just skim the surface of this serious backlog.

To assist us in this effort, we have successfully developed and implemented a robust and balanced process to prioritize projects based on facilities' conditions and the level of maintenance required to ensure they remain functional and viable working environments for the Congress.

This process uses several tools in the formulation of the project prioritization list including Facility Condition Assessments, the Capitol Complex Master Plan, and Jurisdiction Plans. Over the past year, this process has matured to include a Five-Year Capital Improvements Plan, which examines phasing opportunities, project sequencing, and other factors to better facilitate the timing of the execution of major deferred maintenance and capital renewal projects. Tied into the overall planning process is the Line Item Construction Program. During this process, projects are scored against six criteria: preservation; regulatory compliance; mission; economics; security, and energy efficiency and environmental quality. We also take into consideration the challenge of executing required programs efficiently throughout this process.

The component that provides us and the Congress with the "big picture" — the 20-year look ahead to queue up the priorities, investments, and projects — is the Capitol Complex Master Plan. We have been working with Congress to develop the Master Plan, and its related Jurisdiction Plans. Jurisdiction Plans identify the "common denominators" which are short-term actions supporting future discretionary decisions about facility renewal requirements and new projects. For example, there may be instances where major, whole building renovations should be undertaken rather than a myriad of smaller projects. The Capitol Complex Master Plan assumes incremental decision making; leaving choices about future renewal and development to be made closer to the anticipated time when those decisions are needed.

The Capitol Complex Master Plan and the other prioritization tools we have developed and refined over the past few years provide Congress with concrete and practical assessments of our infrastructure. By using these tools, Congress can choose where best to make investments in the Capitol complex.

Within our organization, as Acting Architect, I have continued to invest in our most valuable assets – our employees. I set out to provide them with the right tools, equipment, and training to allow them to build on our successes and to be the best of the best. In that regard, I have implemented a number of programs providing greater workforce flexibilities including a telework program, a flexible work schedule program, and a student loan repayment program among other initiatives that they richly deserve.

Most importantly, I have worked to foster open communication and transparency with members of Congress, with our clients, and among colleagues within our organization. I believe open and honest communication is vitally important and is the key to building strong and productive relationships.

This year we will be updating our Strategic Plan to set new goals and priorities that will drive this organization for the next five years. Because we are responsible and accountable for our own results, we will continue to build on our achievements as well as learn from our experiences and from one another.

What makes the Office of the Architect of the Capitol unique is that in order to move forward to meet future challenges, we must protect and preserve the past – our nation's past. This involves addressing the care and upkeep of aging buildings, while at the same time keeping pace with new facility maintenance and building technologies, reducing energy consumption and saving natural resources, as well as addressing increased security requirements.

Our long-term goals and priorities are designed to balance all of these requirements. For example, we take our responsibility to identify, quantify, and report to Congress the state of our facilities and the extent of the deferred maintenance backlog very seriously. Therefore, if confirmed, I will continue to refine our project prioritization process and work with Congress to determine where best to make investments in the Capitol complex. I will also use innovative technologies to ensure the U.S. Capitol remains the nation's most visible and treasured icon of our government for centuries to come.

I am committed to using sustainable design practices whether we're building a new facility or maintaining one that is 100 years old. One of our biggest challenges is preserving the historic elements of our buildings, while at the same time making them as energy efficient as possible.

With Congress's support, we have implemented a number of programs and completed a variety of projects designed to save energy and conserve natural resources. For FY 2009, the Congress met its energy reduction goals for the fourth year in a row, and reduced energy consumption by 15.3 percent across the Capitol complex. This exceeded the FY 2009 requirement of a 12 percent reduction (as compared to the FY 2003 baseline). For Fiscal Year 2010, a 15 percent reduction is required under the Energy Independence and Security Act of 2007, (three percent reduction per year for a 30 percent reduction by 2015), and in FY 2011, an 18 percent reduction is required.

A few of the sustainable practices we have adopted include using low-impact materials, installing energy efficient equipment, incorporating durable and high-performance systems and materials, investing in renewable energy, and encouraging and supporting a culture that promotes reuse and recycling. This includes using food waste, garden clippings, and other green waste, and

repurposing it as compost for flower beds, and sustaining other plantings throughout the Capitol complex.

To better identify and evaluate energy savings opportunities in Capitol complex facilities, we have been using energy audits since FY 2007. The data collected help us realize better cost-benefit results, and determine where best to invest our resources.

In December, the AOC entered into an Energy Savings Performance Contract (ESPC) in the Senate Office Buildings. The project includes nearly $42 million in facility infrastructure upgrades in the Hart, Dirksen, and Russell Senate Office Buildings, as well as the Senate Underground Garage, and Senate Employees' Child Care Facility. Highlights include installing energy-efficient lighting upgrades of nearly 31,000 fixtures in all buildings and integrating occupancy and daylight sensors; upgrading existing pneumatic and electric controls for heating, ventilating, and air-conditioning systems with direct digital controls; replacing existing transformers with high-efficiency transformers; and installing removable insulation covers for steam valves to reduce heat loss, improve comfort, and reduce the safety risks associated with the hot surfaces.

After we implement these energy conservation measures (over the 36-month construction period), we estimate that the Senate Office Buildings could realize a 36 percent reduction in total energy consumption, and approximately $3.9 million in annual energy savings. Another example of our ongoing sustainability projects include the recent renovation of room G-50 in the Dirksen Building where we installed new LED light bulbs that use over 80 percent less electricity, give off less heat, and have a life expectancy of 30 years. In addition, the carpet and paint used in the room has low or no volatile organic compounds (VOCs). We also use low-VOC and other green cleaning products throughout the complex to ensure we maintain excellent indoor air quality.

Last year, the AOC also entered into ESPCs to implement energy savings projects in the House Office Buildings and the U.S. Capitol Building. The House contract includes nearly $34 million in facility infrastructure upgrades, and the Capitol ESPC involves $17 million in planned facility infrastructure upgrades. These public-private partnerships will help us achieve very significant energy reductions over the next several years.

We appreciate the support of the Senate Leadership, Chairman Schumer, and all of our Oversight Committees in our ongoing efforts to improve energy efficiency and reduce the carbon footprint of the Capitol complex. You have made clear your commitment to reduce energy consumption, conserve natural resources, protect the environment, and in the long term, save taxpayer dollars.

To ensure that we continue to see a reduction in energy consumption, we are evaluating proven technologies that could be implemented in our continued effort to increase energy efficiencies across the Capitol complex. For example, because the Capitol Power Plant (CPP) plays a critical role in our long-term energy conservation strategy, we are continually working to improve and upgrade operations there. The CPP has served the Capitol complex very well since 1910, but in order to continue to provide services well into the future, it is time to transform the CPP and its operations. We started this transformation last February when we began using natural gas as the primary fuel source. We are now studying and evaluating potential technologies to implement at the CPP.

We recently completed our Strategic Long-Term Energy Plan, which will help to determine our future energy program planning, and explore various options for continued energy efficiencies. Among the options being considered are cogeneration, which simultaneously generates both electricity and heat, and the use of biofuels. Moving in a more sustainable direction at the CPP will enhance our efforts to meet the Energy Independence and Security Act and other energy reduction mandates as well as provide higher energy system security and reliability, and lower overall costs.

The AOC's mission is to serve Congress with a commitment to excellence, and we will continue to provide the expertise and services necessary to support the Congress in its work, and to ensure the American public has a welcoming, rich, and educational experience while visiting their nation's Capitol. In just the past three years, our work has been honored with more than 20 awards that recognize the high-quality, professional workmanship demonstrated by AOC staff who possess the special skills associated with quality craftsmanship from organizations such as the Washington Building Congress and the Construction Management Association of America. In addition, an overwhelming majority of our customers have consistently said they are satisfied or very satisfied with the services the AOC provides in our annual surveys. I won't be satisfied until we achieve a 100 percent satisfaction rating.

Mr. Chairman, the reason we consistently achieve these high marks is due to the dedicated, professional men and women of the AOC. I believe being the best attracts the best, and I am committed to providing our team with the best tools, training, and opportunities. Their efforts have put us on the path to success, and I am privileged to have the opportunity to work along side them every day.

The Architect of the Capitol has a long and rich history that dates back to the laying of the Capitol's cornerstone in 1793. Every brick, every floor tile, every element of the U.S. Capitol is saturated with our nation's art, history, and politics. Twenty-four hours a day, seven days a week, 365 days a year, the AOC is ready to do what is necessary to keep the Capitol complex open and operating every day of the year – under any circumstances.

The successes the Architect of the Capitol has realized over the past few years are due to both Congress's support and the dedication of our remarkable workforce. They are deeply committed to our mission to serve Congress and the American public, and I am extremely proud to be a part of the AOC team. Should this Committee recommend that I be confirmed by the full Senate, I will be honored to continue to work with these very talented professionals as the 11th Architect of the Capitol.

Thank you.

John L. Nau, III
Chairman

Susan S. Barnes
Vice Chairman

John M. Fowler
Executive Director

Preserving America's Heritage

April 21, 2010

Hon. Charles E. Schumer
Chairman, Committee on Rules and Administration
United States Senate
Washington, DC 20510

Dear Mr. Chairman,

It is a pleasure to write in support of the President's nomination of Stephen T. Ayers to be Architect of the Capitol. Mr. Ayers is a statutory member of the Advisory Council on Historic Preservation, an independent federal agency created by the Congress in 1966 and charged with advising the President and the Congress on historic preservation matters.

In his capacity as a Council member, Mr. Ayers has demonstrated those capabilities that make him uniquely suited for the position of Architect. He is a consummate professional, well skilled in the field of architecture and the workings of buildings and complexes of great historic value, as exemplified by the Capitol and its attendant buildings. But Mr. Ayers brings more than professional competence to his position. He is one of those rare individuals who can work collegially with those of varying views, exhibiting a willingness to listen and the acuity to weigh the competing values and considerations to reach a reasoned and sound conclusion. Mr. Ayers has repeatedly demonstrated those attributes in a variety of highly charged issues of great consequence that have come before the ACHP.

Mr. Ayers has been an active participant in the work of the ACHP, bringing sound professional judgment to our deliberations. Our interactions with him on matters pertaining to the Capitol have always left us confident of his administrative skills and his ability to get the job done.

I thank you for this opportunity to provide my endorsement of his candidacy and hope that you will move to a speedy and well-deserved confirmation.

Sincerely yours,

John M. Fowler
Executive Director

ADVISORY COUNCIL ON HISTORIC PRESERVATION
1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@

THE AMERICAN INSTITUTE OF ARCHITECTS

April 15, 2010

Lynden Armstrong
Chief Clerk
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Armstrong:

On behalf of the American Institute of Architects, I would like to reuqest that the attached statement be included in the record of the Committee's April 15, 2010 hearing on "The Nomination of Stephen T. Ayers as Architect of the Capitol."

If you have any questions, please feel free to contact me at 202-626-7438 or agoldberg@aia.org.

Sincerely,

Andrew L. Goldberg
Senior Director, Federal Relations

1735 New York Avenue, NW
Washington, DC 20006-5292
Information Central: 800-242-3837

STATEMENT OF

THE AMERICAN INSTITUTE OF ARCHITECTS

—

"The Nomination of Stephen T. Ayers to be Architect of the Capitol"

—

UNITED STATES SENATE
COMMITTEE ON RULES & ADMINISTRATION

APRIL 15, 2010
301 RUSSELL SENATE OFFICE BUILDING

The American Institute of Architects
1735 New York Avenue, NW
Washington, DC 20006
(202) 626-7438
govaffs@aia.org
www.aia.org

Introduction

The American Institute of Architects (AIA) is the leading professional membership association for the nation's licensed architects, emerging professionals, and allied partners. Since 1857, the AIA has served as the voice of the architecture profession and represents more than 80,000 member architects and allied professionals through nearly 300 chapters in the United States and around the world.

The AIA strongly supports President Obama's nomination of Stephen T. Ayers, AIA, LEED AP, as the next Architect of the Capitol and recommends that the Committee favorably report his nomination to the Senate.

History and Role of the Architect of the Capitol

The Architect of the Capitol is responsible for the operation and maintenance of the buildings committed to his care by Congress. Permanent authority for the care and maintenance of the United States Capitol was established by the Act of August 15, 1876 (19 Stat. 147; 40 U.S.C. 162–163). The Architect's duties include the mechanical and structural maintenance of the building, the upkeep and improvement of the Capitol grounds – which include the Capitol, the congressional office buildings, the Library of Congress buildings, the Supreme Court building, the U.S. Botanical Garden, the Capitol Power Plant, and numerous other facilities – and the arrangement of inaugural and other ceremonies held in the building or on the grounds.

The Architect of the Capitol also serves on the U.S. Capitol Police Board, the Capitol Guide Board, the Advisory Council on Historic Preservation, the Washington, D.C., Zoning Commission, and the National Capitol Memorial Commission, as well as a number of other boards in Washington, D.C. The Architect's role for these posts is to provide professional perspectives on historic preservation, aesthetics, health and safety on any decisions made by these important boards.

Dr. William Thornton, whose design for the Capitol was selected by President George Washington after a national architectural competition, served as the first Architect of the Capitol. Until 1989, the position of Architect of the Capitol was filled by a presidential appointment for an indefinite term. During the 19th

Century, some of the world's most prominent architects served as Architect of the Capitol, including Benjamin Latrobe, Charles Bulfinch, and Thomas U. Walter, FAIA (who also served as second president of the AIA).

During the administration of President Theodore Roosevelt, however, the Architect of the Capitol became more of a political appointee than a member of the architecture profession. Throughout the 20th Century, architects were passed over as career bureaucrats and engineers were appointed to the post. This trend continued until President Nixon appointed licensed architect George White, FAIA, to be Architect of the Capitol in 1971. Mr. White was an AIA Vice President at the time of his appointment and served until his retirement in 1997.

In 1989, Congress changed the method by which the Architect of the Capitol is appointed. Congress enacted legislation that established a congressional advisory commission tasked with selecting at least three nominees from which the President chooses his appointee to the post. Upon confirmation by the Senate, the Architect becomes an official of the Legislative Branch as an officer and agent of Congress; he is eligible for reappointment after completion of his term.

In 1997, President Bill Clinton nominated Alan Hantman, FAIA, as Architect of the Capitol. Upon his confirmation by the Senate, Mr. Hantman served until his retirement in 2007.

The U.S. Capitol is a unique historical structure that must be protected from the slow erosion of time, as well from threats by those who would make a symbolic strike at our system of government. The Capitol and its grounds serve as both a workspace for members of Congress and Congressional committees, boards and support staffs, as well as a major tourist attraction for visitors from around the world.

Qualifications for Architect of the Capitol

The AIA believes any viable candidate for the Architect of the Capitol position should possess a number of attributes. While professionals in other fields possess some of these skills, only licensed professional architects can possess all of them. These abilities include:

- Experience in managing large facilities and teams of professionals from many disciplines while overseeing complex schedules and tight budgets.
- Significant skills in diplomatically resolving issues presented by elected officials.
- Consummate design/architecture skills
- Detailed knowledge of the most recent advances to building security, sustainability and safety technologies
- Knowledge of the science and preservation of historic structures

Architects are the primary individuals who work with building owners to ensure that structures are designed, constructed and renovated in ways that meet the owner's preferences. They work with their clients to identify those parameters that are critical to the safe, secure, cost-efficient, and productive use of the structures under their care. By virtue of their licensure, architects are charged with protecting the health, safety and welfare of the occupants of the structures they design. Architects are the sole professionals able to balance cost, safety, security, and design requirements to produce a structure that is satisfying to the building owner.

In addition to the extensive training and testing involved with achieving licensure, architects learn, both in the classroom and during professional apprenticeships, how to manage multi-disciplinary teams that design, build and renovate buildings and lead the design and construction process from the initial drawings through completion and operations. Architects also are required in most states, as well as by the AIA as a condition of membership, to complete continuing education requirements on a regular basis; much of this continuing education is focused on advanced technologies and materials that achieve health, safety, security and sustainability goals.

Over the next decade, the Architect of the Capitol will be responsible for managing a nearly 15 million square foot campus, oversee major renovations to existing historic structures, improve the energy efficiency of the complex, enhance the security of the Capitol and its occupants, and improve working conditions for legislators and their staff.

Without question, the Capitol and its campus are among our most cherished national treasures. Any future renovations or new construction to be executed must consider the national significance of the structures and their surroundings. The federal government is increasingly looking to design and build high performance buildings, defined in the Energy Independence and Security Act of 2007 (P.L.110–140) as "building[s] that integrate and optimize on a life cycle basis all major high performance attributes, including energy conservation, environment, safety, security, durability, accessibility, cost-benefit, productivity, sustainability, functionality, and operational considerations." The planning and design capabilities of a licensed architect are critical to integrating all of these functions into some of the most historically prized buildings in our Republic, all the while assuring that the business of America's legislature and judiciary is not disrupted.

For these reasons, the AIA has consistently stated that the Architect of the Capitol must be a licensed, professional architect.

Record of Stephen T. Ayers, AIA, LEED AP, as Acting Architect of the Capitol

Mr. Ayers has served as the Acting Architect of the Capitol for the last three years. In that time, he has ably and successfully managed the Office of the Architect, guiding the Office to achieve many notable milestones and achievements. These include:

- Meeting the completion cost and schedule of the Capitol Visitor Center, which welcomed 2.3 million guests in the first year of operation
- Successfully leading various components of the 56th Presidential Inaugural, including the construction of the platform
- Completing a Collective Bargaining Agreement with AFSCME Local 626, representing 500 employees
- Taking a leadership role in implementing sustainable practices on Capitol Hill, including opening an ethanol (E-85) fueling station and doubling tonnage of recycled waste
- Singing an MOU with the U.S. Small Business Administration to promote the use of small business programs

- Maintaining a more than 90 percent customer satisfaction rating from the annual Building Services Customer Satisfaction Surveys, with this number growing annually
- Maintaining a 97.5 percent customer satisfaction rating for the 197 Congressional office moves his Office has completed
- Implementing innovative management strategies, including new telework and flexible work programs, that have raised employee job satisfaction by 20 percent

Mr. Ayers has received significant praise for his achievements from members of Congress and stakeholders both on and off Capitol Hill, and under his leadership the Office has won numerous honors and awards. He has shown a special understanding of the need to balance safety, security, sustainability, accessibility and the preservation of historic structures in his approach to the design, construction, maintenance, and renovation of Capitol Complex facilities and grounds.

Mr. Ayers' experience in facilities management, his natural leadership abilities, and the skills he brings through his education and licensure as an architect, all contribute to his proven ability to serve the United State Congress – and by extension the nation – as steward of the U.S. Capitol and its grounds and facilities.

Conclusion

The Architect of the Capitol is not only charged with managing the Capitol facilities and grounds, but supervising over two centuries' worth of American artistic and architectural heritage. Mr. Ayers has demonstrated through his leadership and service over the past three years that he has the characteristics and qualifications necessary to lead the office of the Architect of the Capitol into the next decade.

For these reasons, the AIA asks for Mr. Ayers' nomination to be swiftly approved by the Committee and the full Senate.

AIA New York State

An Organization of The American Institute of Architects

Executive Committee

Francis Murdock Pitts, AIA
President
Eastern New York

David Businelli, AIA
President Elect
Staten Island

Burton L. Roslyn, AIA
Immediate Past President
New York

F. Eric Goshow, AIA
VP Government Advocacy
New York

Kelly Hayes-McAlonie, AIA
VP Public Advocacy
Buffalo/Western New York

Robert Stanziale, AIA
Treasurer
Westchester/Mid-Hudson

John P. Goodman, FAIA
Secretary
Central New York

Russell A. Davidson, AIA
Regional Director
Westchester/Mid-Hudson

Terrence E. O'Neal, AIA
Regional Director
New York

Susan Chin, FAIA
Regional Director
New York

Edward C. Farrell
Executive Director

[illegible] South Pearl Street
[illegible] Floor
Albany, New York 12207
518.449.3334
www.aianys.org
aianys@aianys.org

April 6, 2010

Senator Charles Schumer
313 Hart Senate Building
Washington, D.C. 20510

Re: Architect of the Capitol

Dear Senator Schumer:

On behalf of the 7,000 members of the New York State component of the American Institute of Architects, I write to ask you to support the nomination of Stephen Ayers, AIA, as the next Architect of the Capitol. After an extensive search process, President Obama has nominated Mr. Ayers to fill this important post. Mr. Ayers possesses the qualities and characteristics necessary to be a successful steward of the US Capitol Complex, and I urge you to support his nomination when it comes before the Committee on Rules and Administration.

For the past three years, Mr. Ayers has served as the Acting Architect of the Capitol. Under his leadership, the office of the Architect has carefully balanced the multi-faceted and often competing responsibilities of maintaining the facilities under its purview, ensuring they are safe and secure places to visit while allowing the important business of the Legislative and Judicial Branches to continue.

Over the next ten years, the Architect of the Capitol will be called upon to manage a nearly fifteen million square foot campus, oversee major renovations to existing historic structures, improve the energy efficiency of the complex, enhance the security of the Capitol and its occupants and improve working conditions for legislators and their staffs. At the same time, the Architect of the Capitol must integrate all of these functions into some of the most historically cherished buildings in our Republic. As demonstrated by his tenure as the Acting Architect of the Capitol and throughout his distinguished career, Mr. Ayers clearly possesses the qualifications to lead the office of the Architect of the Capitol throughout the next decade.

For these reasons, I urge you to vote in favor of Mr. Ayers' confirmation as the next Architect of the Capitol.

Sincerely,

Ed

Edward C. Farrell
Executive Director

AIA Utah
A Chapter of The American Institute of Architects

April 6, 2010

The Honorable Robert F. Bennett
United States Senate
Washington, DC 20515

Dear Senator Bennett:

On behalf of the 560 members of the Utah component of the American Institute of Architects, I write to you to ask you to support the nomination of Stephen Ayers, AIA, as the next Architect of the Capitol. I understand that after an extensive search process, President Obama has nominated Mr. Ayers to fill this important post. We believe that Mr. Ayers possesses the qualities and characteristics necessary to be a successful steward of the US Capitol Complex. Therefore, I urge you to support him when his nomination comes before the Committee on Rules and Administration.

For the past three years, Mr. Ayers has served as the Acting Architect of the Capitol. Under his leadership, the office of the Architect has carefully balanced the multi-faceted and often competing responsibilities of maintaining the facilities under its purview, ensuring they are safe and secure places to visit while allowing the important business of the Legislative and Judicial Branches to continue.

Over the next ten years, the Architect of the Capitol will be called upon to manage a nearly 15 million square foot campus, oversee major renovations to existing historic structures, improve the energy efficiency of the complex, enhance the security of the Capitol and its occupants and improve working conditions for legislators and their staffs. At the same time, the Architect of the Capitol must integrate all of these functions into some of the most historically cherished buildings in our Republic. As demonstrated by his tenure as the Acting Architect of the Capitol and throughout his distinguished career, Mr. Ayers clearly possesses the qualifications to lead the office of the Architect of the Capitol throughout the next decade.

268 S. State Street, Suite 190
Salt Lake City, Utah 84111-5202
801/532-1727
801/847-6517 Facsimile
www.aiautah.org

For these reasons, I urge you to vote in favor of Mr. Ayers' confirmation as the next Architect of the Capitol.

Sincerely,

John P. Sparano, AIA, NCARB
President

04/16/2010 FRI 13:33 FAX 703 356 6388 CMAA 001/001

Construction Management Association of America
7926 JONES BRANCH DRIVE • SUITE 800 • MCLEAN, VIRGINIA 22102-3303
(703)356-2622 • FAX (703)356-6388 • WWW.CMAANET.ORG

April 16, 2010

Lynden C. Armstrong
Chief Clerk
U.S. Senate Rules and Administration Committee
305 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Armstrong:

The Construction Management Association of America, representing more than 6,200 professional Construction and Program Managers, strongly supports the nomination of Stephen T. Ayers, AIA, LEED® AP, to be Architect of the Capitol.

In his "Acting AOC" capacity during the last three years, Mr. Ayers has led a series of highly successful initiatives to improve energy efficiency, implement sustainable design, and make other significant improvements to the functioning of the Capitol complex.

Moreover, he has been a strong proponent of using proven, quantified construction industry Best Practices by AOC and industry practitioners to deliver optimum outcomes from every project and program. Through his active involvement in organizations like CMAA and others, he has worked consistently to improve both the industry's and the AOC's capabilities and performance.

CMAA believes Mr. Ayers is a proven leader who will guide his organization to even greater success in the years to come.

Thank you.

Sincerely,

Bruce D'Agostino

Bruce D'Agostino, CAE, FCMAA
President & CEO

NCSHPO
National Conference of State Historic Preservation Officers
SUITE 342 HALL OF THE STATES
444 NORTH CAPITOL STREET, N.W., WASHINGTON, D. C. 20015-1512
202/624-5465 FAX 202/624-5469 WWW.NCSHPO.ORG

April 14, 2010

The Honorable Charles E. Schumer, Chairman
United States Senate Committee on Rules and Administration
Washington, DC 20510

Dear Chairman Schumer:

The President of the Board of Directors of the National Conference of State Historic Preservation Officers, Ruth Pierpont, asked me to forward the attached testimony in support of the confirmation of Stephen T. Ayers, AIA, as Architect of the Capitol, for the hearing on Thursday April 15, 2010.

The National Conference asks that our testimony be made part of the hearing record.

Thank you.

Sincerely,

Nancy Schamu

Nancy Schamu
Executive Director schamu@sso.org

ec: Ruth Pierpont, President, NCSHPO
Director of Historic Preservation
New York Office of Parks, Recreation and Historic Preservation
PO Box 189, Waterford, New York 12188
518-237-8643 x 3261 ruth.pierpont@oprhp.state.ny.us

NCSHPO
National Conference of State Historic Preservation Officers
SUITE 342 HALL OF THE STATES
444 NORTH CAPITOL STREET, N.W., WASHINGTON, D.C. 20015-1512
202/624-5465 FAX 202/624-5489 WWW.NCSHPO.ORG

Testimony
United States Senate
Committee on Rules and Administration
Charles E. Schumer, Chairman
April 15, 2010
for the Confirmation of
Stephen T. Ayers, AIA, LEED AP
as
Architect of the Capitol
Ruth Pierpont, President
National Conference of State Historic Preservation Officers
Director of Historic Preservation
New York State Office of Parks, Recreation and Historic Preservation

The National Conference of State Historic Preservation Officers supports the confirmation by the United States Senate Committee on Rules and Administration of Stephen T. Ayers as Architect of the Capitol.

As Acting Architect of the Capitol since February 4, 2007, Mr. Ayers has ably executed the duties of the Architect of the Capitol providing concrete evidence of his ability to fulfill the duties of the office.

Every visitor walking from the litter-strewn Union Station plaza to the grounds of the Capitol can attest that the "face of the Nation" is in pristine condition. Similarly, the success of the U. S. Capitol Visitors Center is a credit to the Acting Architect.

On a more direct level, I can unreservedly endorse Mr. Ayers confirmation. Both the Architect of the Capitol and the National Conference of State Historic Preservation Officers serve as statutory members of the Advisory Council on Historic Preservation, an independent federal agency created by the National Historic Preservation Act (16 U. S. C. 470). Through his service on the Council–at member business meetings, at committee meetings and on special review panels–I can attest to ability to find the appropriate solution that both meets the needs of the modern world and respects our irreplaceable national heritage.

The National Conference urges the Senate to confirm Stephen T. Ayers as Architect of the Capitol.

USGBC
2101 L STREET, NW
SUITE 300
WASHINGTON DC 20037
202 828-7422
WWW.USGBC.ORG

April 19, 2010

The Honorable Charles Schumer
Chairman
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Bob Bennett
Ranking Member
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Senate Committee on Rules and Administration:

On behalf of the U.S. Green Building Council, I am writing to express support for the nomination of Stephen Ayers as the next Architect of the Capitol.

The work that lays ahead for the Architect of the Capitol is great. The successful candidate must effectively manage major modernizations in energy and water efficiency, security, and day-to-day responsibilities throughout the complex, while simultaneously preserving the historic nature of these treasured buildings and ensuring critical legislative work is not compromised. Under Mr. Ayers' guidance as Acting Architect of the Capitol, the Office of the Architect has already begun to implement innovative practices and management strategies that create safe, healthy, and environmentally responsible spaces for employees of the Capitol complex.

Mr. Ayers has demonstrated a commitment and determination to transform the Capitol complex into one that is more environmentally responsible and cost-effective for taxpayers. Backed by a distinguished career and three years as the Acting-AOC, Mr. Ayers is extremely qualified to undertake the stewardship of the U.S. Capitol complex and to implement the initiatives that the Office of the Architect will undertake in the coming decade.

USGBC is pleased to support the confirmation of Stephen Ayers as Architect of the Capitol and encourages swift confirmation of his appointment.

Sincerely,

Jason Hartke, Ph.D
Vice President, National Policy
U.S. Green Building Council

Questions for the record
Chairman Charles E. Schumer

Operational Management

AOC has made good progress in improving its operations in areas such as human capital, project, and facilities management and worker safety to become a more strategic and accountable organization.

- What is your strategy for making continued improvements to the organization?

RESPONSE: The AOC is leading the way in becoming a performance-driven organization. We instituted a metrics and measures program that is driving change and will continue to drive improvements into the future. Senior executives and division managers are required to develop, implement and review a set of operational metrics on a monthly basis. Areas in need of improvement are discussed and action plans are put into place. This system of continuous monitoring and feedback is essential to high performing organizations. Our Strategic Plan outlines several other measures that we report on annually through our Performance and Accountability Report.

The AOC also completed two reorganizations in January 2010 that are important to our continued improvement. I established the Business Transformation Division in order to enhance our planning and analysis capabilities. The Business Transformation Division's mission is to add value by enabling process improvement through strategic and business planning, analysis, performance management, and the development of business solutions in support of the AOC's mission. They enable and drive the change set forth by the Acting Architect and Chief Operating Officer.

The position of Chief Human Capital Officer was also established in order to bring all human resource functions under one organization to drive internal business process improvements. This division includes human resource operations, EEO/Diversity programs, workforce planning, labor relations, and the employee assistance program.

These are just two recent examples of efforts to drive change across the organization. I constantly challenge our divisions to identify best practices, benchmark against industry leaders, and continually improve operations. It is the culture of the AOC to continually monitor progress and identify opportunities for improvement. As I noted in my testimony, because we are responsible and accountable for our own results, we continue to build on our achievements as well as learn from our experiences and from one another.

- What are the biggest obstacles to achieving your strategic goals?

RESPONSE: In today's fiscal environment, we must continue to prioritize our investments and communicate clearly to our stakeholders so that we commit resources to our highest priorities while maintaining operations and being effective stewards of the heritage assets entrusted to our

care. Our project prioritization process and long-term planning work provides us the structure in which to do this. It is critical that we maintain the appropriate balance between maintaining and improving operations while addressing the critical deferred maintenance backlog and future facilities needs of the Congress.

Like many other federal agencies, we must also address the aging of our workforce and put in place succession plans to ensure continuity of operations and knowledge transfer. Keeping pace with technology and ensuring an adequately trained workforce is also critical to our success.

We will address these challenges, and others, as we develop our next Strategic Plan, and update our metrics and measures program to align with the critical needs of the future.

- What is your leadership approach given your varied workforce of wage grade and professional employees?

RESPONSE: While AOC has a varied workforce consisting of all types of job groups from skilled labor to executive-level positions, every employee's contribution is vital to our ability to meet the Agency's mission of service to Congress and the American public. Our core values of respect, integrity, and professionalism, along with our standard practice of transparency and honesty transcend pay grades and position descriptions. The importance of each employee's role must be regularly communicated and recognized. Managers and supervisors are expected to integrate AOC's diversity at every level so that operational decisions include diverse perspectives and approaches to work.

One of my goals is to ensure we continually showcase the important work of our many talented employees across the various professions at the AOC. I make feedback from employees a top priority. I hold regular meetings in my office to obtain feedback directly from employees and host town hall meetings twice a year for every jurisdiction and every shift to share information with staff and answer their questions. The launch of a new employee magazine is also aimed at communicating internally and externally the wonderful stories of AOC workers and their mission critical work.

I challenge my senior leadership team to carry forth my strategic direction and ensure they are carrying my approach to every level of the organization. Regular staff meetings and communications are essential to building a collaborative work environment, and I encourage cross-functional work groups to address new initiatives and planning efforts.

- In order to be considered among the best places to work in the federal government, how can AOC build upon its successes and address challenges?

RESPONSE: We must continue to engage our employees and our stakeholders in a proactive manner. Continued communication about our mission and employees' roles in the Agency's mission as well as accountability are paramount to maintaining and building upon our successes. We must carefully listen to the needs of our employees and stakeholders, benchmark best practices, and implement risk-based planning. We must also leverage emerging trends. Our workforce must reflect the constantly growing diversity of our labor market. The Agency's ability to attract and retain highly competent and diverse talent is integral to our future success. We must provide competitive opportunities that value skill development and job growth. We must also recognize the work/life demands of our employees and prospective employees by offering programs that assist them in balancing organizational and personal needs. Ensuring our workforce is adequately trained to meet work demands, have safe work environments in which to perform assigned work and employee recognition for jobs well done, has and will continue to be top priorities.

- AOC has recently cited challenges in recruiting and retaining senior level employees. How do you plan on addressing this issue within AOC's current and potential future authorities?

RESPONSE: The retention of senior level employees and ability to recruit seasoned executives when turnover occurs is critical to maintaining our operations and customer satisfaction. We requested legislation that we believe will make the AOC a competitive employer by aligning our senior level positions with the Executive Branch.

The Agency's leadership development program furthers our succession planning efforts to develop current and future leaders across the AOC. Successful participants of this core management program serve as a pipeline for identifying potential candidates for leadership positions.

We also will continue to make improvements with a number of work-life balance initiatives such as the implementation of a telework program, alternate work schedule policies, student loan repayment program, and a gym subsidy program, among others.

Sustainability

Sustainability—a multi-disciplinary strategy that effectively integrates all aspects of site development, building design, construction, and operations and maintenance to minimize resource consumption and environmental impacts—has gained wide acceptance as a leading capital asset management practice.

- What is your vision for adopting sustainable concepts in management of the U.S. Capitol complex?

RESPONSE: Sustainability makes sense, it's the right thing to do and it is cost effective. The industry and the country look to the Capitol to take the lead on sustainability and energy reduction. We must meet and exceed this expectation with smart, cost effective investments as we have done to date. We must stay abreast of the emerging technologies and ever-changing costs. We have already seen that investments that were not cost effective a year ago are now becoming good practices.

Finally, although we have achieved early successes in energy reduction, there is much hard work yet to be done. Appropriate staff and financial resources must continue to be directed to this important initiative over the long term.

We appreciate the support of the Congress in our ongoing efforts to implement sustainable practices, improve energy efficiency and reduce the carbon footprint of the Capitol complex. We all share a commitment to reduce energy consumption, conserve natural resources, protect the environment, and in the long term, save taxpayer dollars.

- How do you plan to reduce energy consumption and promote "greening" initiatives that are linked to sustainability?

RESPONSE: Reducing energy consumption, "greening" initiatives, and sustainability are all inextricably linked and we are implementing a program that includes all three. Processes in our design, construction, procurement, operations, and maintenance divisions were updated to take advantage of sustainability initiatives. Where practical, projects are required to meet an equivalent level of Leadership in Energy and Environmental Design (LEED) Silver or higher. Consultants are required to meet minimum professional requirements and staff members are obtaining training to further enhance their knowledge and skills in the implementation of "greening" initiatives.

To expand our efforts in the reduction of energy consumption and the promotion of "greening" initiatives, our business processes are being revised to incorporate more rigorous requirements. These processes for project delivery, operations, and maintenance will include more opportunities for sustainable practices, reflect the new sustainability goals set forth by the Sustainability Plan and allow the ability to track progress.

- What challenges to implementing sustainable concepts are presented by the age and historic character of many capitol complex facilities?

RESPONSE: The mission of the Architect of the Capitol includes an unwavering commitment to the history and preservation of the Capitol complex buildings; therefore, sustainability is a natural product of our culture and commitment to the perpetual conservation of our complex. Preservation is sustainability. Demolition and reconstruction of a building consumes an

enormous amount of energy and contributes to the expansion of landfills. Preservation is the ultimate recycling program. However, historic buildings offer numerous opportunities such as thick masonry walls and, by the same token, numerous challenges such as inefficient glazing and fireplaces that we must address in our efforts to make the Capitol campus more sustainable.

The challenge to incorporate the many other sustainability opportunities is not a single isolated challenge. It is a complex equation to balance the potential loss of historic fabric, to provide enhanced security, to update our buildings to meet current building codes and to avoid disruption to our building occupants and visitors. We have met this complex challenge by leveraging the new technologies available in industry today. We must continue to seek out the technologies that allow adaptation and integration of sustainable features with minimal impact to the historical fabric of our buildings such as new re-lamping options for historic fixtures and window upgrades that meet historic, security, and energy parameters.

Capital Improvements

Your Five-Year Capital Improvements Plan (fiscal year 2011 through 2015) indicates a nearly $2 billion requirement for building renewals, upgrades, security enhancements, new construction, and other projects to preserve and maintain the Capitol complex facilities. This is a considerable increase over historic levels of funding for capital projects.

- What are the factors contributing to this increase?

RESPONSE: The draft Five-Year Capital Improvements Plan integrates existing ongoing work, deferred maintenance and capital renewal requirements identified through the AOC's ongoing Facility Condition Assessment program, and new work associated with the Capitol Complex Master Plan. The draft Capital Improvement Plan forecasts required work based upon predicted failure of systems, new mission requirements, and other drivers including security and energy reduction mandates. Due to the age of our structures and internal building systems, the need for continued government operations at all times, and our stewardship responsibilities to maintain historic preservation standards, we face a trend in increased dollars needed to maintain the Capitol complex.

Capital projects have historically been funded at less than one-half of one percent while two to four percent is the industry norm. This underfunding became clear with the results of our independent Facility Condition Assessments.

- How can you defend this projected level of spending when appropriators will be looking to hold the line on budget growth?

RESPONSE: Addressing deferred maintenance and capital renewal projects ensures that we attend to the critical needs of the Capitol complex as quickly and effectively as possible. Although every project is necessary, we realize that not all can be immediately funded in these fiscally-challenging times. To address these concerns, we have recently embarked on a careful analysis of the Capital Improvements Plan to flatten our budget growth over the next several

years. Our goal is to identify the most essential work needed to support those critical facilities that sustain Congressional operations. This mission-focused triage looks at each facility, determines to what level that facility supports Congressional operations, and then examines the work proposed in the facility.

While we are still analyzing the data, preliminary results indicate that in order to ensure Congressional activities and critical structures are properly maintained, new mission requirements will have to be put on hold. More importantly, short-term flat funding profiles could result in system failures potentially involving the closure of certain facilities or portions of facilities to ensure the health and safety of the Congress, employees, and the public. Additionally under this scenario, energy reduction mandates from the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007 may not be met.

- What new and innovative approaches to building design and construction project delivery could you implement to control costs of future capital projects?

RESPONSE: If confirmed, I plan to carefully study and implement as appropriate new industry trends such as integrated project delivery, building information modeling, construction management "as agent" and "at risk," and lean construction.

I have also embarked on an analysis and re-engineering of our project delivery business processes. The goal for the business process re-engineering is to identify ways to work more efficiently while maintaining client trust and satisfaction. This analysis will include organizational structure improvements, overall portfolio management implementation, project delivery process enhancements, personnel skill sets optimization, appropriate quality control metrics, and clearer communications to aid in decision-making.

Finally, we will stay abreast of industry delivery practices through memberships with Construction Industry Institute, National Institute of Building Sciences, Construction Management Association of America, National Institute of Standards and Technology, and other organizations.

Stewardship

The Architect of the Capitol is responsible for stewardship of some of our country's most iconic structures. What is your vision for how to deal with updating our buildings to modern building codes while still preserving their historic fabric?

RESPONSE: The Architect of the Capitol is committed to the preservation of the historic buildings entrusted to our care. We have a preservation policy that guides our work and a staff of experienced professionals to implement the policy. My basic tenet, and that of the historic preservation industry as well, is to do no irreversible harm.

Introducing modern fire, life-safety, and other code-related systems into our historic buildings is a significant challenge but not a new one. The restoration of the Jefferson and Adams Buildings

for the Library of Congress, for example, gave us a great deal of experience in the art of hiding sprinkler heads amid historic plaster ornaments. Our fire protection work in the Russell and Cannon lower rotundas, where we installed sprinklers in the tile domes, is virtually invisible. New emergency exits have been added to the Capitol, Russell, and Longworth Buildings that are inconspicuous and respectful.

I am especially concerned with those projects which strict code compliance would inflict irreversible harm on the architectural or historical integrity of our buildings. It is for that reason that we must consider alternatives, such as the new "smart codes" or equivalencies, which work to accomplish the goals of life-safety while preserving heritage assets.

Safety Issues

Providing a safe environment for members, staff, and visitors to the Capitol complex is paramount. You have undertaken significant projects, such as repairs to utility tunnels, to mitigate some of the safety problems that have been identified and are working to develop solutions to other safety issues.

- What is your assessment of the safety of the facilities on the Capitol complex?
- What steps would you take to continue to promote and improve safety within facilities on the Capitol complex?

RESPONSE: The level of safety across the Capitol complex has never been higher and continues to improve as we complete enhancements and repairs to the facilities and grounds. However, I believe work remains to be done and constant vigilance is required. Our infrastructure continues to age and as a result, we face a number of challenges, as highlighted in our Facility Condition Assessments, internal inspections, and the Office of Compliance Biennial inspection program.

My safety responsibility is two-fold: 1) to provide safe facilities for all building occupants and visitors, and 2) to provide a safe work environment (facilities, equipment, and operations) for the AOC workforce.

The key to improving both facility safety and worker safety is to identify and manage risks. The identification of risks results from regular and recurring inspections (such as facility conditions assessments, safety and fire inspections, focused surveys, safety program evaluations, worker observations, etc.) and evaluation of the degree of hazard or level of risk posed. The level of risk is determined based on the probability that the finding will cause an injury or incident and the severity or seriousness of the resulting injury or incident. Once the risks are known, activities are prioritized and appropriate actions are taken to eliminate or reduce and control hazard.

Facility abatement activities that require substantial effort, such as fire safety citation projects, will continue to be planned and executed through the prioritization processes within our Capital Improvement Program. Less involved efforts will continue to be funded through operations and maintenance and/or minor construction funding.

Ensuring that all buildings have complete smoke detection and complete sprinkler coverage is of paramount importance, and I plan to push this effort to completion.

Open Citations

Worker health and safety must be of the utmost concern to the Architect of the Capitol, and to the Capitol Hill community. Therefore, it is incumbent upon us to periodically review the health and safety record of the Capitol Complex.

How many citations issued to the Architect of the Capitol by the Office of Compliance are currently open? If confirmed, how do you plan on addressing these open citations?

Please submit for the record current information on open citations issued to the Architect of the Capitol by the Office of Compliance. This information should include the original date of the citation, a description of the citation, the Architect's efforts to date to remedy the citation along with an outline of future plans to ensure continued safety. Please also provide a list of citations that have been closed since January 1, 2009.

RESPONSE: Worker health and safety is a top priority for me personally, and for our entire organization. The Architect of the Capitol is dedicated to providing a safe, healthy, and secure environment for all who work in the Capitol complex and millions of people who visit every year.

Over the past three years, we have committed the necessary resources to address the citations issued by the Office of Compliance (OOC). Since 1998, the OOC has issued 97 citation items to the Architect of the Capitol. I am pleased to report that 80 have been closed by the OOC, including 11 since January 2009. The attached report provides the requested status for the citations that remain open and information on the 11 that have been closed.

Of the 17 citations remaining open ***(see attachment)***, four are fully funded and scheduled for completion by mid-2011. Seven are utility tunnel-related and will be completed prior to June 2012. The remaining six address complex fire and life-safety matters in historic buildings that must be addressed as they pose a significant threat to life-safety. The AOC's Capital Improvement Program prioritizes all AOC proposed projects and assigns the highest priority to safety-related citations. In 2009, AOC and OOC jointly developed a process to prioritize the remaining unfunded fire and life-safety citations. If confirmed, I will continue to work with our Congressional Oversight Committees and the OOC to develop mutually acceptable solutions that complete abatement activities at the appropriate time, giving full consideration to citation severity, historic preservation, design and construction processes, client impacts, and available resources.

Utility Tunnels

In February 2006, the Office of Compliance filed an unprecedented legal complaint against the Architect of the Capitol concerning hazards in the tunnels, including falling concrete, an inadequate communication system for these confined spaces, and inadequate escape exits. This was the first time Office of Compliance has filed a legal complaint under the Occupational Safety and Health Act.

In 2007 as Acting Architect, you negotiated a settlement with the Office of Compliance addressing asbestos and hazard mitigation in the Capitol Power Plant's utility tunnels. Please describe the current status of this settlement.

RESPONSE: I am pleased to report that the work required to close the settlement agreement is 52 percent complete and that substantial progress continues to be made. The settlement agreement improvement efforts are projected to finish ahead of schedule and under budget. Final cost is projected at $176.13 million; reduced from the original estimated program budget of $295.46 million as a result of improved engineering data, scope consolidation, and performance efficiencies realized through lessons learned.

We have completed a number of projects and several others are currently underway throughout the tunnel system as part of the improvement program. Here is a brief update on those activities.

- Communications: A new communication system was installed in 2008 and is fully operational. The Office of Compliance accepted the Notice of Corrective Action for this citation in early 2009. The system is checked regularly and maintained in working order.

- Egress and Emergency Evacuation: Fourteen new egress points are required in order to meet the 300-foot travel distance requirement established by the Office of Compliance. Installation is complete on four new egress points in the Y tunnel and two new egress points in the G tunnel. The remaining egress points (four in the R tunnel, three in the V tunnel, and one in the CVC tunnel) are under contract by various procurement strategies, including design-bid-build and design/build. Additionally, tunnel evacuation procedures have been enhanced, four tabletop exercises and one evacuation drill (in conjunction with DC Fire and EMS and the U.S. Capitol Police) have been held, and a second evacuation drill is scheduled for May 2010.

- Falling Concrete: Work to address concrete spalling and overhead hazards is ongoing and progressing well. All of the required structural steel buttresses have been installed in the Y tunnel to mitigate the falling concrete hazard. Additional buttress designs are currently in procurement for the R and G tunnels. Structural buttresses are not considered part of the settlement agreement, but will be installed to maintain the integrity of the tunnels.

- Heat Stress: Temperatures have been substantially reduced in all tunnels by the installation of thermal insulation, additional egress points and/or ventilation fans.

- Asbestos: Friable asbestos insulation removal is essentially complete; a third party consultant is currently surveying the tunnels to verify removal. Required asbestos air monitoring results indicate that work is performed in accordance with industry and regulatory standards.

In addition to the work required by the settlement agreement, the utility distribution system operations team was restructured and a maintenance contract was instituted for ongoing operations and maintenance support, including quick correction of non-settlement safety related repairs.

Energy Efficiency and Greening of the Capitol

In June 2007 you testified before this Committee that energy audits would play a critical role in meeting energy reduction mandates. Has the AOC performed energy audits of the buildings on the Capitol complex?

RESPONSE: To ensure that our efforts save energy and taxpayer dollars, we are conducting energy audits on Capitol campus facilities. Our goal is to perform energy audits on all buildings on a four-year rotating schedule. The data collected helps us realize better cost-benefit results and determine where best to invest resources.

In 2008, six energy audits were completed for the Capitol Police facilities and one for the Construction Management Building at Blue Plains. In 2009, the AOC completed four audits that included the Thomas Jefferson Building, Little Scholars child care facility, the Ford House Office Building and the House Page Dorm. In 2010, AOC completed energy audits for the U.S. Capitol and the Taft Memorial with nine audits currently underway for the James Madison Memorial Building, the Cannon and Longworth House Office Buildings, the East and West House Underground Garages, the Botanic Garden facilities (Administration Building, Conservatory and Greenhouse), and the Dirksen Senate Office Building. Five additional energy audits are planned to be completed before the end of this year and 10 audits are scheduled for 2011.

In summary, AOC has completed 13 energy audits and will have completed an additional 14 audits by the end of this year. The remaining 10 audits planned for 2011 will complete the four-year audit plan for a total of 37 energy audits. In accordance with the Energy Independence and Security Act, the four-year audit cycle will re-start in FY 2012 for all facilities managed by the AOC.

In June 2007 you testified before this Committee that the installation of meters and submeters would play a critical role in meeting energy reduction mandates. Has the AOC completed the installation of chilled water, steam and electricity meters in Capitol complex buildings?

RESPONSE: One of our major energy initiatives is the installation of meters in Capitol campus facilities for steam, condensate, chilled water, domestic water, and electricity so that the impact of energy and water conservation projects can be measured rather than estimated. By thoroughly assessing utility usage, we can better target our long-term investments in projects that will yield the greatest payback over time.

In FY 2008 and FY 2009, 104 advanced utility meters and supporting network infrastructure were installed. Ongoing projects include the installation of 15 meters in the Senate Office Buildings, and the design and construction for an additional 201 meters campus-wide with completion targeted for FY 2012. In addition to the building-level metering projects, a metering enterprise system and an electric sub-metering study are funded for FY 2010.

When all the projects have been completed, the Capitol complex will have 317 advanced utility meters installed, a data warehouse to collect and store this valuable data, and a user-friendly reporting system. This enterprise system will not only be used by facility personnel to validate utility bills, identify under-performing buildings or systems, optimize and verify performance, and identify retrofit/replacement opportunities, but will also promote energy awareness among building occupants and staff.

In September 2009 the AOC completed the Strategic Long-term Energy plan for the Capitol Power Plant. Please summarize the report's key findings. I understand that the plan recommendations installation of cogeneration capabilities at the Capitol Power Plant. What is the reasoning behind this recommendation and what is the cost estimate for installation of cogeneration capacity?

RESPONSE: The 2009 Strategic Long-Term Energy Plan for the Capitol Power Plant (CPP) was a comprehensive study of the current condition of the CPP and the future utility needs of the Capitol complex. The study evaluated several viable options and provided recommendations based on five selection criteria including: construction costs; life cycle costs; environmental impacts; energy efficiency; and security. The Plan's recommendations were divided into three main areas: refrigeration, steam, and utility distribution tunnels.

- Refrigeration – The AOC should replace the chillers in the West Refrigeration Plant. The current chillers in the West Plant are over 30 years old and have exceeded their expected useful life. In order to maintain reliable refrigeration services and improve energy efficiencies, AOC should replace these chillers.
- Steam – The AOC should install cogeneration equipment and begin generating electricity. The benefits of cogeneration include annual operational savings, reduced overall emissions, improved energy efficiency, and increased energy security at the CPP.

The report also recommended that the AOC investigate the use of bio-mass in some boilers as an environmentally friendly fuel alternative.

- Utility Distribution Tunnels – The AOC should install a tunnel loop system and will need to plan for the long-term replacement of the utility tunnels. The tunnel improvement program is well underway and additional tunnel repairs will need to be made in both the short- and long-terms.

After the CPP Strategic Long-Term Energy Plan was completed, the AOC began an analysis of the cogeneration recommendation to define the requirements and parameters necessary to undertake such a project, including cost estimates, which are not yet complete. The long-term goal is to move the CPP in a more sustainable direction to enhance the efforts to meet the Energy Independence and Security Act and other energy reduction mandates as well as provide higher energy system security and reliability, and lower overall costs.

Project Prioritization

In your testimony you state that there is a "significant backlog of deferred maintenance and capital renewal projects" facing the Capitol complex. What is the current cost estimate for these projects?

RESPONSE: The current backlog of deferred maintenance and capital renewal projects for Legislative facilities over the next 10 years is more than $1.5 billion. This information is obtained from our independent Facility Condition Assessment surveys conducted each year, which identify work elements and associated preliminary planning cost models. The AOC's cost projections are consistent with the Government Accountability Office's cost estimating guidelines. The $1.5 billion includes planning cost models for projects not yet under design.

Obviously Congress will not be in a situation to fund each one of these deferred maintenance and capital renewal projects. How does the AOC prioritize these projects?

RESPONSE: We have a mature, robust, and balanced process to prioritize projects based on facilities' conditions and the level of maintenance required to ensure they remain functional and viable working environments for the Congress.

The AOC analyzes each project and determines a classification defined as follows:

1. **Deferred Maintenance:** Past due maintenance, repair, or replacement work on existing facilities and infrastructure causing failure or partial failure.
2. **Capital Renewal**: Maintenance, repair, or replacement in-kind prior to failure.
3. **Capital Improvements:** Major alterations, additions, expansions, conversions, or replacements of systems or components.
4. **Capital Construction:** A new building, facility or other infrastructure where none previously existed, or construction that enlarges or expands an existing facility.

The AOC then establishes an initial urgency for the project defined as follows:

1. **Immediate:** Project completion needed within 1–2 years or system failure is predicted and/or critical mission requirements are not met.
2. **High:** Project completion needed within 2–4 years or system failure is predicted and/or critical mission requirements are not met.
3. **Medium:** Project completion needed within 5–7 years or system failure is predicted and/or critical mission requirements are not met.
4. **Low:** Project completion needed beyond 7 years.

The AOC then scores each project on specific criteria defined as follows:

1. **Preservation of Historic Resources:** Stewardship responsibilities.
2. **Regulatory Compliance:** Compliance with applicable safety, environmental, and ADA requirements established in law, standards, regulations and AOC Policy.
3. **Mission Accommodation:** Meeting Congress' needs and requirements.
4. **Economics:** Effective and efficient utilization of public funds.
5. **Security:** Protection and physical security of capital assets, employees, and the public as well as continuity of operations and continuity of government efforts.
6. **Energy Efficiency and Environmental Quality:** Environmental stewardship, sustainable development, and energy conservation through its facilities programs.

The final prioritization combines each of the above, the project classification, project urgency, and project importance, to determine a composite rating score that ranks each project on its merits.

According to the Government Accountability Office, more than three-fourths of the funds for line item projects in the AOC's FY2009 budget were requested to address health or safety issues identified by the Office of Compliance. In your view, does the AOC prioritization process contain enough flexibility to allow Congress to determine its own priorities, rather than priorities identified almost entirely by an outside organization?

RESPONSE: I believe that the current project prioritization process is sound, mature, and appropriately considers all perspectives of any given project. It effectively prioritizes all projects and delivers a top-to-bottom list of priorities. We worked with the Government Accountability Office to benchmark this process with other Federal agencies, and our process seems to be more thorough and superior to the others' processes.

VOTING BY MAIL: AN EXAMINATION OF STATE AND LOCAL EXPERIENCES

WEDNESDAY, MAY 5, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The committee met, pursuant to notice, at 10:06 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer and Roberts.

Staff Present: Jean Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Mary Jones, Republican Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Rachel Creviston, Republican Professional Staff; and Justin Lee, Republican Intern.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The Rules Committee will come to order. Good morning. First, I want to thank my friend, Senator Roberts, for joining us this morning. Ranking Member Bennett is unable to attend. I would also like to welcome Senator Ron Wyden of Oregon and Congresswoman Susan Davis of California, two very strong advocates of voting by mail.

Now, I have had a lot of opportunity to work with Senator Wyden on many, many occasions, most recently on the DISCLOSE Act, where a major portion of our bill comes from provisions that he and Senator Collins put together originally. I can say that there is no truer champion of reform than Senator Wyden. He is a great champion for all Oregon constituents and Oregon is always first on his mind when he is legislating.

In this case, I can tell the public here that I, probably a minimum of 25 times, have heard Ron Wyden talk to the Democratic Caucus about why voting by mail is a great thing and how well it works in Oregon, as recently as our last Tuesday lunch, not about this hearing, but it came up. So we are honored to have him here today and look forward to his insight, experience, firsthand knowledge of election law issues.

I also want to thank Congresswoman Davis, who has also called me on this issue on several occasions and is as strong an advocate in the House as Senator Wyden is in the Senate.

So we are going to examine vote by mail systems and programs used by States for Federal elections. Vote by mail is no longer a rare exception. Today, many voters throughout the country exercise their constitutional right to vote by mailing in their ballot, and the most well known vote by mail State is Oregon, which is the only State that conducts all elections entirely through its vote by mail system. It is amazing, and I followed it a little bit myself.

Washington State is a close second. It conducts elections in 38 of 39 counties by mail. I don't know if one of our witnesses can tell us why one county isn't involved. Maybe they don't have the Post Office serving them.

Meanwhile, Colorado voters cast ballots by mail at a 64 percent rate. And in our largest State, California, voters went 44 percent by mail in the 2008 Federal elections. Some of those States are represented by members on this committee, Senator Feinstein and Senator Murray.

But what do we actually mean when we talk about vote by mail? There are two different ideas and we are going to discuss them today.

First is what many call, appropriately, the Oregon model. In this model, a State does not have polling places and its election is conducted solely by mail. The second is what is called the "no excuse absentee balloting," or universal vote by mail. In this system, polling places still exist as much as they do in other States, but voters can choose to vote absentee and by mail without any reason whatsoever.

I am happy that my own State of New York just decided to adopt the second model—not that I prefer it over the first, but at least it is better than nothing—of no excuse absentee balloting. We joined 29 other States that offer no excuse absentee balloting and four States that provide permanent no excuse absentee balloting.

Finally today, we will discuss how to give voters the tools to track their ballots once sent. If people can track a package when it arrives, surely the technology is there to track a ballot.

It is an issue that we have had some experience, successful experience, in this committee. Working with Senators Bennett, Chambliss, Nelson, and others, we passed the Military and Overseas Voter Empowerment Act, known as the MOVE Act, as part of the National Defense Authorization last year. It ensures that all States permit military and overseas citizens and their dependents to register and vote by absentee.

One of the most important aspects of that law, which passed with Congresswoman Davis's strong support in the House, is that it requires election jurisdictions to provide to all military and overseas voters free access to notification that their voted ballots have been received by the local Board of Elections. Congresswoman Davis has her own bill, which passed the House on the Suspension Calendar, H.R. 2510, which is aimed at providing that same free access notification to all absentee voters in the country. I look forward to learning more about this particular proposal, as well.

I believe these reforms to be sensible, secure, and the right thing to provide voters. Vote by mail elections will help all eligible voters to register and vote in Federal elections, including disabled voters and their caretakers, Americans holding down two jobs who can't get away to vote, and just about anyone who can't get to the polls but wants to exercise their prized constitutional right.

So after we hear from our two Members of Congress, we are going to be lucky to hear from State and local election officials who can relate their experiences with these programs. They have been on the ground in the areas of policy, law, legislation, and imple-

mentation of vote by mail programs. We can all benefit from their experience.

Senator Roberts?

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman. It is a privilege to be here to pinch hit or stand in for Bob Bennett.

I might observe that in a unique test of observation by the media on Capitol Hill, many times, we have been mistaken for one another. This is somewhat unique in that Bob is six inches taller than I am and he, when a member or the Chairman of the Joint Commission on Economics and I was the Intelligence Committee Chairman, were being asked by media, Mr. Chairman, all the time different questions, they would ask me about the Fed and about the interest rate and about the economy, and I would say, well, we are going to take that up very quickly and if you will just get back to me, I can have something for you later. And Bob, when asked about an intelligence matter, would simply smile and say, "Well, you know I can't say anything about that."

And so we have become sort of a, what, band of brothers in regards to the media, I guess, inquiries. That still has puzzled me, other than the fact that I think we both belong to the follicly challenged caucus. Perhaps that is the reason that one is mistaken for the other.

It is a pleasure to be here with you. I have known the Chairman. We served together in the House and now serve in the Senate. The Chairman is known for his legislative prowess and his political acumen. I simply want to thank him for getting who I was in 2008 and I appreciate that very much.

So at any rate, with Ron Wyden, Ron comes from Wichita, along with some other very famous person that we know at 1600 Pennsylvania Avenue, and so I have known him for a long time and he serves on the Intelligence Committee. I think you are still serving there. And I appreciate his efforts. If there is one person who does reach out and tries to be bipartisan in regards to the challenges that we must face, it is Ron. And so, Ron, I really appreciate your friendship and your service.

And Susan is a member of the sometimes powerful House Administration Committee, of which I was a member many, many years in the House——

Chairman SCHUMER. It was always powerful when you were on it, Senator Roberts.

Senator ROBERTS. It was always very chaotic and very controversial, but at least I think we got some things done, so thank you to the members. I am looking forward to the panel.

The Constitution under Article I, Section 4, states the time, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof. Although the Constitution does permit Congress to make laws that affect elections, it is clear that the Founders intended for the responsibility and administration of elections to remain within the States and accountable directly to their voters.

Since 1995, my State of Kansas has permitted advance so-called no excuse balloting for Kansans who fill out the appropriate appli-

cation and meet the statutory requirements. There are some county—there is county flexibility due to cost and access and things of that nature, however. They may vote prior to Election Day either by mail or in person at a location approved by their County Election Office.

Now, 27 other States have various forms of advance balloting, but it is important to remember that 22 don't. These States have chosen probably for different reasons, I suspect cost and other matters, not to initiate advance balloting. That choice must be respected, I think, by the Federal Government as well as by other States.

And I understand that some advocate extending advance balloting to States that have not adopted advance balloting. Others highlight concerns that doing so opens the door to abuses such as fraud. For example, in Essex County, New Jersey—where else—there is an ongoing investigation of fraudulent absentee ballots in the 2007 Senate race and this is not the only example. We could go on and on.

Worse yet, we must consider the possibility of coercion. The concept of the secret ballot is one of the cornerstones of democracy and we must exercise extreme caution with any form of legislation that could potentially or inadvertently undermine the secret ballot and open the door to intimidation of individuals when voting on candidates or questions before them on Election Day.

I thank the Chairman again for calling this hearing. I look forward to the witnesses' testimony. Thank you very much, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Roberts.

And now we will hear from Senator Wyden.

STATEMENT OF HON. RON WYDEN, A UNITED STATES SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Thank you very much, Mr. Chairman. With your leave, let me just spare you the speechifying and maybe just highlight a few of my main concerns.

I don't want to make this a bouquet-tossing contest, but I also especially appreciate the way you, Mr. Chairman, and Senator Roberts and Senator Bennett tackle these issues in a bipartisan way. I think both of my colleagues know that Senator Grassley and I, for example, have spent a full decade trying to eliminate secret holds here in the United States Senate, another effort to open up the political process to make Government more accountable.

Senator Schumer, when I talked to him about this a decade ago, the very first question Senator Schumer asked me was, are you doing this in a bipartisan way, so Chairman Schumer, I am very appreciative of the fact that you have put a special focus on these issues that are so important to democracy to work in a bipartisan fashion, and it is obvious you are doing that again.

And to my friend, Senator Roberts, my former Chairman on the Intelligence Committee, we have worked together often on so many issues, and to work with you and Senator Bennett, and he, of course, has been my partner on a number of economic issues, health, and others, this is exactly what we need more of in the

United States Senate, and so I very much appreciate the way you all are tackling these issues.

I am the first United States Senator to have been elected by mail. Suffice it to say, when you look at the 30-year history of what Oregon has done, what you see is that this empowers voters. They have almost three weeks to have a ballot in their hand to get more informed on the issues. It has increased turnout. It is cost effective. And on the central issue that colleagues have asked me about as they have looked at it, I am of the view that it reduces election fraud, and let me cut to the bottom line on this issue.

We know that elections are contentious matters. People have passionate differences of opinion. The first point on this issue, in the history of our using vote by mail, and it goes back almost 30 years, and I mentioned this to my friend, Senator Roberts, not once has a Democratic candidate or a Republican candidate said that they lost their election by voter fraud using vote by mail. There has not been one instance of that.

And in fact, to highlight how strongly we feel that this is bipartisan, at one point, I was one of a handful of Democrats who were for this idea. Republicans at that time thought it would favor them because they thought that their constituency would be more interested in this. Then the roles were reversed and now Oregonians have put it on the ballot because overwhelmingly this is a bipartisan approach.

One of the reasons that it has not been something susceptible to fraud is the extensive checks that we have put in this, and our very fine Secretary of State will touch on this in a few moments. First, we require that people sign the ballot. Then we verify the signatures. And because you have close to a three-week process, you have plenty of time to see if a signature is verified. And we have very substantial penalties—it is a felony if you sign somebody else's name to the ballot.

And Mr. Chairman, with your leave, I would like to put into the record an instance in Curry County where an elected official whose wife had back surgery and asked her husband to sign the ballot, he did it, they picked it up on verification and he went to jail for his conduct. So we have very substantial——

Chairman SCHUMER. You are a tough folk in Oregon.

Senator WYDEN. We are tough folks, but we are very serious.

Chairman SCHUMER. Without objection, that will go in the record.

[The information of Senator Wyden submitted for the record:]

Senator WYDEN. We are very serious, and I just want my colleagues to know that we don't take a back seat to anybody on this question of ballot integrity. So we have 15 million ballots that have been cast by mail since we have used it and absolutely no evidence of systematic voter fraud, and our excellent Secretary of State will get into this in just a moment.

Finally, Mr. Chairman, the package of bills that I have introduced includes a universal right to vote. We consider that fundamentally about access and fairness. No longer would there be arbitrary requirements that block voters from choosing to vote by mail. I want it understood that this wouldn't force anyone to vote

by mail, nor does it require States to implement new voting systems. It, again, increases voter choice and voter options.

Also, S. 3299 would eliminate arbitrary barriers that may prevent voters from exercising their rights in States that still have excuse requirements, and I note that the State I was born in, the State that Senator Roberts represents, was the first State to eliminate absentee ballot restrictions.

Then I have also introduced S. 3300, the Vote by Mail Act of 2010, that would create a model grant program to help States or smaller jurisdictions transition to vote by mail systems. And one of the reasons why I think, colleagues, we also ought to look at these small grant programs is it seems that every four years, when we have jurisdictions around the country having substantial problems in protecting the franchise and empowering the voters, we end up spending more Federal money on broken systems. So it would make more sense, it seems to me, to pick up on a model that has strong bipartisan support, that has worked, that is cost effective, that is efficient, that has not in any way promoted fraud, and quite the opposite, has sanctioned any instances of tampering with a ballot aggressively. I think it would be in the country's interest to follow the Oregon model.

I will plead guilty, colleagues, to being proud of my State. I think good government is in the Oregon chromosomes. It is hwy we participate so extensively in government. It is why people show up at my town hall meets in every county, every year. This is another way to open up the doors of democracy and to do it in a bipartisan way.

So I thank colleagues for the chance to come, to you, Chairman Schumer, for particularly showing that you can be passionate about issues like this and do it in a bipartisan way.

[The prepared statement of Senator Wyden inserted into the record]

Chairman SCHUMER. Thank you, Senator Wyden, and we thank you for your leadership on this issue.

Congresswoman Davis?

STATEMENT OF HON. SUSAN DAVIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. DAVIS. Thank you very much. Chairman Schumer and Senator Roberts, it is an honor to be here and to be here with Senator Wyden, a true leader on mail ballot issues, to testify about the rising use of absentee voting and improving the process. I will be as brief as I can to allow for your panel of experts, because truly, these are election officials whose experience offers us the greatest value.

My interest in bettering our elections goes back to my service as President of the League of Women Voters of San Diego. Historically, the Federal Government has opened the doors to those who have been shut out of the voting process, whether intentionally or unintentionally, and each time those doors open wider, our country has been the better for it.

But our work is not done. The next step is to give hard-working Americans with busy lives the best chance to vote no matter what comes up on Election Day. I vote at polls whenever I can because

I really want to. Many Americans feel the same, and I am not proposing that we take away that option. But we shouldn't consider a person any less patriotic for wanting to do his or her civic duty at the kitchen table.

The reality today is that ever-increasing numbers of voters choose to vote by mail because people pursuing the American dream are getting up earlier, commuting longer distances in more traffic, and they savor precious family time. They want to participate in democracy, but are uncertain whether they will make it to the polls between their work and family obligations.

These ballots today are longer and they are often filled with complex initiatives and some voters don't like to feel rushed at the polls. An absentee voter can choose whether to turn a ballot in right away or wait to hear everything the campaigns have to say.

Some say early in-person voting is an alternative to voting by mail. While I fully support this opportunity, I would disagree with that. Like Election Day, early voting still involves lines and limited hours and administrative burdens. Mail simply has a broader reach.

In California, we have no excuse absentee voting, meaning that anyone can vote by mail for any reason. I took the right to vote by absentee for granted until 2004, when a nurse from an excuse State told me she could not vote for President because her shift overlapping with polling hours and work wasn't an acceptable excuse for an absentee ballot. Since she would not abandon her patients, well, she did not vote. Her story compelled me to take action.

The fact that some 21 States still require excuses to vote by mail is a problem on three levels. First, voters in excuse States simply do not have as great an opportunity to vote as their counterparts in no excuse States. This creates an unequal playing field when we are all voting for the same President and the same Congress.

Second, the excuse requirements are arbitrary impediments and they do not increase security. For example, in Michigan, you can vote absentee if you are over 60. In Mississippi, you have to be over 65. And in Georgia, you have to be over 75. In Delaware, you need to collect and pay for a notary signature to prove that you are on vacation or that you are a student. In Tennessee, sick voters need a note directly from their doctor to the county clerk. Even work doesn't count as a valid excuse in many States, and in some, only certain kinds of work do.

And no State has a special exemption for parents of young children. I am all for setting an example by taking kids to the polls when they can, but any parent knows it is not always practical to stand in line with a couple of toddlers and then try to concentrate on a long ballot.

And the third reason absentee excuses are a problem is they can violate our privacy for no good reason. Some people say a voter's privacy is at risk voting from home. There is not much evidence of that, however, and most people talk politics with their family anyhow. What is clear is the threat to privacy States pose when they request unnecessary information just to vote.

For example, in Virginia, you must state where you will be vacationing to get an absentee ballot. If you have a religious obligation,

you have to explain that. If you are sick, you must list the nature of your disability or illness. If you are caring for someone else, you have to list that person's illness. And my favorite one, if you are pregnant, you must disclose that to the State. All of this information becomes public record and it is never verified to prevent fraud. But if you forget to fill out any part of it, sorry, you can't vote.

The good news is, we can fix all of these problems by passing the Universal Right to Vote by Mail Act. This bill merely expands a process every State already has and it clearly falls under Congress's constitutional authority to regulate the place, time, and manner of Federal elections.

In addition, the Congressional Budget Office scores it at zero and finds it is not an unfunded mandate because it is a civil rights bill.

So before I close, I just want to urge the committee to consider one more bill, as well, H.R. 2510, the Track Act, a bill we recently passed in the House and is awaiting action here in the Senate. This bill, which I co-authored with Kevin McCarthy, also on the Administration Committee, is modeled on a successful law in California and would expand on the tracking language in the MOVE bill. You are familiar with that. It would provide State grants to set up absentee ballot tracking systems so voters can know whether their absentee ballot has been sent, received by the Elections Office, and has been counted, all three of those steps, which are very important.

I strongly believe this Congress must expand and improve absentee voting for all eligible voters and extend a bedrock promise of our democracy, a vote for every citizen.

I want to thank you very much, Mr. Chairman, for holding this hearing. I want to thank you for your help and support. And I certainly want to thank your staff, as well, that were tremendously helpful to us.

I seek permission to submit for the hearing record a letter from the Michigan Association of County Clerks.

Chairman SCHUMER. Without objection.

[The information of Ms. Davis submitted for the record:]

Ms. DAVIS. Thank you very much.

[The prepared statement of Ms. Davis submitted for the record:]

Chairman SCHUMER. One quick question for Senator Wyden. When did Oregon implement its universal by mail voting, and how was the education and transition process? I am sure people would want to know that.

Senator ROBERTS. Wasn't that with Lewis and Clark when they——

[Laughter.]

Senator ROBERTS. Lewis was for it and Clark was against it, as I recall.

Senator WYDEN. And then when they saw how well it worked, they both came on board.

Senator ROBERTS. I see.

Senator WYDEN. Mr. Chairman, I would also like to submit for the record, we have put together—our State officials put together a history of vote by mail.

[The information of Senator Wyden submitted for the record]

Chairman SCHUMER. Oh, good.

Senator WYDEN. But essentially, there is a 30-year chronology dating back from 1981, where we started testing vote by mail for local elections, the chronology. We made vote by mail permanent in 1987. The majority of counties began to use it for local elections, as I noted. We held the Statewide special election in 1995 and 1996. In January of 1996, when I was chosen Oregon's first new United States Senator in almost 30 years, we had 66 percent turnout, Mr. Chairman.

Chairman SCHUMER. Wow.

Senator WYDEN. This was in the dead of winter. It was unbelievably cold. And colleagues, I don't remember it——

Chairman SCHUMER. That was because of the quality of the candidate.

Senator WYDEN. Well, as all of us know, Senator Smith was an extraordinary elected official, as well, and he and I worked very closely together. But I note that at that time, when 66 percent turned out, people compared it to the previous Senate special election. We had one, which I believe was in Texas, that had turnout somewhere in the 20 percent range. So you get a sense of what the extraordinary effect this has had in terms of increasing voter turnout. Make this chronology a part of the record——

Chairman SCHUMER. Without objection.

Senator WYDEN[continuing]. But we have a 30-year successful history, and that is why I feel comfortable about coming before you and arguing that it ought to be expanded, is we have had a chance to work through the kinks.

Particularly just one last point, Mr. Chairman. You have been very gracious on time. When you look at this fraud issue, if a ballot is fraudulent, under the Oregon system, it never gets counted because we have used that three-week period to essentially check the envelopes, identify the problems, fix the errors, investigate any questionable ballots, as opposed to what happens when you have the traditional process of the polling place. The vote has already been counted and then you are playing catch-up ball to deal with retrieval issues as opposed to what we think has been successful in terms of getting at these questionable activities up front.

Chairman SCHUMER. And to Congresswoman Davis, California's rate of vote by mail is extraordinarily high, 44 percent. Why do you think that is, compared to, say, other States that have the same law, basically the same law in effect?

Ms. DAVIS. Well, one thing, they have made it permanent voting so that people don't have to actually request an absentee ballot every time there is an election. They can—that is basically a permanent absentee voter and I think that makes a large difference, and people have found that it works for them.

Chairman SCHUMER. Senator Roberts? Thank you both.

Senator ROBERTS. With a highly mobile society, more especially with California, how does that work? It is a permanent situation by address, I am assuming.

Ms. DAVIS. Yes. If people move, then of course they have to reregister at that address.

Senator ROBERTS. Sure. But I would guess, what, 20 percent at least in California——

Ms. DAVIS. Are moving around?

Chairman SCHUMER. Are moving to Kansas.

[Laughter.]

Senator ROBERTS. I don't think so.

Ms. DAVIS. A lot of them do move within the State, but even if they move down the street——

Senator ROBERTS. We have very strict immigration laws.

[Laughter.]

Ms. DAVIS. But the other thing that has been mentioned is the signature is really the key in California, as well. I have been at the registrar when they are checking all of that and they do. They go through every signature——

Senator ROBERTS. I don't think there is a better salesperson for this than you have represented yourself before the committee. If you have been talking to your colleagues in regards to the 22 States that do not have this, it would seem to me you have a very convincing argument.

I think I can say the same thing about Kansas. I am not too eager to superimpose by federal fiat upon the 22 who do not. You may think they live in the Dark Ages or whatever it is that one may think, but being the sales person that you are, of course, you have other duties to perform. Have you talked to some of your colleagues in some of the States that you were talking about in regards to the need for voting by mail?

Ms. DAVIS. I certainly have, and you are absolutely right that people believe that this is in the venue of the State. I think what we have to point out to them is that, actually, traditionally, while the States have run elections, no court has really said that the Tenth Amendment trumps Article I, Section 4, which basically says that the Congress can determine the place and time. We have HAVA. We have Motor Voter. We have done a number of things to try and provide some standardization.

So I have given them those arguments and I think that they do tend to fall back on the State argument. But when they have an opportunity to talk to their registrars and their county people, I think that they come around often with the feeling that this doesn't make sense anymore. It may have at one time.

Senator ROBERTS. I am a veteran of the Motor Voter meaningful dialogue that we had in the House Administration Committee and had three amendments. One, you had to be a citizen; two, that it was an unfunded mandate and we should pay for it; and then, third—oh, what the heck was the third one? But at any rate, another common sense amendment. They all went down by a party line vote.

I am trying to think of the Washington Representative that was such a leader in that—Congressman Swift, Al Swift. And then ten years later, I went back over all of the evidence that he indicated State by State in terms of what he thought would represent an increased voter turnout. As it turned out, it didn't affect it much one way or the other. What affected it was the candidates and the timing and everything that involves a political year. So I still have some reservations about that. But at any rate——

Ms. DAVIS. I think one of the things you might look at is for all of those States that have made this decision and moved forward, none of them have changed and gone back.

Senator ROBERTS. I understand that. It would be very difficult to do that under the circumstances. I think, politically—the third one was, by the way, if the State had a more strict law enforcement requirement than the bill actually provided, that that would prevail. And it seemed to me those three things were very reasonable.

Mr. Chairman, I did not mean to get into a renewed debate on Motor Voter, but anyway, that struck a chord. Thank you very much.

Ms. DAVIS. Thank you.

Chairman SCHUMER. I thank both of our witnesses for being here.

Senator WYDEN. Thank you.

Chairman SCHUMER. And now we will call the next panel to come forward, who are Kate Brown, the Secretary of State of Oregon, recommended by Senator Wyden, John Fortier from the AEI, and Rokey Suleman, who is from the Board of Elections in the District of Columbia. I will read a brief biography of each and then we will ask each witness to submit their entire statement to the record and speak for five minutes.

Ms. Kate Brown currently serves as the Secretary of State of Oregon, a position she has held since 2008. She was elected to Oregon's House of Representatives in 1991, served there until 1997 when she was elected to the Oregon Senate in 2004. She became the first woman elected Majority Leader in the Oregon Senate, served there for five years, earned her law degree from Northwestern School of Law at Lewis and Clark College in Portland, Oregon. Welcome. And one of your Statewide colleagues, John Kroger, worked for me for a number of years.

John C. Fortier is a research fellow at the American Enterprise Institute as the principal contributor to the election reform project done in conjunction with the Brookings Institute, a member of the Committee to Modernize Voter Registration, and the author of Absentee and Early Voting: Trends, Promises, and Perils. He taught political science at the University of Pennsylvania, University of Delaware, Boston College, and Harvard. He earned his undergraduate degree from Georgetown, Ph.D. from Boston College.

And Mr. Rokey Suleman currently serves as the Executive Director for the Board of Elections and Ethics in the District of Columbia, where he is responsible for the maintenance of voter records and election preparation. Before joining the D.C. Board, he served in Fairfax County, Virginia, as the General Registrar in the Office of Elections, as well as in Warren, Ohio, as the Deputy Director of the Trumball County Board of Elections.

You are all welcome. Secretary Brown, your entire statement is read in the record and you may begin.

STATEMENT OF KATE BROWN, OREGON SECRETARY OF STATE, SALEM, OREGON

Ms. BROWN. Thank you, Mr. Chair and committee members. For the record, I am Kate Brown, Oregon's Secretary of State, and thank you for inviting me here to testify today. I really appreciate both Senator Wyden and Congresswoman Davis's leadership in attempting to provide Americans with universal access to vote by mail.

You have my written testimony in front of you. I would like to highlight a few of those points.

Oregon's 30-year experience with vote by mail has been a resounding success. Vote by mail enhances turnout, is cost effective, and secures the integrity of the ballot. We know that Oregonians like vote by mail because we can measure the effects it has had on turnout over the past few election cycles. Oregon has been in the top ten of States in voter turnout amongst registered voters for the last two Presidential elections. It is the only State in the top ten that does not have same-day voter registration, another subject for another day.

It is easy to understand why. With vote by mail, we make it easier, more accessible, and more convenient for Oregonians to cast an informed ballot. It is easier for folks living in rural Oregon, miles away from the Elections Office, to drop their ballot in a mailbox. It is accessible for people with disabilities to vote independently in the privacy of their own homes. And it is convenient for busy families, as Congresswoman Davis mentioned.

Vote by mail is cost effective. The last general election at a polling place was in 1998. It cost $1.81 per voter. Our special election in January of 2010 cost $1.05 per voter, not including inflation.

We continue to add efficiencies, as well. Last legislative session, we passed a bill which allows counties to process the ballots before Election Day. As you all know, voters and elected officials want results immediately in this day and age, and in our last Statewide election, we released more than three-quarters of the results within half-an-hour of the voting deadline.

In addition, as Senator Wyden mentioned, vote by mail is secure. To combat any attempts at fraud, we have put a number of security measures in place to make vote by mail as secure as traditional polling place systems. For example, to ensure the integrity of each ballot, we check every single signature, and I know this because it happened to me. One election, I got a call saying my signature didn't match my signature on the voter registration card and would I come down to the Elections Office to verify my ballot. Of course, I did.

We are also using tracking measures by including a bar code on every single envelope so we can track a given ballot while it is in the custody of Elections. And by November of 2010, voters will be able to track their ballots and confirm that they have been received by elections officials, just like we can track our purchases on eBay.

As Senator Wyden mentioned, the penalties for voter fraud are severe. I have another case in Josephine County where a man forged the name of his younger brother to register to vote. His younger brother was a citizen. We caught him. He was discovered when his brother was summoned for jury duty and the county learned that his brother was only 14 years old. He was convicted of four felonies and deported, and now he can never become a citizen of the United States.

Finally, given the length of time of the election, as Senator Wyden mentioned, with the ballots going out about 18 days ahead of time, county clerks and elections officials have ample opportunity to resolve unanticipated problems.

It has truly been a collaborative process and we work closely with our partners at the United States Postal Service.

Senator Schumer, I would let you know that Secretary Reed has a letter detailing the experience in the State of Washington and he can tell you why Pierce County is not all vote by mail. But I believe it is the only county in Washington that doesn't have vote by mail.

In sum, we are really proud of our system in Oregon and we are very encouraged by the willingness of Congress and this committee to discuss its merits. However, as excited as I am about the prospect of vote by mail going national, I know that I have to temper my excitement in light of the long path we took to fully implement the system, and that was a full 30 years.

Senator Wyden's approach is creative and a common sense way to give all voters across the country access to the convenience of voting by mail in a very "take it easy" approach.

I would like to thank the members of the committee for having me here today. I heartily encourage you to support the three bills that the good Senator Wyden has introduced. And if Oregon's experience is any indication, universal access to vote by mail has the potential to affect our country's elections for the better. Thank you.

[The prepared statement of Ms. Brown follows:]

Chairman SCHUMER. Thank you, Secretary Brown.

Mr. Fortier?

STATEMENT OF JOHN FORTIER, THE AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. FORTIER. Thank you, Chairman Schumer and Senator Roberts. I commend you on having this hearing today because we have had a silent revolution in voting that has taken place over the last 30 years. Thirty years ago, we could look at the States and there would be some similarities. Most States would have about five percent people voting by absentee. You would have those people with reasons. They would be overseas, they would be ill, or they would be out of town on business or some personal business.

And starting in the late 1970s and early 1980s, a number of States started to change this, and we have seen a tremendous rise in voting by mail, but I also want to highlight a tremendous rise in voting early in person. Both of these phenomena have added together, add up to about a third of voters voting before Election Day, a tremendous change which has really been State by State.

Some States, Oregon, 100 percent, Washington State, nearly there, are voting by mail. Some States—New York is now moving in this direction but has traditionally had very low rates of absentee voting. Many of the Northeast States still have those rates of five percent or less.

Some States have moved very heavily to voting early in person but do not do much voting absentee. Texas and Tennessee were the leaders. Georgia and North Carolina also fall into this category. And then there are a number of States who do a lot of both.

So I note to you the great variety that is out there in the States, and I think that is some caution to what Congress should weigh in on, whether Congress should put early voting in person, or early voting by mail above other forms of voting.

Now, if I were advising you as a State, I do have some reservations about moving towards voting by mail. Of course, it is needed for a certain percentage of voters who cannot make it to the polls, but that does not mean that you could not go to a certain form of convenience voting, and that is voting early in person. And the reason I would recommend that method of voting rather than voting by mail or expanding voting by mail in a significant way is several reasons.

One, it is not a secret ballot, a vote by mail. It is needed by some people, but once that ballot has left the polling place, it is in the hands of someone. It is potentially out there for others to see. And while most of us do not have pressures on us as to how to vote, there are some that do. There are vulnerable voters. There are people with prying spouses or bullying employers or who face a certain sort of peer pressure being part of a group, and the fact that the ballot is out there makes it very hard for those people to resist those pressures. If you go to a polling place, you may have all the pressures in the world, but ultimately, you pull the curtain behind you and you vote as you like no matter what your friends, spouse, or peers have told you to do.

There are also problems with the chain of custody. Certainly, an absentee ballot or a mail ballot leaves the polling place. It is sent. It is requested. It has to be turned back. And the problems that we have found have been in the fraud area. While I don't think we can prove in any way that they are extensive, they certainly are to do with people intercepting ballots, people requesting ballots for people who are not eligible voters or are not where they are supposed to be. There is an extra opportunity for fraud that does not exist at the polling place.

I also think there are some problems with the way ballots are handled, and I want to accept Oregon for this. In many ways, I am a critic of voting by mail, but I think Oregon, when it does voting by mail, does it very well. That is not the case all around the country. There are many States who do not take the same care of checking signatures, of ensuring that there is contact with voters if there are problems.

And I point to the Minnesota example, where Minnesota, a contentious recent election, we had problems that both sides argued about, about ballots being not counted that should have been counted or ballots that were counted that didn't meet the requirements, and ultimately also some problems potentially of votes being cast with errors in them which are not able to be corrected on the ballot itself, whereas at a polling place, there are error checking mechanisms in a number of voting systems.

You know, my caution on moving towards requiring voting by mail everywhere is that, look, we have a very good other system, voting in person early, and we wouldn't—I am going to speak for Secretary Brown here. I am not sure she would be excited if we passed a bill and said that we should require there be early voting in person everywhere all the time or in an extensive way. I don't think we should impose one or the other. I think the States are making decisions. And I will note, I think that the statistics show that we are moving more in the direction of voting early in person. The recent rise in that has been greater than the other.

My last point is that just because I don't think we should ask States to—we shouldn't force States to offer absentee ballots to everyone, we should consider making some of the improvements that are dealing with the tracking, with the signatures and other things that Oregon and other States do well.

[The prepared statement of Mr. Fortier inserted into the record]

Chairman SCHUMER. Thank you, Mr. Fortier. You hit the nail on the head exactly at five minutes.

So we now go to Mr. Suleman.

STATEMENT OF ROKEY W. SULEMAN II, EXECUTIVE DIRECTOR, D.C. BOARD OF ELECTIONS AND ETHICS, WASHINGTON, D.C.

Mr. SULEMAN. Thank you, Chairman Schumer and Senator Roberts. Universal access to an absentee ballot is something that should be available to every U.S. citizen.

I have been an election official in a State with universal access to an absentee ballot—that would be Ohio, an official in a State that severely restricts absentee ballot access—that would be Virginia, and am currently the Chief Election Official in the District of Columbia, a jurisdiction that is now making the transition from excuse-based absentee to no excuse absentee voting. I can speak with firsthand experience to the administrative difficulty that results from restricting ballot access through the mail.

Demands on the lives of voters have grown as our country has grown. We owe it to our citizens to give them as much access to the ballot as they request. No fault absentee voting does just that in a place that is convenient, their home.

Some argue that a vote by mail system erodes a community's sense of civic duty, that a ballot received through the mail is equal to junk mail received on a daily basis. I disagree. I believe that voting by mail gives families as much of an opportunity, if not more so, to educate their children about voting. Not every parent has the luxury to have their children tag along to the polls with them on Election Day. With vote by mail, families can sit around the kitchen table and discuss the issues and the candidates.

Virginia places significant restrictions on access to an absentee ballot through the mail. A person must meet one of numerous requirements in order to vote absentee either in person or via the mail. A voter must check a box on a form and also give supporting information for their reason. For example, a voter must check "personal business" or "vacation" and then list the place that they are visiting. Failure to list the location results in a mandatory denial of that application.

Medical reasons for requesting an absentee ballot through the mail also require supporting information. If a person does not list the nature of their illness on the application, the application must be denied. The medical reason to vote absentee may be very personal and subject the voter to public embarrassment. Absentee applications are records available to inspection by the public. Although there is some thought that the Health Insurance Portability and Accountability Act of 1996, HIPAA, may apply, election officials have received no guidance to how to balance the right to privacy against the freedom of information regarding these docu-

ments. We face the prospect of serious litigation in the future if these requirements are still in place.

Requiring an excuse to vote absentee also places a significant administrative burden on local election officials. The denial rate in my office in Fairfax, Virginia, for absentee applications was very high in 2008. A significant number of voters check a reason but do not supply the supporting information. My staff has to review each application for completeness. Failure to properly complete the form requires a notice to the voter informing them of the deficiency and supplying a new application. This is all done by hand.

During the November 2008 general election season, my former office denied thousands of applications because of these simple failures to supply burdensome information. There were several file drawers filled with applications that were denied. Some voters were denied multiple times before submitting a properly completed application. This took thousands of dollars out of our budget for the increase in man hours, postage, and supplies needed to process these applications. This is a tremendous waste of valuable tax dollars. No excuse access to a ballot through the mail would have saved that office thousands of dollars in processing and overtime costs.

Some opponents of no excuse absentee voting by mail claim a person should be able to fill out a form properly and failure to do so should disqualify their vote. I have had to deny applications to former U.S. Congressmen and current U.S. Supreme Court Justices because of failure to supply supporting information. If these educated folks make mistakes, imagine the mistakes made by a 90-year-old voter that has difficulty reading and writing.

The transition from excuse-based absentee voting to no excuse absentee voting in Ohio caused no problems or increased fraud. As a matter of fact, in today's Cleveland Plain Dealer, they indicate that the majority of votes in Cuyahoga County in yesterday's primary came in through the mail.

It is my professional opinion that increased access to ballots through the mail does not lead to an increase in voter fraud. The numbers I have seen just do not support the assertion. What universal access through the mail does is give a voter another option in casting a ballot, an option that more and more voters across the country desire.

There are other benefits to vote by mail. Election officials will also be able to take advantage of technology to let a voter know where their ballot is. By placing bar codes on both the original and return envelope, my office in the District will have the ability to tell every absentee voter the status of their ballot on our website up to the point the ballot is on the vehicle of their postal carrier. While we are implementing this technology to comply with the MOVE Act, this process will be easily extended to all vote by mail voters at nearly no cost. This process is expected to significantly reduce the number of "where is my ballot" calls to the office, which in turn will reduce staffing costs. The combination of convenience and technology will be a tremendous benefit for the voters in the District.

It is my belief the District will start to see such a shift to early and no fault absentee voting that we will be able to combine pre-

cincts. This will provide my office with thousands of dollars in savings from poll worker reduction, reduced training costs, fewer polling location rental fees, and less overtime.

No fault absentee voting is a concept whose time has arrived. Voters like the ease of use. Election officials as well as the funding authorities appreciate savings realized in the elimination of polling locations. This is a good government bill. This bill will save taxpayer money and provide greater access to our government. It is a bill whose time has arrived. Thank you very much.

[The prepared statement of Mr. Suleman follows:]

Chairman SCHUMER. Thank you. And again, I want to thank our witnesses for observing the time limit.

The first question I have is for Secretary Brown and Mr. Suleman in particular, education, and particularly the experience with Oregon. When Senator Wyden rehearsed the history, it was sort of gradual. It started in local elections. I guess it wasn't mandatory. You could go to the polls, et cetera. How long did it take for Oregon voters to become familiar with the process? How do you educate new voters? You have an influx of many citizens from other States who come to Oregon. Tell us a little bit about that.

Ms. BROWN. Mr. Chair, thank you for the question. As Senator Wyden suggested, the process to moving to vote by mail in Oregon was gradual. A Republican Secretary of State passed legislation in 1981 to allow for local elections, and it wasn't until the voter initiative passed in 1998 that we went to full vote by mail. That being said, basically, no one under the age of 30 has ever voted in a polling place in Oregon, so it certainly has been a gradual transition.

I think the beauty of Senator Wyden's bill is it doesn't force the States to do vote by mail. It allows the voters to have the choice of voting by mail, and it is really an expansion. My understanding is that all the States have access to some type of absentee voting. So it really just expands the systems that the States already have in place.

In terms of education, I am in the schools on a regular basis working to educate young Oregonians that we vote by mail and how we vote by mail. And we, frankly, have used our Federal Help America Vote Act dollars to educate voters about the voting process in Oregon.

Chairman SCHUMER. Mr. Suleman, you mentioned Ohio. That was very interesting, that in the primary, a majority of votes were cast by mail in Cuyahoga County. How is the process going there with educating voters, voters adapting, et cetera?

Mr. SULEMAN. The election offices in Cuyahoga County and Franklin County, Ohio, the two largest jurisdictions in Ohio, are very proactive and they send out applications to all of the voters to fill out and submit ballots and it has worked very well for them.

My experience in my county in Ohio was we did a limited approach because we didn't have the local resources to send out applications to all of our voters. However, we knew that there was going to be difficulty with the applications, so we sent out—inside the application itself, we sent a form that described actually how to fill out the application so when the ballot came back there weren't any mistakes on the ballot so we could pass that forward.

Each county has taken it upon themselves to educate the voters a little differently, but it has proven to be a great success.

Chairman SCHUMER. And it is working?

Mr. SULEMAN. It is working.

Chairman SCHUMER. Okay. Secretary Brown, Mr. Fortier mentioned some of the complaints with this process. We have talked about the fraud, so I am going to leave Senator Wyden's comments on that in Oregon. But what about this idea that you lose some of your privacy from, I think his words were, prying spouses and employers who were trying to pressure people, or something like that. Do you get many complaints about that from Oregon voters?

Ms. BROWN. Mr. Chair, actually, we have had no complaints regarding coercion amongst spouses or partners in terms of coercion around the ballot, and we have actually done some research. The prior administration reviewed divorce petitions looking for allegations regarding coercion between spouses——

Chairman SCHUMER. No divorces because of election differences?

Ms. BROWN. Correct. Correct. But the other thing I would add, Mr. Chair, is that——

Chairman SCHUMER. It would be a pretty fragile marriage.

[Laughter.]

Ms. BROWN. I have been very involved in the domestic violence community in my work in the legislature and I have never heard any complaints about this particular issue. So we——

Chairman SCHUMER. What about with employers?

Ms. BROWN. Uh——

Chairman SCHUMER. No, but employers would say, hey, I want you to vote Republican or Democrat and let us see your ballot.

Ms. BROWN. Mr. Chair, we have not heard any complaints about that. The legislature recently passed legislation in Oregon regarding, shall we say, meetings with employers that doesn't require employees to attend meetings. But no, I haven't had any complaints regarding employers forcing them to turn in the ballot.

Chairman SCHUMER. Mr. Fortier, when you brought these up, is that speculative, hypothetical, or do you know of instances and can you mention a few to us?

Mr. FORTIER. Well, if I could just turn back in a way to the history, we actually had two reform movements, one right before the other, a reform movement at the end of the 19th century which put in the privacy of the ballot, the Australian ballot, and shortly thereafter, we had a reform that States started introducing absentee ballots. And some of the reasons for these requirements to go to a notary or provide a reason to vote absentee were because State Constitutions had enshrined the idea of privacy of the ballot and they wanted to balance these things.

I am not advocating going back to a notary public, which I will note actually I did have to go to the first time I voted absentee, but you can see the reason for wanting to do so, that you go to a notary public, you show a blank ballot, you then are standing over there——

Chairman SCHUMER. But any specific instances here?

Mr. FORTIER. Well, I mean, the reasons at the time, I will just say, of course, were worse than we would expect today with polit-

ical machines which had walked into the ballot box with a color-coded ballot. You knew how you voted.

I just think you are unlikely to find the subtly pressured voter or the voter who is under some pressure to come forward and say, look, I have these problems. They are vulnerable voters who potentially have someone giving them a hard time and might actually be able to see the ballot. I mean, certainly you can pay someone to see their ballot and turn it in, as well. It is not prohibited, or there is no way to ultimately get around that.

I applaud Oregon for doing lots of things to stop that, and I don't think we should get rid of absentee ballots. We need them for some people. But in many ways, the polling places provide these protections that that sort of voting doesn't. And when a State like Texas or Tennessee wants to do a lot of convenience voting, a lot of voting early at polling places and say voting by mail is for only people who really need it, I think that is a good choice for those States to make.

Chairman SCHUMER. Okay. And one final question for all three witnesses. Could some States' motivation here be that they don't want some people to vote or certain people to vote or make it more difficult? Is it that States that had traditionally denied voting rights to certain groups have tougher laws still to this day for any particular reason? Any of the panel on that. Or is that just gone, thankfully?

Mr. SULEMAN. No. Quite honestly, in my professional opinion, that is the reason why the extreme absentee restriction to vote by mail exists in Virginia. I believe that they just do not want to open up access to the ballot to folks.

Chairman SCHUMER. Mr. Fortier, you disagree with that?

Mr. FORTIER. Yes, I do. I mean, I think most of the States that still have these restrictions are actually in the Northeast, so some of those historical reasons may not be quite there. And, look, many of these reasons, we may want to revisit them at a State level and say, well, maybe this particular provision for providing a reason isn't what we want, or maybe we may need to make it easier. But I am not sure that the main reason is to keep turnout down.

We didn't really talk about turnout, and I think there are some real problems with the claim that voting by mail increases turnout. Most academic research has actually shown that it does not. There are some contradictory studies, but there are certainly a number of studies that show a negative result. So I think the consensus is that it doesn't increase turnout by itself, nor does voting early in person. It is convenient. There are some benefits to it. But it is not something that is an automatic turnout increaser.

Chairman SCHUMER. Thank you all.

Senator Roberts?

Senator ROBERTS. Well, thank you all. I truly appreciate your taking the time. I know you are very busy and it has been very interesting.

We had a hearing on voter registration issues last March and one of the witnesses at that hearing submitted a study showing turnout increased nationwide over a period, I think that was highlighted by Ms. Brown when she said increased six percent in your State in the last three Presidential elections, and then I think

there were similar numbers, too, in other States that had a similar system.

But according to the Center for the Study of the American Electorate—I don't know who that is, by the way, but it sounds pretty good—average turnout nationwide for 2000, 2004, and 2008 Presidential elections was 59.26, almost 60 percent, while average turnout for 1988, 1992, and 1996—it occurs to me that is when I ran—was 54.3 percent, about five percent below, actually 4.96. So the turnout increase over that period was pretty close to the national average.

Do you have any comments on that, Ms. Brown, and also to Mr. Fortier?

Ms. BROWN. Mr. Chair, Senator Roberts, what I can relay to you is that Oregon's turnout amongst registered voters has been in the top ten in the nation during the past couple of Presidentials. In terms of non-registered voters, we are, frankly, in the middle of the pack, and that is why we moved to—in March, we moved to an online voter registration system. We used our Federal Help America Vote Act dollars to move to an online system to make it easier and more accessible for Oregonians to register online if they have a State ID or driver's license. So we are really working hard on the registration end.

Senator ROBERTS. Mr. Fortier?

Mr. FORTIER. I will just say, I want to commend Oregon because Oregon does have high voter turnout, but it has had high voter turnout for quite a long time, before it had all vote by mail elections. So I think that in itself has not been the reason for its high turnout.

There are a number of studies, I would point to some in California, where there are some districts where people are required to vote by mail because the number of people who have the same ballot is quite small, and a number of academics have studied those districts and found actually a negative result. I don't claim that that is the case, but the range of results is from some small negatives to some small positives.

The one exception, I will say, is for local elections, small really low turnout local elections, local referenda. There, we do see some significant turnout. But for any major Statewide race or even local State legislative or for House of Representatives, those races, we don't see an increase in turnout.

Senator ROBERTS. I am going to refer to the Dark Ages when I attended the Kansas State University, the home of the ever-optimistic and fighting Wildcats, and we had two political science professors that were pretty famous, or infamous. One was trying to lower the voting age to 16. This is before even 18 and if you are old enough to fight, you are old enough to vote, which I always thought was a rather odd connection, but I can understand it.

And another political science professor who, I would say to the Chairman, had a very unique version. He said a higher voter turnout isn't necessarily good, that the old expression, it doesn't matter who you vote for, just make sure you vote, if you really look at that, that is a pretty stupid observation. I mean, that is you would just vote for anybody, just vote. Now, that happens in this country, I understand that, for various reasons. And so he thought that the

best election would probably be about a 20 percent turnout and everybody else is playing golf and things were getting along just fine. I happen to also harken back, that was the Eisenhower years and——

Chairman SCHUMER. You would have very few municipal golf courses.

Senator ROBERTS. That is true. We would have very few golf courses. Actually, we have a lot of pastures out in Kansas that would work out.

[Laughter.]

Senator ROBERTS. But Ike was President. It was eight years of peace and prosperity. People seemed to be less interested in dramatic legislation, et cetera, et cetera.

But at any rate, I am not asking you to comment on that except that an informed vote, I think, is probably the most important thing. But Ms. Brown, you have raised something that really makes my eyebrows go up. You argue that in your State, the civic ritual of voting at the polling place has been replaced with a new civic tradition of families getting together to discuss and vote their ballots together.

I am thinking of my own family and then I am also thinking of maybe a family reunion in which this could take place. I shudder at that thought, knowing various members of my family—extended.

[Laughter.]

Senator ROBERTS. I have one son and three daughters—pardon me, two daughters. I am into grandchildren now, but that is another thing. I ran for the Senate in 1996. My one daughter was in school at the University of Kansas. I don't know how that happened, but anyway, she enrolled in that school and completed her degree. At any rate, the other daughter and the other son did precisely what their Great-Grandfather and their Grandfather and their father had recommended in regards to voting, along with the various mothers.

The other daughter, however, decided that she marched to a different drum. I can remember the case of where her brother put one of my bumper stickers on her car, which I thought would be an understandable thing. She immediately took it off. She didn't put my opponent's bumper sticker up there. To date, I do not know if she voted for me in 1996, and I have never asked her how she voted in this last election.

But I can see—I am not too sure that this is a civic ritual in regards to our family. It is not that we do not have meaningful dialogue about the issues of the day and various candidates and their qualifications, but at any rate, I don't know. Isn't the key difference that while both systems allow families to sit around and discuss the candidates, only one assures a secret ballot as opposed to everybody signing at the appropriate time and everybody pretty much knowing how everybody voted, which I am not sure is a good thing?

Ms. BROWN. Mr. Chair, Senator Roberts, I have a number of responses and I will try and be responsive to your question, but——

Senator ROBERTS. Well, help me with my daughter first.

[Laughter.]

Ms. BROWN. Okay. Well, I will say, when I first ran for the legislature, I ended up running against a three-term incumbent and was outspent two-to-one. I won that race by seven votes.

Senator ROBERTS. Wow.

Ms. BROWN. And one of the reasons I ran to become Secretary of State is because I believe that every vote really does matter and needs to be counted.

In terms of the power differential, and Chair Schumer raised this earlier, I think that is the beauty of the Wyden-Davis approach, and that is it allows the individual voter to determine whether he or she wants to do the vote by mail. If someone wants to retain the polling place system and go to the polls, they can do that. That is the beauty of the Wyden approach. It gives the voter the choice.

In terms of the family conversations, the wonderful thing that happens in Oregon is that our voters' pamphlets come out about three weeks ahead of time, so the photos are there, the statements are there from the candidates. The ballots come about a half-a-week later. It gives people an opportunity to discuss what is on the ballot. We have a complicated ballot in Oregon normally because we have an initiative process to further complicate everything, and so normally, there are about five to eight initiatives on the ballot, as well.

So people discuss these issues in neighborhood associations, in churches, in libraries. Certainly, there is discussion around family dining room tables. I know that folks try to influence people, but to my knowledge, there is no coercion happening. We haven't had any evidence of coercion.

And I don't know what I can do to help you with your daughter other than to share with her my story of seven votes and that we would hate it if you were to lose.

Senator ROBERTS. Well, you will probably agree with her. That is the thing that——

[Laughter.]

Senator ROBERTS. One other thing. I am way over time here, and I apologize to the Chairman and everybody else. This is probably not really pertinent, but it does make me stop and think a minute. I was editor and publisher of a weekly newspaper in Phoenix during the explosion of Phoenix, and it is still exploding, in more ways than one, but at any rate, it was on the West side of Phoenix and obviously the home of Barry Goldwater. And I actually traveled with the Senator and had great respect for him, and then obviously it was the Johnson-Goldwater election. In that newspaper, I editorialized that perhaps the experience of Johnson weighed heavily in favor of voting for him and wrote that editorial and voted accordingly.

My father, who is the former Republican National Chairman under Eisenhower, did not get a copy of the paper—thank God—until about two weeks later. Coercion? You have no idea about the coercion that followed for years afterwards. I have never made that mistake again in regards to at least a decision like that, either that or I just simply, might add, just sort of took it for granted that I voted the way that he thought that I should vote. But anyway, I would assume that not all families are like mine.

I want to thank you all very much and thank you for your personal examples and your expertise. I think it has been a good hearing, Mr. Chairman.

Chairman SCHUMER. Well, thank you, Senator Roberts, and you helped make it a good hearing, as did our three witnesses.

I would say to you, I just had a little experience. I ran for the Assembly at age 23. My parents, particularly my mother, thought I should go practice law and make some money and she told many of her friends not to vote for me so I would get this dumb idea of being a politician from my thick head. So you are not alone.

[Laughter.]

Chairman SCHUMER. Anyway, thank you all for coming.

The hearing is adjourned.

[Whereupon, at 11:17 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Testimony of Senator Ron Wyden

Senate Rules Committee

Voting By Mail: An Examination of State and Local Experiences

May 5, 2010

SR-301, Russell Senate Office Building

Chairman Schumer, Ranking Member Bennett, and members of the Committee:

Thank you for holding this hearing today to examine Vote by Mail. As you may know, Oregonians have voted exclusively by mail since 2000. I am very pleased that this issue is getting attention at the national level, because those of us from Oregon are excited to tell the rest of country about the success we've had in voting by mail. I am especially proud that Oregon's exceptional Secretary of State, Kate Brown is here to testify. And I couldn't be happier to have my House-side partner, Representative Susan Davis, joining me on the witness panel. Representative Davis is a true champion for Vote by Mail.

Vote by Mail offers many advantages.

- Vote by Mail empowers voters – it gives voters more flexibility, affords voters more time to study the ballot, and allows them to vote when it's convenient for them.
- Vote by Mail increases turnout – in the three Presidential elections since Vote by Mail was adopted in Oregon, turnout has been six percent higher than in the three before. For lower-profile elections, such as off-year, municipal, or referenda elections, Vote by Mail has an even stronger positive impact on turnout.
- Vote by Mail is cost-effective – the Oregon Secretary of State's office found that election administration costs were reduced by 30 percent after Vote by Mail replaced polling place elections.
- Vote by Mail is popular -- an academic study conducted in 2005 found that over 80 percent of Oregonians prefer Vote by Mail to conventional polling place elections.
- Vote by Mail reduces election fraud – Oregon's system offers many safeguards that are not available in conventional elections. There is a paper trail for each and every vote, and the processing is conducted at a central, secure location. Plus, the longer election period gives election officials time to identify problems, fix errors, and investigate any questionable ballots.

Oregon blazed the trail on Vote by Mail with gradual steps over a long period of time. But the turning point in this pioneering effort came in 1996. That year, Oregon conducted its first state-wide primary and general election for a federal race exclusively by mail. That election, of course, sent me to the U.S. Senate. But that election was not just a success for my campaign, it was a win for the voters of Oregon.

Because Vote by Mail has been so beneficial in Oregon, I believe voters in other states should have more opportunity to cast ballots by mail. That's why I've introduced two Vote by Mail bills. One would give voters universal access to absentee ballots, and the other would provide funding to help with transition costs for any states, or smaller jurisdictions, that wish to convert to an exclusive Vote by Mail system similar to Oregon's.

The Universal Right to Vote by Mail Act has just been introduced in the Senate as S. 3299. Representative Davis introduced this bill in the house last year as H.R. 1604. The bill has five Senate cosponsors, 50 House cosponsors, and has been reported out favorably by the House Administration Committee.

The Universal Right to Vote by Mail Act is, fundamentally, about access and fairness. The bill would provide that any voter who requests an absentee ballot can get one. No longer would arbitrary requirements block voters from choosing to Vote by Mail. Voters in 29 states already enjoy this right. However, voters in another 28 states and territories cannot obtain a mail ballot unless they meet certain "excuse" requirements.

Voting is a fundamental right. I believe that no citizen should have to miss an election because they have to work, are ill, are caring for a loved one, traveling, or have a religious obligation. When voting for President, Oregonians shouldn't have an advantage over New Yorkers or Virginians. The Universal Right to Vote by Mail Act doesn't force anyone to Vote by Mail, nor does it require states to implement any new voting systems. All states are already required to have an absentee ballot system. This bill merely says that all voters should have equal protection in choosing how to participate in elections.

I would also note that excuse requirements for obtaining an absentee ballot constitute an unwarranted invasion of voter privacy. All information submitted on an absentee ballot request form becomes part of the public record. There is no reason why voters should be forced to reveal sensitive personal information simply to have the opportunity to vote. I believe all voters should enjoy equal access to mail ballots while having their privacy ensured.

S. 3299 would eliminate the arbitrary barriers that may prevent voters from exercising their rights in states that still have excuse requirements. History has shown that giving voters the right to choose to vote by absentee ballot is a safe and popular option. Since Kansas became the first state to eliminate absentee ballot restrictions, no state that has granted a universal right to vote by absentee ballot has ever reversed that policy. In those states, increasing numbers of voters have chosen to Vote by Mail.

I have also introduced the S. 3300, the Vote by Mail Act of 2010, which would create a three-year, $18 million grant program to help states, or smaller jurisdictions, transition to Vote by Mail systems like the one in Oregon. This bill would not mandate that any state adopt Vote by Mail. However, the bill would provide funding for state or local jurisdictions that choose to take advantage of the benefits that Vote by Mail offers.

S. 3300 would provide grants of $2 million dollars to states, or grants of $1 million to smaller jurisdictions, to help pay for the costs of implementing a Vote by Mail system. I believe Vote by

Mail can improve elections in any state that adopts it. But rather than simply assume that Vote by Mail delivers benefits, I offer a solution that would provide proof that it does. My bill would instruct the Government Accountability Office to evaluate Vote by Mail and produce a study comparing traditional voting methods with Vote by Mail.

Finally, I'd like to address the issue of vote fraud, which is sometimes mentioned as a concern about Vote by Mail. Oregon's experience has also shown that fraud is almost non-existent. Every ballot envelope is scrutinized before it is opened, and the voter's signature on it is reviewed to make sure it matches the one on file for the voter. With the longer time period involved – typically about two and a half weeks – in a Vote by Mail election, there is ample opportunity to determine whether a ballot is valid before it is counted and to investigate any allegations of fraud. If a ballot is fraudulent, it never gets counted. That could never happen in a polling place election where, by the time fraud is discovered, the vote has already been counted and can't be retrieved. Since Oregon converted to Vote by Mail elections, over 15 million ballots have been cast. During this time, thousands of ballots have been challenged and investigated for allegations of fraud. Thorough investigation of every allegation, however, has revealed only nine instances of vote fraud. There has been absolutely no evidence of any large-scale, systemic vote fraud that some predicted when Vote by Mail was first adopted in Oregon.

I would like to thank those who have supported Vote by Mail, including the original cosponsors of the two bills: Senators Kerry, Carper, Cantwell, Merkley, and Gillibrand. I would also like to thank the many organizations that support Vote by Mail, including the National Association of Letter Carriers, National Association of Postmasters, National Association of Postal Supervisors, American Postal Workers Union, National Postal Mail Handlers Union, National Rural Letter Carriers' Association, and other labor organizations including the AFL-CIO and SEIU. Vote by Mail also has the support of many civil rights and elections organizations, including Common Cause, the NAACP-LDF, the ACLU, and the League of Rural Voters. And I would also like to thank the Chair of the U.S. Postal Regulatory Commission, Ruth Goldway, for her leadership in promoting Vote by Mail.

Again, I would like to thank Chairman Schumer for holding this hearing, and I urge the committee members and all of my colleagues to give voters more choice and greater opportunity to participate in elections by supporting these two important Vote by Mail bills. It's time to move the nation's elections systems into the 21st century and answer the needs of today's voters. These bills are an important step in that direction.

SUSAN A. DAVIS
53RD DISTRICT, CALIFORNIA

WASHINGTON OFFICE:
1526 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-2040

DISTRICT OFFICE:
4305 UNIVERSITY AVENUE, SUITE 515
SAN DIEGO, CA 92105
(619) 280-5353

Congress of the United States
House of Representatives
Washington, DC 20515–0553

COMMITTEES:
ARMED SERVICES
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HIGHER EDUCATION, LIFELONG LEARNING AND COMPETITIVENESS

HOUSE ADMINISTRATION
SUBCOMMITTEE:
ELECTIONS

Testimony
Senate Committee on Rules and Administration
"Voting By Mail: An Examination of State and Local Experiences"
Honorable Susan A. Davis
May 5, 2010

Chairman Schumer, Senator Roberts:

It's an honor to be here before you with Senator Wyden – a true leader on mail ballot issues – to testify about the rising use of absentee voting and improving the process.

My interest in bettering our elections goes back to my service as President of the San Diego League of Women Voters. I was active in League because there is no greater good one can do for our democracy than ensure all Americans have their voices heard and have a fair chance to participate in elections.

Our Constitution is clear in providing Congress with the authority to set some basic ground rules for Federal elections, and this power has often been used to extend the franchise. Throughout our nation's history, the federal government has opened the doors to those shut out of the voting process intentionally or unintentionally – whether they be women, racial minorities, members of the military, Americans living overseas, 18 to 21 year-olds, or voters with disabilities. Each time those doors open wider our country has been the better for it.

But our work is not complete. The next step is to give hard-working Americans with busy lives the best chance to vote no matter what comes up on Election Day.

I vote at the polls whenever I can because I just like to. Many Americans feel the same and I am not proposing to take that option away. But we shouldn't consider a person any less patriotic for wanting to do his or her civic duty at the kitchen table.

The reality today is that ever-increasing numbers of voters are choosing to vote by mail because people pursuing the American Dream are getting up early, commuting long distances in more traffic, and they savor the precious time they have to spend with their families.

Many people who vote by mail want to participate in democracy but are uncertain whether they'll make it to the polls between their work duties, family obligations, and

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unexpected Election Day occurrences like a sick child, a long day at the office, or an early November snowstorm.

Certain states don't even have requirements that employers give workers an hour or two on Election Day to go to the polls. And while some states do protect this right for employees, one to two hours can easily be mitigated by long lines or a long drive to the polling station.

Further, ballots are growing longer and longer these days, and they're often filled with complex initiatives that voters want to take their time and study before deciding how to vote. Some voters simply don't like to feel rushed at the polls, and no voter should have to choose between getting back to work on time and filling out their ballot completely.

Some have speculated that absentee voters will cast their votes before campaigns are over and will regret their votes. I can tell you, campaigns these days start pretty early, and we know that some voters do make their minds up well before campaigns are over. But it's essential to remember that absentee voters have the choice and flexibility to turn a ballot in right away or wait to hear everything the campaigns have to say. No one is forcing them to cast their ballot too early, and in many places they can even drop it off at a polling place on Election Day.

Others have suggested that early in-person voting is an adequate substitute for voting by mail. While I fully support this opportunity, I disagree that it's a viable alternative to absentee voting. Like Election Day, early voting still involves waiting in line, limited hours, and few locations. Early in-person voting can also be highly burdensome for elections officials, who have difficulty securing early voting sites and staffing, and must provide hundreds of different ballot types at each location where paper ballots are used.

Voting by mail simply has a broader reach.

And Americans trust our Postal Service to carry out our most important of transactions, from handling our financial documents to seeing our ballot through to elections officials. In fact, the Pew Research Center found again this year that the Postal Service has higher favorability (83%) than any other federal agency in their survey.

That trust is why voters in my state of California and the twenty-eight other states with "no-excuse" absentee voting are increasingly voting by mail. In the 2008 general election, over 40% of California voters cast their ballots by mail. In 2004, that number was 32%, and in 2000 only 24%.

I took the right to vote absentee for granted until 2004, when a nurse from Ohio told me she could not vote for President because the polls there were only open from 7:00 AM to 7:00 PM, hours that overlapped with her commute and shift.

She called her elections office in advance to request an absentee ballot but was told her work was not a valid reason to vote absentee.

Since she would not abandon her patients, she did not vote.

Fortunately, Ohio has since changed its laws to allow no-excuse absentee voting, but twenty-one states still have not.

Hearing the nurse's story compelled me to take action.

The fact that some twenty-one states still require excuses to vote by mail is a problem on three levels.

First, voters in "excuse states" simply do not have as great an opportunity to vote as their counterparts in "no-excuse states" – this creates an unequal playing field when we're all voting for the same President and the same Congress.

Second, the excuse requirements are arbitrary impediments and they do not increase security.

For example, in Michigan, you can vote absentee if you're over 60, in Mississippi, you have to be over 65 and in Georgia you have to be over 75.

In Delaware, you even need to collect and pay for a notary signature to affirm that you'll be on vacation or are a student unable to vote in person.

In Tennessee, sick voters need a note directly from their doctor to the county election commission stating that they are medically unable to vote in person. And that's in addition to the letter a voter must write directly to the commission.

Even work doesn't count as a valid excuse in many states—and in some only certain work does. For example, in Alabama you can only get an absentee ballot if you work at least a ten hour shift. Unfortunately, your commute doesn't count.

And no state has a special exemption for parents of young children. I support parents who set an example for their kids by taking them the polls when possible, but any parent knows it's not always practical to stand in a long line with toddlers and then try to concentrate on a long ballot.

The third reason absentee excuses are a problem is that they violate our privacy for no good reason. Some people say a voter's privacy is at risk voting from home. There's not much evidence of that, and many people talk politics with their family anyhow. What is clear is the threat to privacy states pose when they request unnecessary information from individuals just to obtain a ballot.

For example, in Virginia you must state where you will be vacationing to get an absentee ballot. If you have a religious obligation, you have to explain that. If you are sick, you must list the nature of your disability or illness. If you are caring for someone else, you

have to list their illness. And, most surprisingly, if you are pregnant you must disclose that to the state.

All of this information becomes part of the public record. And elections officials tell me it is never verified. But if you forget to fill out any part of the request – "Sorry you can't vote."

The good news is we can fix all of these problems by passing the Universal Right to Vote by Mail Act.

As a former state and local elected official, I have great respect for the role of states and am always concerned about how federal law will affect local government. The great thing about this bill is that it merely expands a process every state already has. In fact, the bill would allow elections offices to *reduce* layers of bureaucracy and save money they spend having staff check for excuses and track supporting documentation.

Apart from that, the Congressional Budget Office indicates the bill would have no impact on the Federal budget and is not an unfunded mandate on the states because it regards basic Constitutional rights, namely the right to vote.

I want to emphasize that, like the Help America Vote Act, this measure clearly falls under Congress' authority under Article 1, Section 4, of the U.S. Constitution to make laws governing the place, time and manner of Federal elections.

In 1974, a Fulbright professor and his wife travelling overseas were denied an absentee ballot by their state and told by a state court that they had no right to an absentee ballot under state law. The decision of *Prigmore v. Renfro* made it clear that Congress would have to pass such a law for them to have that right.

Vote by mail is what the American people want. A recent study by the Election Assistance Commission showed that 65% of Americans think all voters should have the option to case an absentee ballot.

But if Congress does not act, millions of Americans will remain without the right to an absentee ballot. States have had decades to do this. Even some local elections officials, like the Michigan Association of County Clerks, have grown so frustrated by unsuccessful state-based efforts they are turning to Congress for a national no-excuse absentee law.

Since Kansas started no-excuse absentee voting in 1967, more than half the states and the District of Columbia have followed suit and no one has switched back. The case for a federal measure establishing the right to vote absentee is even stronger today than it would have been in the past. Whereas no-excuse absentee voting is now the law in half the country, the other half has been left with fewer options and less flexibility in casting their ballots for Congress and the Presidency.

Before I close, I also want to urge the committee to consider one more bill – HR 2510, the Absentee Ballot Track, Receive, and Confirm (TRAC) Act, a bill we recently passed in the House and is awaiting action here in the Senate. I introduced this bill along with my colleague, Congressman Kevin McCarthy. This bill is modeled on a successful law in California and would expand on the tracking language in the MOVE bill. It would provide state grants to set up absentee ballot tracking systems so voters can know whether their absentee ballot has been sent, received by the elections office, and has been counted.

I want to take this opportunity to express my deep gratitude to those groups and individuals supporting the Universal Right to Vote by Mail Act and the TRAC Act, many of whom have entered letters into the record here today.

I strongly believe this Congress must expand and improve absentee voting for all eligible voters, and extend a bedrock promise of our democracy – a vote for every citizen. Thank you Mr. Chairman for holding this important hearing, to the other panelists who will speak here today, and the staff that helped this happen.

Kate Brown
SECRETARY OF STATE

BARRY PACK
DEPUTY SECRETARY OF STATE

SECRETARY OF STATE
136 STATE CAPITOL
SALEM, OREGON 97310-0722
Phone 503-986-1523 & Fax 503-986-1616
www.sos@state.or.us

Statement by Oregon Secretary of State Kate Brown
Senate Committee on Rules and Administration
Executive Summary
May 5, 2010

Oregon started local vote-by-mail in 1981 and completed its implementation statewide after the passage of a 1998 ballot initiative. Since then, Oregon's vote-by-mail system has become a part of the State's political DNA.

Three points today about Oregon's experience:

- **It increases turnout.** The average turnout in the past three Presidential elections, all of which were completely vote-by-mail elections – 2000, 2004 and 2008 – were a full 6 percentage points higher than that of the final three elections conducted in the polling place.

- **It costs less.** The 1998 general election, the last one with polling places, cost $1.81 per voter. The cost of our January special election was $1.05 per voter, not accounting for inflation.

- **It's secure.** Since 2000, we've investigated thousands of fraud complaints, leading to nine criminal prosecutions. Voter fraud is a class C felony. The State has levied fines, sent people to prison and seen through deportations. Nine fraud cases out of 15 million mail ballots cast in the last ten years is not evidence of systemic, large-scale fraud.

We are proud of our vote-by-mail system and are encouraged by the willingness of Congress to discuss its merits. However, as excited as I am by the prospect of vote-by-mail going national, I know I have to temper my excitement in light of the long path we took to fully implement the system. Voters and election workers needed time to get comfortable with the new way of doing things.

Voters say they miss sharing the voting experience with neighbors, going to the school or the church or the neighborhood firehouse in this rite of citizenship. However, in Oregon, we have replaced one civic ritual with another. Families and groups of friends are gathering in homes, churches or libraries to discuss the issues and candidates on the ballot. Voters often tell me how they can now give more thought to filling out the ballot. They also like not having to stand in long lines at the polling place.

If Oregon's experience is any indication, vote-by-mail has the potential to affect our country's elections for the better.

END

Kate Brown
SECRETARY OF STATE

BARRY PACK
DEPUTY SECRETARY OF STATE

SECRETARY OF STATE
136 STATE CAPITOL
SALEM, OREGON 97310-0722
Phone 503-986-1523 & Fax 503-986-1616
www.sos@state.or.us

Statement by Oregon Secretary of State Kate Brown
Senate Committee on Rules and Administration

May 5, 2010

Thank you for the opportunity to address the Senate Rules Committee this morning about Oregon's vote-by-mail system.

I want to start by commending all of you on your efforts to discuss the merits of vote-by-mail, which has become a part of our political DNA in Oregon. I strongly believe that nothing we do is more important than making sure that voters have confidence that we are providing them with a world-class infrastructure for their democracy. Elections are the means by which the public grants government the power to make decisions that affect their lives. If the public loses confidence in the elections process, it can quickly lose confidence in the legitimacy of government itself.

We have now had over a decade of experience with vote-by-mail in Oregon. In 1998, 70 percent of voters approved a citizen initiative, making us a full vote-by-mail State. That means that few voters under the age of 30 have ever been in an Oregon voting booth.

In that decade we have seen the benefits of the system. I would like to highlight just a few of the ways that vote-by-mail has improved our elections experience.

Firstly, we have found that it increases turnout. The average turnout in the past three presidential elections, all of which were completely vote-by-mail elections – 2000, 2004 and 2008 – is a full 6 percentage points higher than that of the final three elections conducted in the polling place. In fact, 2008 and 2004 were banner years, ranking second and third highest in voter turnout in the history of the State.

It's not just State records we're after; 2008 also saw us place third nationally for voter turnout. What's more, turnout was especially high in our rural counties nearly all of which were above the state average. In fact, every one of our 36 counties saw turnout above 80 percent, with one surpassing the 90 percent threshold.

We think we're trending in the right direction when it comes to turnout and we know that vote-by-mail is a big part of that positive trend.

Secondly, it cuts costs.

The cost of the 1998 general election --the final election that utilized polling places-- was $1.81 per voter. By comparison, the cost of our most recent Special Election in January

was $1.05 per voter, and that's not accounting for inflation. These are real savings at a time when states across the nation are facing structural budget deficits.

And thirdly, it's secure.

The security of our democratic process has always been and must remain of the utmost importance. The vote-by-mail system does not sacrifice security for accessibility. Elections staff compare every signature, on every ballot, with the signature on the voter's registration card before the ballot can be counted. Each specialist responsible for checking signatures undergoes intensive training by the same company that trains the Oregon State Police in signature identification.

If a signature doesn't appear to match, the ballot is set aside and the voter is called and asked why. Sometimes there is a perfectly good reason; people's signatures do change a little with age or as the result of an injury. Sometimes the reason is unacceptable. In any case, fraud gets caught before the vote is counted.

We also ensure that even attempting fraud is deterred with a harsh penalty scheme. Before sending a ballot in by mail, potential voters must swear that the information they provide is true. Forging a signature or lying about qualifications - such as age, residency or citizenship - is a class C felony and can mean a $125,000 fine, five years in prison or, when relevant, deportation.

Since 2000, we've investigated thousands upon thousands of fraud complaints. They have led to exactly nine criminal prosecutions. We take this seriously. Vote fraud is a felony and the state has levied fines, sent people to prison and seen through deportations. Nine cases of fraud out of more than 15 million mail ballots cast in the last ten years is certainly not evidence of systemic, large-scale fraud.

We are proud of our vote-by-mail system and are encouraged by the Congress' willingness to discuss its merits. However, as excited as I am by the prospect of vote-by-mail going national, I know I have to temper my excitement in light of the long path we took towards fully implementing the system. In fact, it took 19 years, from the first local vote-by-mail election in 1981 to the first full general election conducted entirely by mail in the year 2000.

Other states may not have to take that long, but there's great wisdom in letting it develop slowly and carefully. It would be a mistake for any state to change voting procedures too quickly. Our slow transition allowed voters and the elections workers to get used to the new system.

In 1981, the Legislature approved mail voting as a pilot project only. One of my predecessors as Secretary of State, Norma Paulus, a Republican, was Oregon's first major proponent of vote-by-mail. It was optional and was reserved for local races. County clerks could decide for themselves whether or not to hold the park district or library district election by mail.

In those early days, we also allowed voters to sign up as permanent, no-excuse absentee voters. This process gave those interested the opportunity to sign up once to receive their ballots by mail for all future elections. Our county elections offices eventually found that more than half of the ballots received were being cast 'absentee,' by mail. In practice, our counties were holding two elections at once: one at the polling place and one by mail. It

was complicated and increasingly expensive. However, it was also instructive. Voters were sending a message and the message was clear: they liked voting by mail.

Even as the voting booth was still used throughout the 1980s for statewide primaries and general elections, increasingly, our local races for school boards and city councils were conducted entirely by mail.

It wasn't until June of 1993 that we held our first statewide election entirely by mail. During that election, a ballot measure was put to voters by the Legislature to approve the repayment of urban renewal district bonds. Not the most exciting ballot measure in our State's history, but it did serve to showcase vote-by-mail and had a 39 percent turnout, hardly a number to scoff at for a measure of that type.

Vote-by-mail really came of age in 1996 with the election to fill a vacancy in the U.S. Senate. It was the first time we used vote-by-mail for a statewide election featuring a Federal race and it drew considerable attention. Turnout was a very healthy 66 percent as current Senator Ron Wyden was sent to Washington.

Finally, the transition to vote-by-mail was completed in 1998, when a ballot initiative was passed by the citizens of Oregon. It required our elections officials to use vote-by-mail for each and every election: from the smallest park district race, to the general election.

One typical knock I hear on vote-by-mail is that voters miss out on the shared experience of voting amongst their neighbors; going to the school gymnasium or to the church, or the neighborhood firehouse for this common rite of citizenship. And it's true; in Oregon, voters no longer take part in that time-honored ritual. However, we have replaced one civic ritual with another. With vote-by-mail, a family can sit around the kitchen table, talk about the issues surrounding a ballot initiative, or the merits of candidates, and make their decision right then and there. Voters often tell me how now they can give more thought to filling out the ballot. They also like not having to stand in long lines at the polling place.

If Oregon's experience is any indication, vote-by-mail has the potential to affect our country's elections for the better. I would like to once again to thank Senator Schumer and the Committee for giving me the opportunity to share Oregon's vote-by-mail experience.

END

Oregon Secretary of State Kate Brown

The Office of Secretary of State is one of three constitutional offices established at statehood. The Secretary of State is the custodian of the state seal and oversees the functions of seven divisions. As auditor of public accounts, the Secretary evaluates and reports on the financial condition and operations of state government and administers the Municipal Audit law. The Secretary of State is the chief elections officer. She is responsible for uniformly interpreting and applying state election laws. She also acts as the filing officer for state offices, initiative and referendum petitions, campaign finance reports and other election documents. In addition, the Secretary publishes and distributes the Voters' Pamphlet and investigates and prosecutes election law violations. The Secretary is the public records administrator for Oregon, a role that includes preserving official acts of the Legislative Assembly and state agencies, supervising the state archivist, publishing the administrative rules for state agencies and producing the Oregon Blue Book. The Secretary of State registers domestic and foreign corporations assumed business names, and trade and service marks. The Secretary prepares notarial applications and serves as filing officer for Uniform Commercial Code transactions. The Secretary of State serves with the Governor and State Treasurer on the State Land Board, managing state-owned lands for the benefit of the Common School Fund. She also serves as chair of the Oregon Cultural Trust Board.

Biography

Kate Brown was born in Torrejón de Ardoz, Spain, on June 21, 1960. After spending most of her childhood in Minnesota, Brown earned a B.A. in Environmental Conservation with a certificate in Women's Studies from the University of Colorado at Boulder. She earned her law degree and Certificate in Environmental Law from the Northwestern School of Law at Lewis and Clark College in Portland, OR.

Brown has taught at Portland State University, and practiced family and juvenile law. She was appointed to the Oregon House of Representatives in 1991 and in 1996, after winning election to two more House terms, won election to the Oregon Senate. Two years later, she was elected Senate Democratic Leader and in 2004, senators made her the first woman to serve as Oregon's Senate Majority Leader. In 2008, she was elected Oregon's 24th Secretary of State.

In her legislative career, Brown led successful efforts to make Oregon's state government open and accessible by taking legislative committee meetings to communities around the state. She also ensured funding for a comprehensive review of Oregon's ethics laws, spearheaded legislation creating a searchable online database of campaign contributions and expenditures and reformed Oregon's initiative process to reduce fraud and protect the citizen's right to petition their government. In a recent effort to make registering to vote more accessible to Oregonians, Brown oversaw the development and implementation of an on-line voter registration system.

Secretary Brown lives in Portland with her husband Dan.

One Page Summary of John Fortier's Testimony

Absentee Voting has increased dramatically over the past thirty years as a number of states have encouraged its use as a form of convenience voting rather than just a method of voting for those who have reason to be away from the polls. In the past fifteen years, early in person voting has also increased substantially. It is the leading alternative to absentee or mail voting as a form of convenience voting before Election Day. Through voting by mail and voting early in person, nearly one third of Americans voted prior to Election Day in 2008.

Even though there has been a dramatic expansion of voting before Election Day, there is a great variety of adoption of early voting across the states. Some states have little early voting of either kind, some with a lot of one kind and not the other and some states with substantial voting by mail and in person early voting.

If I were advising a state legislature on how to proceed, I would argue for states to look more seriously at expanding in person early voting rather than absentee voting by mail. In person early voting has the benefit of the protections of the polling place that mail voting lacks. These include, better protection of the secrecy of the ballot and less likelihood of coercion of votes, better protection of the chain of custody of the ballot and fewer opportunities for fraudulent casting or interception of the ballot, and greater opportunities for voters to catch voter errors on the ballot. But caution should be taken with both voting by mail and early in person voting to make sure that the voting period is not so long that voters cast their votes before important events like candidate debates have taken place.

My recommendations to you, not as a state legislative chamber, but as the United States Senate, is not to impose one solution on states which are doing very different things with regard to absentee and early in person voting. For example, requiring states to offer mail ballots to anyone who wants them would impact states which deliberately limit voting by mail to those who need it and promote easy access to voting early in person. Similarly, a state like Oregon, which votes all by mail, should not be forced to open up in person early voting polling places, if it is happy with its current arrangement.

Finally, caution on imposing increased voting by mail on states does not mean that Congress should not be interested in improving the way mail ballots are offered in all of our states. Even though states differ widely on the percentage of their citizens who vote by mail, every state allows some voting by mail, at least for those who have a reason to be away from the polls. Every state might be encouraged to improve its absentee voting, which might include improved signature checking, more consistent local administration of absentee ballot rules, reduction of opportunities for voter error on absentee ballots, and improving the ability of voters to check if their mail votes have been accepted.

Testimony of John C. Fortier, American Enterprise Institute

Before the Senate Committee on Rules and Administration

Voting By Mail: An Examination of State and Local Experiences

May 5, 2010

Room 301

Russell Senate Office Building

Thank you to the Chairman, the Ranking Member and other members of the Senate Rules Committee for holding this important hearing and inviting me hear today. The subject of absentee voting is one that is an essential part of our electoral process. And the rise of absentee voting as well as that of in person voting has been both striking and little noticed.

In this testimony, I will elaborate on seven key points.

1. Absentee voting or voting by a mail ballot has expanded greatly over the past thirty years
2. Absentee voting is not the only form of early voting, as early in-person voting has also expanded dramatically in recent years
3. The variety of practices across the states is vast. Some have very little absentee or early voting. Others have a lot of one, but little of the other. And some states have a lot of both. And states that do have substantial early and absentee voting vary widely in how they conduct this voting.
4. One great promise of voting before Election Day was that the convenience of such voting would increase voter turnout. But many studies have shown that there is little or no turnout increase from voting absentee or voting early in person.
5. Aside from turnout, both early and absentee voting have often proved popular among voters and election officials when adopted.

6. There are some potential negatives to absentee voting, which include the loss of the secret ballot and the possibility of coercion of votes, the greater opportunities for voter fraud from the transmission of the ballot, the possibility that mail ballots will not be properly counted, and the prospect that voting in advance of election day will cause voters to miss important campaign information and will diminish Election Day itself.
7. There are practical aspects of voting by mail that are taken seriously by some states, but should be taken seriously by all states including tracking ballots, reading signatures, and informing voters if their votes have been counted.

The Dramatic Rise in Absentee Voting Over the Past Thirty Years

The first major use of absentee voting was during the civil war when a large percentage of the voting eligible population were soldiers in the field away from their home precincts. After this short period of military absentee voting, the next great movement to allow absentee voting began on a state-by-state basis at the beginning of the twentieth century. With a more mobile country, states found that there were significant numbers of people who were not able to cast ballots in person, and they began to gradually allow civilian and military absentee voting for specific reasons such as illness or infirmity or being out of town on Election Day. While the twentieth century saw a broadening of the reasons for voting absentee, the percentage of voters casting an absentee ballot was

relatively small as late as the 1970s. Approximately 5% of voters in most states cast absentee votes and these were primarily people who were out of town on business, living overseas, or not well enough to come to a polling location.

In the late 1970s, several states, especially western states began to shift the paradigm of absentee voting. Instead of viewing it as a way to vote for those who could not make it to a polling place, these states began to allow or even encourage voters to vote an absentee ballot for convenience, not necessity. With that change, the number and percentage of ballots cast by absentee has gone up steadily over each presidential election. In 2004, approximately 14.5% of votes were case absentee. In 2008, the percentage had risen to 19.9%.

A Similarly Dramatic Rise in In-Person Early Voting

While voting by absentee ballot has risen significantly, a second form of voting early has likewise taken off. Before the 1980s, there was a small, hard to measure amount of voting early in person taking place in states. A state might have allowed an absentee ballot to be cast in person or a voter wanting an absentee ballot to come to a clerk's office to cast a vote in a voting machine. But it was not until the 1980s and early 1990s when several states, Texas and Tennessee in particular began to expand the possibilities for voting early at a polling place.

Early Voting in Person is a smaller phenomenon than voting by mail, but it is growing even more rapidly. In 2004, approximately 7.6% of American voters cast their vote prior to Election Day at a polling location. In 2008, that percentage reached 13.2%.

	Total Ballots	Absentee Ballots	%	Early in Person Votes	%
2004	123,440, 276	17,938, 235	14.5%	9,336,486	7.6%
2008	132, 561, 371	26,312, 399	19.9%	17,511,291	13.2%

Great Variety Among States

While the growth in voting before Election Day is dramatic, it is by no means uniform. Some states today still look like they did 30 years ago when it comes to absentee voting. They have very little of it and that vote tends to be those out of town on business, over seas voters and those who are unable to get to a polling place due to illness or infirmity. And they have very little or no early voting in person at polling locations. New York is an example of such a state with less than 5% absentee voting and less than 1% voting early in person.

Some states have tremendous amounts of voting by mail and little voting early in person. Oregon has more or less move away from polling places and conducts its elections by mail. Washington state is not far behind with nearly 90% of its votes cast by mail in 2008.

States such as Tennessee, Texas, Georgia and North Carolina have over 40% of voters cast their votes at early voting polling locations, but have modest numbers of people voting by mail.

And finally, states like New Mexico and Florida have over 20% of their votes cast by mail and also over 20% early in person.

And in addition to these great differences in the way people vote from state to state, there are endless variants of how states conduct absentee and early voting. The period of time for voting by these alternative methods varies. The number, location and size of early voting polling locations differs. Practices for counting votes, notifying voters, checking signatures also vary.

Absentee Voting and In Person Early Voting Do Not Increase Turnout

Perhaps the most forceful reason for encouraging voting before Election Day is that with the added convenience to be able to vote on several days and, in the case of a mail ballot, to be able to vote from the convenience of your kitchen table, that this convenience will lead to more eligible voters casting their votes.

But while the hope for a rise in turnout is still cited as a justification for voting by mail or voting early, research on this topic has not borne out this hope.

In my book, Absentee and *Early Voting: Trends, Promises, and Perils,* I reviewed a number of studies on this subject, and the conclusion is clear. In anything but very low turnout local elections, absentee and early voting do not increase turnout. Studies continue to be done, and this is a common finding. Essentially the same people who would go to a polling place to vote on Election Day are motivated to vote by mail or to show up at early voting polling places. New voters are not attracted to elections because of these processes.

There is one caveat. In smaller, very low turnout elections such as a local referendum or election, voting by mail can increase turnout. In this case, regular voters, who vote in presidential, congressional or statewide races are less likely to vote in person on election day for low turnout referenda or local elections, but they do participate at a higher rate in these low turnout elections when they are mailed a ballot.

The evidence against the rise in turnout from early and absentee voting is not a sufficient reason to reject various forms of voting before Election Day. But the aims of those who want to move toward more mail and early voting should be moderated and not rely on its increase in turnout.

Other Reasons for Absentee and Early Voting

While turnout might not be positively affected, voting by mail or early in person may still be more convenient for the voter. Convenience might be a good in itself, not just a means to greater voter turnout.

And several studies have shown that, once implemented, voting by mail and voting early in person become popular in the states where they are adopted.

And election administrators make several arguments in favor of these practices. One is that voting early reduces the crush on resources on a single election day. If voters can vote over a several day period, then election administrators may need fewer poll workers and voting machines and might be able to use permanent and experienced election staff more effectively.

Another argument made by proponents of elections held exclusively through the mail is that a state is more efficient if it has one system of voting, rather than trying to maintain several. A number of states have significant in person voting as well as significant early voting and voting by mail.

A final argument that surrounds the practices of voting by mail and voting early in person is the question of cost. On this issue, I urge you to be careful in assessing claims about cost. Because of the very different ways states conduct voting, it is very hard to get a

handle on the costs of voting on Election Day versus voting by mail or voting in person early. The answer depends on the fraction of voting that is conducted on election day, by mail and early. By how long a period of early or mail voting is allowed. By the number, size and type of early voting locations. By whether states and election officials must pay rent for voting sites or if they receive them for free. Even though, it is an important question about the cost of various election administration strategies, we really don't know how to assess their cost.

Reasons to be Skeptical of Voting by Mail

To consider objections against voting by mail, it is helpful to return to the early reformers who sought to introduce absentee balloting in the first half of the twentieth century. These reformers saw the need for absentee ballots in a country that was becoming more mobile. They saw the injustice of someone being unable to vote if he or she was prevented from appearing at a local polling place. But these reformers sought to balance their desire to introduce absentee ballots with the protections of the polling place which had been introduced in another voting reform movement.

At the end of the nineteenth century, there was a successful state by state effort to introduce the Australian or private ballot. The aim of this reform was to protect voters from others who would see their ballot and be able to directly influence their vote. The most egregious cases of this kind of electoral pressure came from big city political machines. City workers might be forced to march into the polls carrying a colored coded

ballot which would be put into a transparent jar. The vote of that worker was there for all to see, and future employment or other rewards or punishments might depend on such a vote.

The answer to these abuses for reformers was the secret ballot. Government would produce a ballot, and voters would cast it alone behind a privacy screen.

The next generation of reformers who wanted to institute the absentee ballot, also wanted to retain these important privacy protections, but worried that a mail ballot is by definition not a secret ballot. So they instituted absentee ballots that required voters to go to a notary public, show that person a blank ballot, and then cast it in a place where the notary public could affirm that no person had coerced that vote.

Witnesses and notary public requirements are seen by many today as an antiquated inconvenience. But they were intended to protect the privacy of the ballot while allowing those who could not get to the polling place to cast a vote. And while the excesses of machine politics in the nineteenth century may not be with us today, it is not hard to imagine pressure put on a voter from a spouse, church, employer, union or direct supervisor. Or one can imagine an unscrupulous partisan taking advantage of a senior citizen in "helping" them fill out a ballot. All of these scenarios disappear when a pressured voter goes into a polling booth, pulls the curtain so prying eyes cannot see, and thumbs his nose at those who would pressure him.

Another reason for doubting the expansion of mail ballots is that mail ballots add another step to the voting process that might open the process up to fraud. Ballots need to be transmitted to the voter and then back to election authorities. Not only are there sometimes problems of voters not receiving their ballots on time, but there have been documented cases of individuals falsifying absentee ballot applications or intercepting absentee ballots in the mail.

The recent closely contested senate election in Minnesota between Senator Al Franken and former senator Norm Coleman highlighted several difficulties with the way absentee ballots are counted. Both sides of the election dispute had something to complain about with regard to absentee ballots. First, a surprising number of absentee ballots were not counted because they did not have very simple information on the outside of the envelope. State laws on these requirements differ, but for example, if you forgot to sign your ballot envelope, your ballot might be thrown out. In addition, both sides pointed to inconsistent local administration of how to handle absentee ballots. Some counties did not count ballots that should have been counted because of a misunderstanding of what was needed on the envelope. Also, some counties did count absentee ballots which did not meet all of the requirements for counting.

In addition to the problem of ballots discarded because of problems with the envelope, absentee ballots might contain mistakes on the ballot which the voter has no way to go back and correct, unlike at a polling place where voters are prompted to correct certain

errors by voting machines or they are not allowed by the machine, for example, to vote for multiple candidates for the same race.

In all of these ways, voting early at a polling place is a superior method of voting to voting by mail. If states want more convenience for voters and an election spread over more days, then early voting at polling places can accomplish these aims while still protecting the secrecy of the ballot, the chain of custody of the ballot and the ability of voters to correct their voting errors.

One final consideration applies to both early voting in person and voting by mail. With an extended election, it is inevitable that voters may have already voted before key parts of the campaign unfold. It is not uncommon, for example, for candidates to hold debates long after the first day you can file an absentee ballot or go to an early voting center. And some believe that voting over a long period of time waters down the civic importance of Election Day.

This last concern affects both mail voting and early in person voting, although generally the period for voting by mail starts earlier than the period of extensive in person voting sites.

Improving Absentee Balloting

Every state has a need for absentee ballots. Some states promote it as a convenience to voters. In both of these cases, states need to professionalize the manner in which they handle mail voters. Sometimes states with large numbers of mail ballots have taken their responsibilities seriously, and states with only a handful of mail ballots might learn something from their example.

Some states, for example, have thorough procedures for checking every voter's signature on the mail ballot envelope. Others are much more sporadic in their checks. In addition, some states have moved to allow individual voters to learn if their mail ballots were counted.

Another area that cries out for is the differential local treatment of absentee ballots that exists in some states.

Congress need not tell states that they must adopt more voting by mail, but it should consider ways it can help states treat their absentee ballots professionally, whether a state has 100% mail voting or less than 5%.

Conclusion

Congress is right to consider how states are moving toward greater amounts of absentee and early voting. If you were a state legislative body, this choice might be even more stark. Each election cycle, several states consider whether to move away from more traditional Election Day voting to various convenience methods. I would urge such states to move carefully into this area. There are a variety of options, and each change will take time and practice to implement.

More specifically, if states are inclined to adopt convenience voting before Election Day, I would recommend that they consider implementing early voting at polling places. This form of early voting preserves the protections of the Election Day polling place, especially the secrecy of the ballot and the chain of custody of the ballot.

But for Congress, I would also recommend not weighing in in favor of a particular method of early voting. Bills like H.R. 1604 to require all states to offer mail ballots to those want them would force state to make a choice of methods. It would, for example, impose voting by mail on some states which have chosen to actively encourage early voting at polling places and to reserve mail ballots for those who have a need for them. Just as states like Texas and Georgia would have to change the way they run elections, so would Oregon likely oppose a federal statute that required each state to provide extensive in person early voting sites in each state.

Given the amount of change in the states and the state legislative debates that surround this issue, it would not be wise for Congress to stifle those debates and impose one solution on states.

On the other hand, while Congress should not force states to increase the number of their voters who vote buy mail, it might weigh in on how states handle their absentee ballots. Even states which have small amounts of absentee voting should take their responsibilities for dealing with absentee ballots seriously. States which have large percentages of their votes cast by mail often recognized the issues surrounding mail ballots. They have invested resources and developed policies for checking signatures, informing voters of mistakes made on ballot envelopes, and allowing voters to determine whether their mail ballots were counted.

In a nutshell, Congress should not force states to move toward a regime of extensive absentee voting, but it should consider ways to ensure that states improve the process by which they handle mail ballots.

APPENDIX I ABSENTEE AND EARLY VOTING IN 2008

State	Total ballots cast	Absentee and early combined		Total absentee		Total early	
Alabama	2,105,622	87,284	4.15%	87,284	4.15%		
Alaska	327,341	98,112	29.97%	73,600	22.48%	24,512	7.49%
Arizona	2,320,851	1,225,787	52.82%	1,182,667	50.96%	43,119	1.86%
Arkansas*	1,086,617	418,000	38.47%	33,000	3.04%	385,000	35.43%
California	13,743,177	5,956,736	43.34%	5,813,440	42.30%	143,296	1.04%
Colorado	2,422,538	1,888,187	77.94%	1,523,217	62.88%	364,969	15.07%
Connecticut	1,644,845	174,624	10.62%	174,624	10.62%	0	0.00%
Delaware	412,412	22,069	5.35%	22,069	5.35%	0	0.00%
District of Columbia	266,871	27,955	10.48%	27,955	10.48%	0	0.00%
Florida	8,456,329	4,609,452	54.51%	1,947,780	23.03%	2,661,672	31.48%
Georgia	3,924,486	2,084,179	53.11%	300,016	7.64%	1,784,163	45.46%
Hawaii	456,064	175,526	38.49%	122,868	26.94%	52,658	11.55%
Idaho	667,506	197,222	29.55%	138,055	20.68%	59,167	8.86%
Illinois	5,577,509	1,161,678	20.83%	289,517	5.19%	872,161	15.64%
Indiana	2,805,986	670,588	23.90%	670,588	23.90%	0	0.00%
Iowa	1,546,453	588,765	38.07%	588,765	38.07%	0	0.00%
Kansas	1,235,872	299,168	24.21%	299,168	24.21%	0	0.00%
Kentucky	1,826,508	115,916	6.35%	115,916	6.35%	0	0.00%
Louisiana	1,980,377	292,481	14.77%	38,272	1.93%	254,209	12.84%
Maine	744,456	230,744	31.00%	230,744	30.99%	0	0.00%
Maryland	2,621,742	208,201	7.94%	208,201	7.94%	0	0.00%
Massachusetts	3,102,995	204,401	6.59%	204,401	6.59%	0	0.00%
Michigan	5,039,080	1,271,240	25.23%	1,271,240	25.23%	0	0.00%
Minnesota	2,920,214	292,546	10.02%	292,546	10.02%	0	0.00%
Mississippi	1,289,865	236,385	18.33%	236,385	18.33%	0	0.00%
Missouri	2,925,205	325,201	11.12%	325,201	11.12%	0	0.00%
Montana	497,599	197,505	39.69%	197,505	39.69%	0	0.00%
Nebraska	811,923	176,803	21.78%	176,803	21.78%	0	0.00%
Nevada	970,019	649,109	66.92%	87,337	9.00%	561,772	57.91%
New Hampshire	719,568	72,056	10.01%	72,056	10.01%	0	0.00%
New Jersey	3,868,237	238,635	6.17%	238,635	6.17%	0	0.00%
New Mexico	833,365	519,295	62.31%	172,136	20.66%	347,159	41.66%
New York	7,591,233	374,697	4.94%	355,898	4.69%	18,799	0.25%
North Carolina	4,310,789	2,638,915	61.22%	227,799	5.28%	2,411,116	55.93%

North Dakota	321,133	119,467	37.20%	76,550	23.84%	42,917	13.36%
Ohio	5,773,777	1,935,822	33.53%	1,714,454	29.69%	221,368	3.83%
Oklahoma	1,462,661	235,483	16.10%	149,880	10.25%	85,603	5.85%
Oregon	1,845,251	1,845,251	100.00%	1,845,251	100.00%	0	0.00%
Pennsylvania	5,995,137	257,791	4.30%	257,791	4.30%	0	0.00%
Rhode Island	469,767	30,199	6.43%	30,199	6.43%	0	0.00%
South Carolina	1,927,153	341,747	17.73%	341,747	17.73%	0	0.00%
South Dakota	387,449	97,582	25.19%	68,307	17.63%	29,275	7.56%
Tennessee	2,618,238	1,569,772	59.96%	63,929	2.44%	1,505,843	57.51%
Texas	8,059,731	5,262,846	65.30%	377,554	4.68%	4,885,292	60.61%
Utah	971,185	361,093	37.18%	85,889	8.84%	275,204	28.34%
Vermont	326,822	94,668	28.97%	66,268	20.28%	28,400	8.69%
Virginia	4,301,575	548,038	12.74%	383,627	8.92%	164,411	3.82%
Washington	3,071,587	2,733,017	88.98%	2,733,017	88.98%	0	0.00%
West Virginia	736,799	173,361	23.53%	18,409	2.50%	154,952	21.03%
Wisconsin	2,983,417	447,513	15.00%	313,259	10.50%	134,254	4.50%
Wyoming	256,035	40,580	15.85%	40,580	15.85%	0	0.00%
TOTAL	**132,561,371**	**43,823,695**	**33.06%**	**26,312,399**	**19.85%**	**17,511,291**	**13.21%**

NOTES:

Sources: The Election Assistance Commission Survey and data provided by individual states

In several cases, where states did not provide data or when they did not break down their absentee and early voting statistics, we made assumptions.

Assumptions

Pennsylvania - we assumed 4.3% of the vote was absentee, using our 2004 estimate

Wisconsin - we assumed 15% of the vote was combined absentee and early and estimated 70% absentee and 30% early

Oregon - we assume 100% of voting was absentee mail ballots

In Alabama, Kansas, Michigan, Nebraska, and Washington when these states did not differentiate between absentee and early voting, we assumed that all of these early votes were by absentee ballot

In Hawaii, Idaho, South Dakota, Vermont and Virginia when these states did not differentiate between absentee and early voting we assumed this early voting was 70% absentee and 30% early in person.

And finally, states like New Mexico and Florida have over 20% of their votes cast by mail and also over 20% early in person.

And in addition to these great differences in the way people vote from state to state, there are endless variants of how states conduct absentee and early voting. The period of time for voting by these alternative methods varies. The number, location and size of early voting polling locations differs. Practices for counting votes, notifying voters, checking signatures also vary.

The United States has undergone a revolution in voting over the past thirty years. Although we still talk of one election day, the rise in absentee and early in person voting means that we really have a series of days on which people vote. Roughly one third of Americans voted before Election Day in 2008. But that number does not tell the full story by itself. There is both great variety in the ways in which Americans vote early, and states have very different levels of voting early. Roughly 17.5% of the country cast an early ballot by mail and another 12.9% cast early ballots in person at a polling location. And even these numbers are not precise because of the variety of practices. Some states allow early voting in person only at a clerks office. Others have many satellite locations. Some states allow mailed ballots to be mailed back, dropped off or handed in person. Some states have a short period of early in person voting, others have longer periods.

John C. Fortier

John C. Fortier is a Research Fellow at the American Enterprise Institute. He has been the principal contributor to the AEI-Brookings Election Reform Project since 2005 and has served as executive director of the Continuity of Government Commission since 2002. In July 2008, he was named the first director of the Center for the Study of American Democracy at Kenyon College. Mr. Fortier writes a column for Politico, commenting on current events in U.S. politics, and is a contributor to Politico.com's "The Arena" forum. He has testified before Congress on issues concerning continuity, representation for the District of Columbia, and absentee voting.

Mr. Fortier is a frequent radio and television commentator on the presidency, Congress, and elections, having made appearances on CNN, Fox News, BBC, ABC's Nightline, PBS's News Hour, and NBC's Today Show. He has been an analyst for AEI's Election Watch series for each election cycle since 2002. A political scientist who has taught at the University of Pennsylvania, University of Delaware, Boston College, and Harvard University, Mr. Fortier has written numerous scholarly and popular articles. His articles have been published in The Hill, Los Angeles Times, Washington Times, Roll Call, American.com, Election Law Journal, Review of Politics, and PS: Political Science and Policy. His books include Absentee and Early Voting: Trends, Promises, and Perils (2006), After the People Vote: A Guide to the Electoral College (editor; 2004), and Second-Term Blues: How George W. Bush Has Governed (editor; 2007). Mr. Fortier received his B.A. from Georgetown University and his Ph.D. in political science from Boston College.

Testimony of Rokey W. Suleman, II
Executive Director of the District of Columbia Board of Elections and Ethics
to the Senate Committee on Rules and Administration on
Voting by Mail: An Examination of State and Local Experiences.
Wednesday, May 5, 2010.

Good morning, Mister Chairman, My name is Rokey W. Suleman, II and I am the Executive Director of the District of Columbia Board of Elections and Ethics. I am pleased to speak with you today about my thoughts regarding no-fault absentee voting.

Universal access to an absentee ballot is something that should be available to every U.S. citizen. I have been an election official in a state with universal access to an absentee ballot (Ohio), an official in a state that severely restricts absentee ballot access (Virginia) and am currently the chief election official in the District of Columbia; a jurisdiction that is now making the transition from excused-based absentee voting to no-excuse absentee voting. I can speak with first-hand experience to the administrative difficulty that results in restricting ballot access through the mail.

Demands on the lives of our voters have grown as our country has grown. We owe it to our citizens to give them as much access to a ballot as they request. No-fault absentee voting does just that in a place that is very convenient-their home. Some people argue that a vote-by-mail system erodes a community's sense of civic duty. That a ballot received through the mail is equal to 'junk mail' received on a daily basis. I disagree. I believe that voting by mail gives families as much as an opportunity, if not more so, to educate their children about voting. Not every parent has the luxury to have their children tag along to the polls with them on Election Day. With vote-by-mail, families can sit around the kitchen table and discuss issues and candidates. Parents can discuss with their children how they reached their decision and mark their ballot.

I have been an election official in three different jurisdictions. My experience in Virginia has led me to believe that we must have a national no-fault absentee ballot bill.

Virginia places significant restrictions on access to an absentee ballot through the mail. A person must meet one of numerous requirements in order to vote absentee, either in-person or via the mail. A voter must check a box on the form and also give supporting information for their reason. For example, a voter must check "Personal Business or Vacation" and then list the place that they are visiting. Failure to list the location results in a mandatory denial of an application.

Medical reasons for requesting an absentee ballot through the mail also require supporting information. If a person does not list the nature of their illness on the application, the application must be denied. The medical reason to vote absentee may be very personal and subject the voter to public embarrassment. Absentee applications are records available to inspection by the public. There is some thought that the Health Insurance Portability and Accountability Act of 1996 (HIPPA) may apply to these documents as well. Election officials have received no guidance in how to balance the

right to privacy against the freedom to information regarding these documents. We face the prospect of serious litigation in the future if these requirements are still in place. This bill will render that issue moot.

Requiring an excuse to vote absentee also places a significant administrative burden on local election officials. The denial rate in my office for absentee applications is very high. A significant number of voters check a reason but do not supply the supporting information. My staff has to review each application for completeness. Failure to properly complete the form requires a notice to the voter informing them of the deficiency and supplying a new application. This is all done by hand.

During the November 2008 general election season my former office denied thousands of applications because of simple failures to supply burdensome information. There were several file drawers filled with applications that were denied. Some voters were denied multiple times before submitting a properly completed application. This took thousands of dollars out of our budget for the increase in man-hours, postage and supplies needed to process these applications. This is a tremendous waste of valuable tax dollars. No-excuse access to a ballot through the mail would have saved that office thousands of dollars in processing and overtime costs.

Some opponents of "no-excuse" absentee voting by mail claim a person should be able to fill out a form properly and failure to do so should disqualify their vote. I have had to deny applications to former US Congressmen and current US Supreme Court Justices because of failure to supply supporting information. If these educated folks make mistakes, imagine the mistakes made by a 90 year-old voter that has difficulty reading or writing.

The transition from excuse-based absentee voting to no-excuse absentee voting in Ohio caused no problems or increased fraud. It is my professional opinion that increased access to ballots through the mail does not lead to an increase in voter fraud. The numbers I have seen just do not support the assertion. What universal access through the mail does is give a voter another option in casting a ballot. An option that more and more voters across the country desire.

There are some issues that have been associated with no-fault absentee voting. In 2008, many voters in Ohio upset that they cast absentee ballots early in the presidential primary only to have their candidate drop out of the race. That is not a fault that should be attributed to voting 'early" or "absentee.' That is a fault of the primary selection process of both parties. It should not be used as an excuse to prohibit vote-by-mail or no-fault absentee voting.

There are other benefits to vote-by-mail. Election officials will also be able to take advantage of technology to let a voter know where their ballot is. By placing barcodes on both the original and return envelope, my office in the District will have the ability to tell every absentee voter the status of their ballot on our website up to the point the ballot is on the vehicle of their postal carrier. This process would be easily extended to

all vote-by-mail ballots at nearly no cost. This process is expected to significantly reduce the number of "where is my ballot?" calls to the office which in turn will reduce staffing costs. This combination of convenience and technology will be a tremendous benefit for the voters in the District.

It is my belief that the District will start to see such a shift to early and no-fault absentee voting that we will be able to combine precincts. This will provide my office with the thousands of dollars in savings from poll worker reduction, reduced training costs, fewer poling location rental fees and less overtime.

No-fault absentee voting is a concept that's time has arrived. Voters like the ease of use. Election officials as well as their funding authorities appreciate savings realized in the elimination of polling locations. This is a good government bill. This bill will save taxpayer money and provide greater access to our government. It is a bill that's time has arrived.

I thank you for this opportunity to testify and will gladly answer any questions that you may have.

Biography of Rokey W. Suleman, II

Rokey W. Suleman, II is the Executive Director of the District of Columbia Board of Elections and Ethics. As the chief election official for the District of Columbia, Mr. Suleman is actively engaged in voting issues across the country. Prior to serving the citizens of the District, Mr. Suleman was the General Registrar of Fairfax County, Virginia's largest election jurisdiction and the Deputy Director of the Trumbull County Board of Elections in Trumbull County, Ohio. In Ohio, Mr. Suleman served as a reviewer for the EVEREST Report-a top-to-bottom review of Ohio's election system.

Mr. Suleman is a Certified Elections\Registration Administrator through the Election Center. He is a member of the Election Center and the National Association of State Election Directors and represents the District of Columbia on the US Election Assistance Commission Standards Board. Prior to coming to the District, Mr. Suleman served on the legislative committees of both the Virginia Registrars association and the Ohio Association of Election Officials, where he was also Second Vice-President. He has served as an election observer in missions to Kazakhstan and Macedonia for the Organization for Security and Cooperation in Europe(OSCE). Mr. Suleman has a bachelors in History from Youngstown State University and a Masters in Public Administration from the University of Akron.

Submitted for the record by Senator Wyden

A RARE VIEW OF POLITICS BEHIND BARS

The Oregonian, (Portland, OR) - Thursday, December 24, 1992
Author: *STEVE DUIN - of the Oregonian Staff*

Sometimes, much to Dave Werschkul's regret, there is room at the inn.

There was room for him in Gold Beach, and talking about that hospitality -- almost a year later -- doesn't do much to fill Werschkul with Christmas spirit.

But his story should provide some holiday cheer for state Sen. Peg Jolin, Rep. Kelly Clark, and yes, even Sen. Bob Packwood. For his crimes and indiscretions, Werschkul went where none of them have gone, or plan to go:

He went to jail.

Of all the politicians who have erred recently, Werschkul is the least infamous. The same could be said for his crimes.

The former Curry County commissioner was not found guilty of 15 counts of undue influence and theft, as Jolin was. He did not plead guilty to misdemeanor charges of trespass and sexual abuse, as Clark did.

And Werschkul didn't leave his fingerprints on a dozen unsuspecting women, as Packwood admits he has done.

No, Werschkul simply forged his wife's name on a mail-in ballot, then lied about doing so. Because the former is a felony, Werschkul was not allowed to duck out of sight and lick his wounds in private.

Instead, he spent 10 days in stir.

Experts on jailhouse room availability argue that Werschkul's misfortune was to commit his crimes in Curry County. The only reason Jolin didn't serve time is that the Lane County jail is overbooked.

No one is arguing, I hope, that the world is a more dangerous place because Jolin and Clark escaped with probation, fines, and community service.

But the world didn't become a less dangerous one when Werschkul disappeared behind bars. Many politicians may deserve the whip of that humiliation, but only Werschkul has felt the lash.

Werschkul's problems began on the roof of his Agness farm in March, 1991. That's where his wife, Sue, was standing, and cleaning their chimney, when she slipped and fell to the ground, breaking her back.

She was recovering from surgery in a Medford hospital two days later, when Werschkul asked

her if he should sign the ballot that had arrived for her in the mail.

The ballot was for Werschkul's recall from his seat on the county board of commissioners. Werschkul was never one of the good ol' boys of county politics and the recall -- which failed miserably -- was the good ol' boys' revenge.

Sue Werschkul told him to sign her name. She had other worries.

A curiously alert county election worker noticed that Sue Werschkul's signature didn't match the one on file. Asked to explain, both Werschkuls insisted Sue had signed her own ballot.

Why the lie? ``Politicians by nature are geared not to admit mistakes," Werschkul said. ``We are programmed not to be candid. We're programmed to hedge our comments, and in my case, the hedging turned out to be a bald-faced lie."

Bad as that was, Werschkul never thought he'd end up in jail. The sinners in spousal signature cases never do. But on Nov. 26, 1991, Werschkul was found guilty of making a false statement.

Circuit Court Judge Richard Barron could have treated the offense as a misdemeanor. Instead, he hammered Werschkul with a felony -- which led to his removal from office -- and sent him to jail.

The jail at Gold Beach ain't San Quentin, but neither is it San Clemente. Werschkul was locked up in a 30-foot by 30-foot dorm room with 10 other guys, most of whom were hibernating on substance-abuse charges.

The lack of privacy was brutal, but the food wasn't bad and the company was tolerable. ``There was only one person with a real mean streak," Werschkul said. This guy, he added, had a giant tattoo of a sex scene on his back and spent a good part of the seemingly endless days wondering where he could find a good wife.

``When I dwell on this now," Werschkul says, ``it doesn't take me to some place I want to be. The biggest punishment that comes from this is the public ridicule."

Doug Marker, who once worked with him in Rep. Peter DeFazio's office, reminds us that Werschkul, a moderate in a reactionary neck of the woods, got into politics for the rarest of reasons: ``He had a real sense of mission, as opposed to other people who like the lights."

One mistake, and that mission ran aground. Werschkul knows he screwed up, but he also knows far more about the odd equation of crime and punishment than Jolin or Packwood ever will.

That he still feels capable of being ridiculed tells me that he didn't need to be.

Submitted for the Record – Senator Wyden

A Brief History of Vote by Mail

1981	The Oregon Legislature approves a test of vote by mail (VBM) for local elections.
1987	VBM made permanent; majority of counties use it for local/special elections.
June 1993	First special statewide election by mail – 39 percent turnout.
May 1995	Second special statewide election by mail – 44 percent turnout.
Spring/Summer 1995	The Oregon Legislature approves a proposal to expand VBM to primary and general elections. The Governor vetoes the bill.
December 1995	Oregon becomes the first state to conduct a primary election totally by mail to nominate candidates to fill a vacancy in a federal office – 58 percent turnout.
January 1996	Oregon becomes the first state to conduct a general election totally by mail to fill a vacancy in a federal office when it selects Senator Ron Wyden to replace Bob Packwood – 66 percent turnout.
March 1996	Oregon holds the country's second VBM presidential primary. (The first VBM presidential primary was held by North Dakota, just weeks prior to Oregon's election.) – 58 percent turnout.
May 1997	Sixth special statewide election by mail – 42 percent turnout.
Spring/Summer 1997	The Oregon House of Representatives approves a proposal to expand VBM to primary and general elections. The bill dies in a Senate committee. The Governor would have signed the bill into law.
November 1997	Seventh special statewide election by mail – 60 percent turnout.
May 1998	Primary election at the polls. Forty-one percent of registered voters in Oregon are permanent absentee voters. Overall, the state posts a record low turnout at 35 percent. Absentee ballots represent nearly two-thirds of all ballots cast; Oregon becomes the first state to have more ballots cast by mail than at the polls during a polling place election. Absentee voter turnout was 53 percent, compared to a turnout at the polls of 22 percent.
June 1998	Supporters of expanding VBM to primary and general elections use the initiative to put the issue on the November general election ballot. No paid signature gatherers were used to put the measure on the ballot – a first since 1994.
November 3, 1998	Oregon voters decide to expand VBM to primary and general elections by a vote of 757,204 to 334,021.
November 2, 1999	Eighth special statewide election by mail - 38 percent turnout.
May 2000	Presidential Primary election VBM - 51 percent turnout.
November 2000	First VBM Presidential General election - 79 percent turnout.
May 2002	Primary election VBM - 46 percent turnout.
September 2002	Special election for two statewide measures VBM - 44 percent turnout.
November 2002	General election VBM - 69 percent turnout.

January 2003	Special election for a statewide measure VBM - 66 percent turnout.
September 2003	Special election for a statewide measure VBM - 35 percent turnout.
February 2004	Special election for a statewide measure VBM - 63 percent turnout.
May 2004	Presidential Primary election VBM - 46 percent turnout.
November 2004	Presidential General election VBM. Voter registration exceeds 2 million - 86 percent turnout.
May 2006	Primary election VBM - 38 percent turnout.
November 2006	General election VBM - 70 percent turnout.

Michigan Association of County Clerks

July 6, 2009

Diane Zuker
President
Clinton County

Timothy Snow
First Vice President
Kalamazoo County

Elaine Richardson
Second Vice President
Wexford County

Lauri Braid
Third Vice President
Shiawassee County

Margie White-Cormier
Secretary
Tuscola County

ıes Riffle
ıreasurer
Mason County

Directors

Mary Ann Froberg
District I
Alger County

Becky Griffin
District II
Oceana County

Joyce Swan
District III
Isabella County

Fran Fuller
District IV
Eaton County

Peggy Koehler
District V
Huron County

The Honorable Susan A. Davis
United States House of Representatives
1526 Longworth House Office Building
Washington, D.C. 20515-0553

Dear Representative Davis,

Our association, the Michigan Association of County Clerks, recently became aware of legislation you have introduced which allows eligible voters to vote by mail (H.R. 1604). We were pleased to see this issue being discussed and possibly passed by Congress since we have tried unsuccessfully, in Michigan, to get such legislation passed for the last decade.

Our association has long sought passage of this legislation and been supportive of allowing all eligible voters to participate in our democratic process regardless of their ability to get to the polls on Election Day. With our ever changing life styles and the mobility of our constituents, it seems only just that we allow every citizen who is registered to vote and desires the opportunity to do so to participate in the process of electing those who would represent them in Washington, as well as on every other level of their government.

To refuse to allow a citizen who has registered to vote the ability to participate in the election process because he/she does not fit a criteria established decades ago when our society was much different is unconscionable and violates the true principles of the democratic process.

As a progressive democracy, we should develop uniform standards throughout our nation for electing our representatives, senators, and president. It is presently inconsistent to allow some States to prevent participation because they fear the process "could be fraught with fraud". This legislation may also prompt states to enact their own legislation which could secure the election process so accusations of massive fraud, as are being raised in Michigan, may be eased.

We, the Michigan Association of County Clerks, support your efforts for reform with H.R. 1604 and encourage Congress to pass this legislation allowing our citizens to vote by mail without having to specify a reason for doing so.

Thank you for your time.

Sincerely,

Diane Zuker
MACC President

Dan Krueger, Co-Chair
MACC Legislative Committee

Larry Kestenbaum, Co-Chair
MACC Legislative Committee

Cc: Michigan Legislators

120 N. Washington Square, Ste. 110A, Lansing, MI 48933 Phone: 517.371.2223 Fax: 517.484.0140

U.S. ELECTION ASSISTANCE COMMISSION
1201 NEW YORK AVENUE, N.W., SUITE 300
WASHINGTON, D.C. 20005

May 12, 2010

The Honorable Charles E. Schumer
Chairman
Rules and Administration Committee
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Robert F. Bennett
Ranking Member
Rules and Administration Committee
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Bennett:

I write to request that the U.S. Senate Rules and Administration Committee consider including resources created by the U.S. Election Assistance Commission (EAC) as part of the record for the May 5, 2010 hearing *Voting by Mail: An Examination of State and Local Experiences*.

EAC has conducted a considerable amount of research and issued best practices about voting by mail, and attached are three examples of EAC's work in this area: the *2008 Election Administration and Voting Survey*, *Election Management Guidelines Chapter 7: Absentee Voting and Vote by Mail*, and the *Absentee Voting and Vote by Mail Quick Start Guide*.

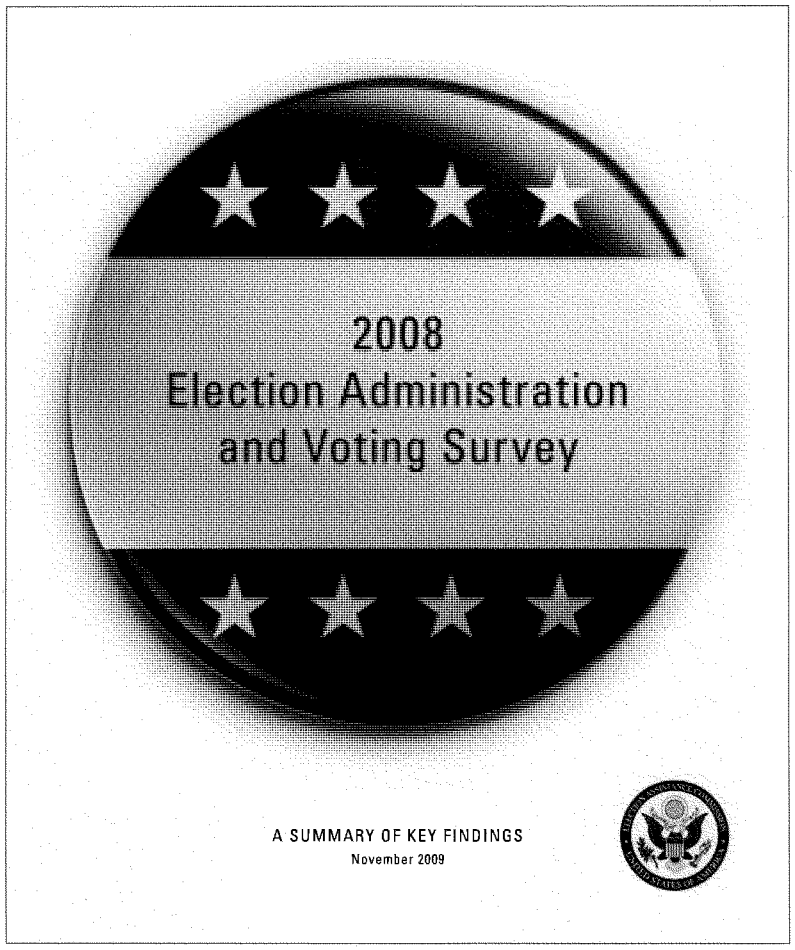
Please let us know if we can be of further assistance, and thank you for your consideration in this matter.

Sincerely,

Tom Wilkey
Executive Director
U.S. Election Assistance Commission

Tel: (202) 566-3100 www.eac.gov Fax: (202) 566-3127
Toll free: 1 (866) 747-1471

U.S. ELECTION ASSISTANCE COMMISSION



U.S. ELECTION ASSISTANCE COMMISSION

The 2008 Election Administration and Voting Survey

A SUMMARY OF KEY FINDINGS
November 2009

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Executive Summary

The U.S. Election Assistance Commission (EAC) Election Administration and Voting Survey is the nation's foremost data collection effort on how Americans cast their ballots. The 2008 survey is the third sponsored by the EAC, and forms the basis for three reports: federally mandated reports on the impact of the National Voter Registration Act (NVRA), 42 U.S.C. §1973gg, and the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), 42 U.S.C. §1973ff, and this comprehensive report summarizing findings across all areas of the survey.

More than 190 million Americans were reported to be registered to vote in the 2008 Presidential election, an increase of more than 14 million since the last Presidential election. The 2008 EAC survey collected information on how 133,944,538 Americans participated in the election, and while the completeness of State responses varied significantly, valuable voting data were collected from each of the 50 States, four Territories, and the District of Columbia.

The increasing use of alternative means of casting a ballot means that, in 2008, fewer than two- thirds of American voters cast a regular ballot in person at a polling place on Election Day (60.2%). The rest voted by domestic absentee ballot (16.6%); by absentee ballot as overseas or uniformed services voters (0.7%); by early voting before Election Day (13.0%); or by provisional ballot, the validity of which was decided later (1.3%). Early voting more than doubled from the 2006 elections, when 6.4% of voters cast their ballots early.

States transmitted more than 26 million domestic absentee ballots, and 91.1 percent were returned and submitted for counting. In three Western States (Arizona, Colorado, and Washington), more than half of all voters cast their ballots via absentee voting, while a fourth, Oregon, conducts its elections entirely by mail.

Improved data collection on UOCAVA ballots resulted in a more complete picture of voting by uniformed services and overseas voters. States reported transmitting nearly 1 million ballots to UOCAVA voters, and 69.0 percent were returned and submitted for counting. Of UOCAVA ballots returned, 93.6 percent were counted; the others were rejected for various reasons, including missing deadlines.

Provisional ballots once again proved to be a significant source of both ballots and votes in some States, with more than 2.1 million provisional ballots reported cast nationwide. Three States—California, New York, and Ohio—reported the highest numbers of provisional ballots cast, accounting for 59.4 percent of the nation's total. States counted 67.3 percent of their provisional ballots in whole or in part. More than 600,000 provisional ballots, or 28.2 percent, were rejected, most commonly because it was determined that the voter was not properly registered. States reported using their provisional ballots in different ways; for example, some States issue provisional ballots when voters wish to change their address.

In addition to the voting data, the 2008 survey collected information on a range of election administration topics, from the ages of poll workers to polling places to voting technology. Among the key findings were that States employed 878,360 poll workers in the 2008 election, staffing some 132,237 polling places, or roughly seven poll workers per polling place. As expected, poll workers tend to be older than average, with 60 percent between ages 41 and 70; only twenty percent were aged 71 years or older. These data—the most comprehensive attempt to collect information on the age of poll workers—do suggest, however, that some past estimates of the average age of poll workers were too high.

Nearly half of reporting jurisdictions reported having at least some difficulty in obtaining sufficient numbers of poll workers.

The type of voting technologies vary across and within States. Twenty-one States, the Virgin Islands and the District of Columbia reported deploying 218,370 Direct Recording Electronic (DRE) machines without the ability to produce voter-verified paper ballots. Another 16 States reported using 81,088 DREs which produced voter verified paper audit trails (VVPAT). The most widely deployed technology was the optical or digital scanner that reads voter-marked ballots; 43 States reported using 107,519 such counters in at least some of their jurisdictions.

While significant gaps remain in election data collection, response rates to the survey were higher in 2008 than for the two previous elections, particularly for UOCAVA-related questions. Readers are encouraged to consult the complete county-level data available from the EAC Web site, at www.eac.gov, for complete details, including explanatory comments.

Introduction

The United States Election Assistance Commission (EAC) is an independent, bipartisan commission created by the Help America Vote Act of 2002 (HAVA). Its mission is to assist State and local election officials with the administration of Federal elections. The EAC provides assistance by disbursing, administering, and auditing Federal funds for States to implement HAVA requirements; conducting studies and other activities to promote the effective administration of Federal elections; and serving as a source of information regarding election administration.

Since 2004, the EAC has collected data on voting, elections, and election administration in the United States. Much of these data support two biennial reports, on voter registration and on voting by uniformed and overseas citizens.

The EAC's data collection has evolved over the past three Federal election cycles. In 2004, the EAC administered two surveys to collect and report information mandated by the National Voter Registration Act (NVRA), 42 U.S.C. §1973gg, and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §1973ff. It additionally conducted a third survey on other information regarding Federal general elections per provisions found in §241(a) of HAVA, 42 U.S.C. §15381(a).

In 2006, the EAC incorporated these three data collections into a single survey instrument, the 2006 Election Administration and Voting Survey, to reduce the burden of responding to multiple collections of information, facilitate data collection and reporting, and encourage participation by the States.

For 2008, the EAC continued the practice of collecting empirical data through a single survey instrument, while seeking to improve tools and processes. Final approval of the survey was granted by the Office of Management and Budget (OMB) on September 25, 2008, with near-final drafts made available the previous month.

These continuing elections data collection efforts provide the basis for a more comprehensive report on a wider range of election issues. These issues range from voting technology to poll workers to the use of electronic poll books. This 2008 Election Administration and Voting Survey report is the third such report produced by the EAC.

Detailed information on the 2008 Election Administration and Voting Survey is presented in this report. It contains summaries of the NVRA and UOCAVA reports, and a wealth of new information on the methods Americans used to vote and how State and local administrators ran their elections. Summary information at the State level is included in the tables which accompany the text. In addition, readers are invited to consult the county-level database, available at the EAC's Web site, www.eac.gov, with complete responses, including explanatory comments and data definitions.

Survey Methodology

The 2008 edition of the survey was the result of discussions with State and local election officials, political scientists, researchers, advocacy groups, and the general public. Revisions to the draft survey were made following review by the EAC's Standards Board and Board of Advisors.[1] The survey was revised based on input from these groups and the public, which was invited to submit comments after notice of the survey was published in the Federal Register on March 20, 2008 (Vol. 73, no. 55, page 14974). The EAC received 53 substantive comments covering all sections of the questionnaire. The questionnaire was further revised in response to these comments, and the revised draft was distributed to State officials in August and September 2008 for planning purposes.

The survey contained 51 questions in the quantitative section and 22 questions in an accompanying qualitative section called the Statutory Overview, which asked States and territories for information on their election laws, definitions and procedures. Many of the quantitative questions contained multiple parts. Both questionnaires were submitted for approval to the U.S. Office of Management and Budget, which approved the data collection on September 25, 2008 (OMB Control No. 3265-0006, exp. 3/31/2009).

The quantitative portion of the 2008 Election Administration and Voting Survey was composed of six sections:

1. Voter registration, which included questions required by the NVRA;
2. Uniformed and Overseas Citizens Absentee Voting Act, which included questions required by that Act;
3. Domestic civilian absentee ballots;
4. Election Administration, which asked States to report on their precincts, polling places, and poll workers;
5. Provisional Ballots; and
6. Election Day Activities, which contained a range of questions, from the number of people who participated in the 2008 election to the types of voting technology employed by local governments.

In addition, in 2008, for the first time, States were asked to report on their State laws, definitions, and procedures in the Statutory Overview. Responses to this portion of the survey are the basis of a separate report available from the EAC. These responses also provide a better understanding of the data analyzed in this report, and highlight the differences between States in how elections are administered.

States' Collection of Election Information

For 2008, the EAC continued its effort to make the survey available to State officials earlier in the election cycle, and to facilitate the task of responding by providing improved survey instruments and increased technical assistance. The primary survey instrument designed to assist the States in collecting and reporting their statistical data was a Microsoft Excel-based template, preloaded with each State's jurisdictions. Most States submitted their data using this survey instrument. States were also offered a Microsoft Word-based template that could be distributed to their local jurisdictions, and States with single jurisdictions could report their totals through this instrument. Responses were collected through uploads via a project Web site; other data were obtained via e-mail or fax. States were asked to begin sending their responses to the EAC on February 13, 2009. Data collection continued through March and early April 2009, as States reviewed and corrected the data they had submitted. The EAC distributed the collected data to the States for review, and in some cases asked for additional information on data that appeared inconsistent or in error. Finally, in preparation for this report, States were invited to review the tables which accompany this report.

1 The Standards Board comprises 110 State and local election officials, and the Board of Advisors comprises 37 members who represent various national associations, government agencies, and congressional leadership.

About the States' Data

Election data collection varied significantly in the 55 States and territories that responded to the 2008 survey. Most States rely at least to some degree on centralized voter registration databases (VRDs) and voter history databases, which allow State election officials to respond to the survey at the local level for many questions. Other States, conversely, collect relatively little election data at the State level, and instead relied on cooperation from county election officials to complete the survey. States and local offices vary widely in the amount of resources devoted to data collection, and in the emphasis placed on data collection. Some States did not collect data in all the categories requested in the survey, and others did not have data for all their local jurisdictions for all variables.

The results of the 2008 Election Administration and Voting Survey are presented in the tables at the end of this report and are summarized in Section 4. Complete results at the local level will also be made available on the EAC's Web site.

Caution is necessary when interpreting these survey data, particularly when comparing these data from year to year or State to State, because of changes to the survey, changes in State tracking of data across time, and the varying levels of completeness in many States' responses. In 2006, the EAC began asking States to produce county-level (or the equivalent) registration data, rather than the statewide totals asked for previously. Even in States with centralized VRDs, some data may be kept only at the local level, and the level of integration of information between local and State election offices varies across the country. Information on the number of jurisdictions in each State is provided in most of the tables, along with the number of counties included in each State's response.

Guide to Terms

Active Voter: A voter registration designation indicating the voter is eligible to vote. See also Inactive Voter.

Ballots Cast: Total numbers of ballots submitted by all voters for counting, including by all voting methods (absentee, provisional, early, in a polling place, etc.).

Ballots Counted: Number of ballots actually processed, counted, and recorded as votes.

Domestic Absentee Ballot: A ballot submitted, often by mail, in advance of an election, often by a voter who is unable to be present at the polls on Election Day.

Citizen Voting Age Population (CVAP): Persons who are citizens and of voting age (18 years or older). These numbers are estimates generated by the U.S. Bureau of the Census. See also Voting Age Population.

Early Voting: Refers generally to any in-person voting that occurred prior to the date of the election at specific polling locations for which there were no special eligibility requirements. Early voting is not considered absentee voting under the State's definitions/requirements for absentee voting.

Electorate: The body of persons eligible to vote.

HAVA: The abbreviation for the Help America Vote Act of 2002, 42 U.S.C. §15301 *et seq.* The text of HAVA and additional information is available at www.eac.gov.

Inactive Voter: A voter whose registration status appears to no longer be current where he or she was registered and who has not attempted to reregister, has not voted, and has not presented him- or herself to vote using the address of record; or one whom election officials have been unable to contact or for whom election officials have been unable to verify registration status. See also Active Voter.

Jurisdictions: Generic term to signify various geographic areas that administer elections. The jurisdictions in this study may include counties, parishes, independent cities, towns or cities, or an entire State (Alaska).

Poll Worker: Election judges, booth workers, wardens, commissioners, or other similar terms that refer to the person or persons who verify the identity of a voter; assist the voter with signing the register, affidavits, or other documents required to cast a ballot; assist the voter by providing a ballot or setting up the voting machine; and serve other functions as dictated by State law. This does not include observers stationed at polling places or regular election office staff.

Polling Place: A facility staffed with poll workers and equipped with voting equipment, or paper ballots, at which persons cast ballots in person on Election Day. Several precincts may be combined into one polling place.

Precinct: An administrative division representing a geographic area in which voters are provided ballots for particular races. These manageable geographic units may also be referred to as electoral districts, precincts, voting districts, boxes, beats, or wards, depending on State law. The number of registered voters in precincts will vary according to State law.

Provisional Ballot: A ballot provided to an individual who claims he or she is registered and eligible to vote but whose eligibility or registration status cannot be con-

firmed when he or she presents him- or herself to vote.

Section 5: Some jurisdictions are required by Section 5 of the Voting Rights Act, 42 U.S.C. §1973 *et seq.*, to obtain preclearance from the Department of Justice or the United States District Court for the District of Columbia before implementing a change in a voting standard, practice, or procedure.

Section 203: Some jurisdictions are required by Section 203 of the Voting Rights Act, 42 U.S.C. §1973 *et seq.*, to provide supplemental voting information to language minority groups.

Spoiled ballots: Ballots that, under the applicable State law, are incorrectly marked or impaired in some way by the voter and turned in by the voter at the polling place or mailed in absentee, with a replacement ballot issued so that the voter can correctly mark the ballot; also referred to in some States as a "voided" ballot.

Voting Age Population (VAP): People who are 18 years of age or older, regardless of whether they are eligible to register to vote, based on estimates made by the Bureau of the Census. Note that not all persons of voting age may be eligible to vote (e.g., felons, individuals judged to be mentally incompetent, noncitizens, etc.). See also Citizen Voting Age Population.

Survey Results

REGISTERING TO VOTE

Voting in the United States, in most places, begins with registration. While North Dakota has no voter registration, and other States allow eligible voters to register and vote on the same day, in most States registration takes place weeks or months prior to the casting of ballots. States maintain their voter registration rolls by removing invalid registrations when voters move out of State or die, and keeping eligible and registered voters on the rolls.

The key Federal legislation on voter registration is the National Voter Registration Act, or NVRA, 42 U.S.C. §1973gg. The information presented in this section is offered in greater detail in the EAC report, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 2007-2008*, available on the EAC's Web site. The report includes complete data tables with totals for each State; data cited in this section are contained in those tables.

How Many Are Eligible?

The United States Census is required by Article I, Section 2 of the Constitution. Obtaining an accurate and complete census of the population remains a daunting task. Complicating the situation, the decennial census is only a baseline. Population estimates must take into account immigration (both legal and illegal), internal migration, mortality rates, and natural population growth and aging.

In 2008, the Census estimated the domestic Voting Age Population (VAP), which includes those 18 years and older, at 233,087,000.[2] Data by State are shown in Table 30. This reflects the standard estimates for July 1, 2008, meaning that it is 4 months out of date by Election Day.

2 Because 8 years have elapsed since the 2000 Census, estimates for 2008 are prone to error, particularly for smaller jurisdictions. More information can be obtained at the Population Estimates page of the U.S. Census Bureau at http://www.census.gov/popest/estimates.html.

REGISTERING TO VOTE

To be eligible to vote a person must be a U.S. citizen, meet a residency requirement, and have attained the age of 18 by Election Day. Eligibility varies further according to State laws. Persons who have been legally declared mentally incompetent or who have been convicted of a felony and have not had their civil rights legally restored may not be able to vote (based on State law).

Individuals can obtain registration applications from either the local election official in the person's county or city or town of residence, or through registration outreach programs sponsored by various private groups. Federal registration forms and many State forms are now accessible on the Internet.

In addition, individuals can register using the National Mail Voter Registration Form when applying for a driver's license or identity card at their State's Department of Motor Vehicles or the driver's licensing offices, offices providing public assistance, offices providing State-funded programs for people with disabilities, and at Armed Forces recruitment offices.

The National Mail Voter Registration Form is the one document that allows individuals to register to vote from anywhere in the United States. (ND does not have voter registration, WY does not permit mail registration and NH accepts the form only as a request for absentee.) The form is available at www.eac.gov. ★

In 2007 the Census Bureau began releasing State estimates, which include citizen voting age population (CVAP) estimates. The nationwide number for CVAP for 2008 was 213,382,000. The State CVAP data are also reported in Table 30.[3]

Registration

Even with a good estimate of the number of eligible citizens, not all citizens choose to register to vote. While the NVRA report showed that approximately 81.6 percent of the nation's estimated voting age population of 233 million were registered to vote in the 2008 Presidential election, registration rates varied from a low of 60.6 percent in Wyoming to a high of 98.1 percent in Michigan (excluding North Dakota, which has no voter registration, and Maine, which reported over 100 percent registration rates in the survey).

Most States require eligible persons to register to vote in advance of the election. An increasing number of States are allowing some form of same day or Election Day registration, although State laws vary. (Alaska, Connecticut, and Rhode Island allow those eligible to register on Election Day to vote in the Presidential election only.[4]) Other States allow for same day registration for certain types of voters, such as new citizens or recently discharged military personnel.

More than 190 million persons were reported to be registered to vote for the 2008 elections—an increase of more than 14 million over the 4-year period since the last Presidential election. In the same 4-year period, the voting age population (VAP) increased 5.7 percent and the percentage of registered voters increased 8.1 percent. The percentage of Americans aged 18 or older who were registered to vote increased from 79.9 percent in 2004 to 81.7 percent in 2006.

3 U.S. Bureau of the Census, American Community Survey, http://www.census.gov/acs/www. The true number of eligible voters is reduced further by variation in State laws such as the eligibility of those convicted of felony crimes and those judged to be mentally incapacitated, and there is little reliable data available on the impact of such laws.

4 Voters who are registered to vote and who have moved within a jurisdiction before an election for federal office are generally entitled to vote in that election even if they did not advise the registrar of the move (42 U.S.C. 1973gg-6(f)).

VOTER REGISTRATION:
THE INTERNET AND SAME DAY REGISTRATION

In 2008, nearly 700,000 Americans are reported to have registered to vote using the Internet, and more States are considering adopting online voter registration, according to data provided by the States.

In 2008, more than 3.6 million citizens took advantage of same day registration, and almost 1 million of these were new voters. ★

Active Versus Inactive Voter Rolls

Once registered, a registrant remains an "active voter," a designation indicating the voter is eligible to vote, until he or she does not vote in a series of elections. In some States, a voter may be moved to an "inactive" list if his or her registration status appears to be no longer current and he or she has not attempted to reregister, has not voted, and has not presented him- or herself to vote at the address of record, or if election officials have been unable to contact or verify the person's registration status.

The EAC's first survey, conducted in 2004, found that States vary in how they report their registration figures. In the 2008 survey, the EAC found that 19 States use both inactive and active in calculating their reported registration totals; 27 reported using a combination of active and inactive; and the other 9 did not respond or chose "other."

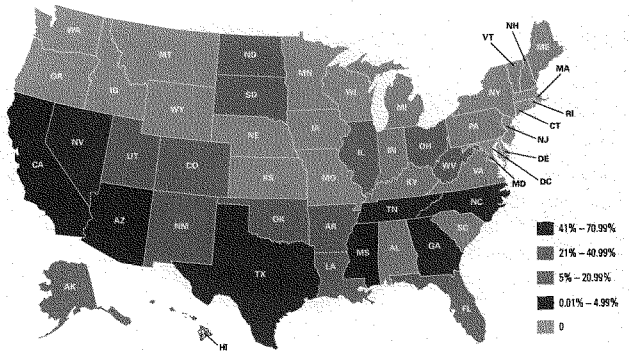
Voter Turnout Rates in 2008

Every eligible voter does not necessarily register to vote, and not every registered voter casts a ballot in each election. In Table 30, voter turnout is reported using three different measures of the eligible population.

First, turnout is reported as a percentage of the total estimated voting age population. This figure is the best possible estimate of the number of individuals living in the United States who are 18 or older as of July 1, 2008, and as noted above, is not "aged" from July to November. This measure leads to the lowest estimates of voter participation in the United States because it does not take into account variations in citizenship status or voter registration. Higher estimates of participation are produced using the additional columns in Table 30, which show the Census estimates of CVAP.

The final column calculates turnout only among those citizens who are registered to vote in their respective States. This last measure provides the highest estimate of voting participation in the country.

EARLY IN-PERSON VOTING 2008 GENERAL ELECTION

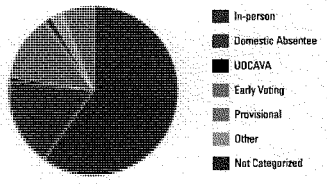


HOW AMERICANS CAST THEIR BALLOTS

An increasing number of alternatives to voting in person at a polling place on Election Day have expanded the ways that Americans cast their ballots in Federal elections. In some places, such as Oregon and Washington, voters primarily receive and submit their ballots through the mail. Further, more States have adopted "no-excuse" absentee voting, which allows more people to vote by mail or in person before Election Day as a convenience. Fifteen States reported maintaining "permanent absentee" lists, automating the distribution of ballots to voters who request their ballot through the mail in every election. In some communities, election administrators have set up "vote centers," central locations where any voter from any precinct can cast his or her ballot. Finally, voters in Federal elections who encounter challenges or problems at the polling place, such as finding their names removed from the registration rolls, now vote "provisional" ballots, which can be counted later when questions concerning registration are resolved.

Approximately 60% of Americans who voted in the 2008 Presidential election voted in the traditional way of casting their ballots in person at their local polling place on Election Day. The 2008 survey collected data from 3,974 jurisdictions (of 4,517 total) on how people who participated in the 2008 elections cast their ballot (see Table 29).

HOW AMERICANS VOTED IN THE 2008 GENERAL ELECTION



Of the 133,944,538 voters participating, 80,693,815 (60.2%) voted in person at polling places. An additional 22,244,396 (16.6%) voters cast their ballots as domestic absentee voters, and States reported 880,995 UOCAVA voters (0.7%).[5]

Twenty-two States and two territories reported that 17,379,871 people (13.0%) cast their votes before Election Day through various forms of early voting. In several States, early voting made up a sizeable proportion of the

5 UOCAVA data on voter participation differs from UOCAVA ballot data because of variations in how States answered the questions and/or track their data.

total votes cast. For example, in Nevada, North Carolina, Tennessee, and Texas, early voters constituted more than half of all ballots. Early voting increased significantly since 2006, when 6.4 percent of voters cast their ballots early.

Provisional ballots accounted for 1,746,338 ballots, or 1.3 percent of the vote. Provisional balloting is discussed in greater detail in Section IV.

In reporting these totals, States drew from various sources in determining their participation numbers[6] (see Table 31):

- 18 States and two territories reported using poll book records;
- 19 States drew from totals of ballots counted;
- 19 States used databases of voter histories; and
- 9 States used the total number of votes for the highest office on the ballot.

Domestic Absentee Voting

Absentee voting covers a range of circumstances under which voters cast their ballots without appearing at a polling place on Election Day. Some States require valid reasons, such as being out of town on Election Day or having a work schedule that precludes making it to the polls. Other States allow any voter who requests it to vote by absentee ballot. Absentee voting has a long history in the United States, dating back to the Civil War, when it was introduced to allow soldiers to vote in the 1864 elections. Absentee voting has gradually expanded through the years, and many States no longer require excuses. Oregon and Washington, have moved to replace their polling place systems entirely with vote-by-mail.[7]

States reported that 26,044,388 ballots were transmitted to voters for the purposes of absentee voting (see Table 32). The 2008 EAC survey collected data on absentee voting from 48 States, the District of Columbia and three territories.

Approximately 8 out of 10 absentee ballots (23,733,439 ballots, or 91.1%) were returned and submitted for counting. Another 226,438 (0.9%) of the domestic absentee ballots were reported to have been returned as undeliverable, 210,730 (0.8%) were spoiled, and for 1,605,620 (6.2%) the status was uncertain. As in past elections, Western States had the highest rates of absentee voting, and one State, Oregon, conducts its elections entirely by mail. On the other hand, in many States absentee voting rates were in the single digits, although problems with States defining absentee voting in different ways makes measurement somewhat challenging.

States report counting 25,276,095 absentee ballots,[8] and rejecting 407,862 (1.7%) (see Tables 33, 34a, 34b, and 34c). Two States, Indiana and North Carolina, report rejecting more than 10 percent of their absentee ballots. The reasons for rejecting voters' absentee ballots varied widely. Note that these reasons are for ballots submitted for counting; more than 400,000 absentee ballots were never submitted, but instead were returned as undeliverable or spoiled.

Many States do not track the reasons absentee ballots are rejected, leaving us with an incomplete picture of why these ballots were not counted.

HIGHEST ABSENTEE VOTING RATES

Washington	97.2%
Colorado	62.3%
Arizona	50.8%
Montana	42.2%
California	41.7%

REASONS FOR REJECTING ABSENTEE BALLOTS

Missed deadline	74,973	18.4%
Lack of valid signature	45,693	11.2%
Already voted in person	26,620	6.5%
Nonmatching signature	26,408	6.5%
Unsealed envelope	4,534	1.1%
First-time voters lacking required ID	4,390	1.1%
Deceased voter	2,698	0.7%
Unofficial envelope	1,749	0.4%
No proper address	1,429	0.4%

6 Some States used a combination of methods, resulting in double counting in the totals.

7 In Washington, 38 of 39 counties conduct their elections entirely through the mail. States vary in whether they consider vote-by-mail ballots to be absentee ballots; some States with vote-by-mail reserve the term "absentee" for specific circumstances. Also, the absentee voting discussed in this section generally does not include voters covered by UOCAVA.

8 Because of inconsistent data reporting, this number is higher than the number submitted for counting (23,733,439).

OVERSEAS VOTING

Voting by members of the uniformed services and by U.S. citizens living overseas is an area of critical concern in election administration. The reliance by the United States on local election administration and on casting ballots in physical polling places, as well as State requirements of prior registration, present special difficulties for eligible voters living outside the country. Federal requirements concerning registration and voting by overseas and uniformed services voters is contained in the Uniformed and Overseas Citizens Voting Act (UOCAVA), 42 U.S.C. §1973ff, signed into law in 1986.

Since 2004, the EAC has gathered data on UOCAVA ballots and voters, pursuant to the statutory reporting obligations in UOCAVA and HAVA. In the 2008 survey, 20 questions sought to gather detailed information on overseas voting. What is presented in this section is explained in more detail in the report *2008 Uniformed and Overseas Citizens Voting Act Survey*, available at the EAC's Web site, www.eac.gov, which includes complete statewide totals.

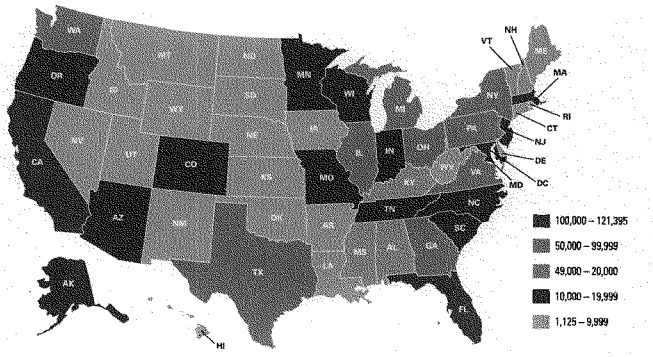
Improved data collection of UOCAVA-related information resulted in considerably higher response rates in 2008 than in 2006. For example, in 2008, 91 percent of the 4,517 jurisdictions surveyed were able to report the number of ballots transmitted to overseas civilians, compared with 64 percent of 3,123 jurisdictions surveyed in 2006. While significant gaps remain, better data are gradually becoming available on UOCAVA compliance.

Responding to the survey's UOCAVA questions, States reported transmitting nearly 1 million ballots, either in response to one-time requests from voters or through automatic transmission of ballots under 42 U.S.C. §1973 ff-3(a) of UOCAVA. Five States (California, Florida, New York, Texas, and Washington) each transmitted more than 50,000 ballots, and together accounted for nearly half of the national total of ballots transmitted. Military voters accounted for slightly more of the ballots transmitted than civilian voters.

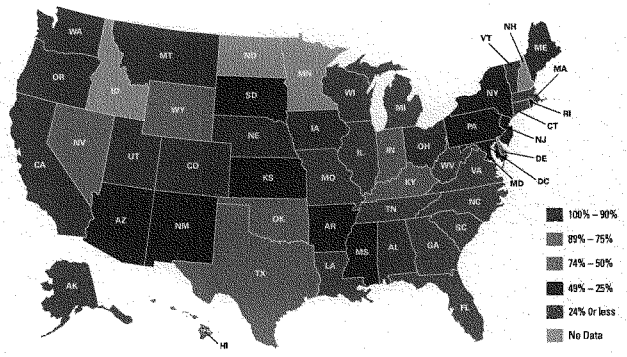
Of the 989,207 ballots transmitted by uniformed services and overseas civilian voters, 682,341 ballots (69.0%) were returned and submitted for counting. About 3.3 percent of the ballots transmitted were returned as undeliverable or spoiled. Among the ballots returned and submitted for counting were at least 28,131 Federal Write-in Absentee Ballots (FWAB), which UOCAVA voters can use when their requested ballots do not arrive in time. State tracking of FWAB remains relatively poor, so the actual number of FWAB cast may be greater.

Once submitted, 93.6 percent of UOCAVA ballots were counted. Military voters made up slightly more of the total (48.6%) than civilian voters (41.2%). Forty-eight States reported rejecting 39,520 UOCAVA ballots. The most common reason for rejecting a UOCAVA ballot was that the voter missed a deadline; 43.7 percent of rejected ballots were not counted for this reason.

NUMBER OF BALLOTS TRANSMITTED TO UOCAVA VOTERS — 2008 ELECTION



REJECTION RATES FOR PROVISIONAL BALLOTS — 2008 ELECTION



CASTING AND COUNTING PROVISIONAL VOTES

The 2008 Federal election was the third in which voters in all 50 States, the Territories, and the District of Columbia were allowed to cast a provisional ballot even if their name did not appear on the voter registration rolls in the jurisdiction where they intended to vote, they failed to have the required identification, or their eligibility was challenged by an election official. Pursuant to HAVA, such voters were allowed to cast a provisional ballot, which would be later counted if election officials determined the person was indeed eligible to vote.

Section 302(a) of HAVA establishes the process of provisional balloting:

> If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows.

Before the minimum standards set by HAVA, the rules regarding the use of provisional ballots varied widely among the States, and some variation continues. For example, provisional ballots cast outside of the voter's home precinct could be counted in 15 States, while in other States and the District of Columbia such ballots would not be counted. States with Election Day registration when HAVA was passed in 2002 are not required to offer provisional ballots (exempt from the provisional ballot requirements are Idaho, New Hampshire, North Dakota, Wisconsin, and Wyoming), but Wyoming and Wisconsin reported small numbers of provisional ballots.

California, New York, and Ohio reported the largest number of provisional ballots, accounting for 59.4 percent of all provisional ballots cast nationwide in the 2008 election (see Table 35).[9] As a share of voters participating, Alaska (6.2%), California (5.0%), Arizona (4.6%), and the District of Columbia (4.6%) had the largest percentages of polling place voters cast provisional ballots (see Table 29).

In 2008, 1,746,338 people cast a provisional ballot that was either partially or fully counted, or about 1.3% of all Americans who voted. The rates of provisional balloting did not change much since the last Presidential election, and in 2008, on average 1 of every 40 voters who cast their votes in a polling place in this country cast provisional ballots. More than 1,330,000 provisional ballots were counted, or 61.8 percent of all the provisional ballots cast. An additional 5.5 percent of all provisional ballots cast

9 The different ways that States use provisional ballots makes direct comparisons difficult. Ohio, for example, uses provisional ballots to process voters' change of address requests in addition to providing an alternative means to vote.

had part of the ballot counted (20 States reported counting partial provisional ballots, generally allowing votes for President to be counted).

The percentage of provisional ballots being counted fell from the midterm election 2 years prior. In 2006, 629,544 provisional ballots were counted, or 79.5 percent of provisional ballots cast. The lower rates of provisional ballots being counted in Presidential elections may reflect the higher proportion of first-time or occasional voters, who may be more likely to face registration questions at the polling place.

Five States and one Territory (Alaska, Iowa, Maine, Montana, Oregon and the Virgin Islands) reported counting more than 90 percent of their provisional ballots, in whole or in part, and an additional seven States reported counting at least 70 percent of their provisional ballots. Conversely, 26 States reported counting fewer than half of their provisional ballots.

Jurisdiction-wide Acceptance

In the 15 States[10] that count provisional ballots cast outside of voter's home precinct, 4.6 percent of ballots cast in a polling place were cast as provisional ballots. In the 30 States and District of Columbia that disqualify provisional ballots cast outside the home precinct, provisional ballots were only 1.7 percent of ballots cast in a polling place. States allowing jurisdiction-wide acceptance of provisional ballots and those that did not had almost an identical percentage of their provisional ballots counted—61.9 percent for the jurisdiction-wide States compared with 61.7 percent of other jurisdictions.

Reasons Provisional Ballots Were Rejected

The reasons for rejecting provisional ballots are shown in Tables 36a and 36b. A majority of provisional ballots (53.6%) were rejected because the voter was found not to be registered in the State. Another 16.8 percent were voters who sought to vote in a precinct or jurisdiction other than where they were registered, and State laws mandated that such ballots would not be counted.

A total of 2,157,126 provisional ballots were submitted for counting in 2008. States reported that 1,332,218 (61.8% of the provisional ballots) were counted in full, and 118,868 (5.5%) were partially counted. States responding to this item reported that 609,016 (28.2%) were rejected.

10 For a summary of the laws on provisional balloting, see the report 2008 Statutory Overview, available at the EAC Web site: www.eac.gov.

REASONS FOR REJECTING PROVISIONAL BALLOTS

Voter not registered	326,154	53.6%
Wrong precinct	70,567	11.6%
Wrong jurisdiction	31,797	5.2%
Incomplete or illegible ballot or envelope	23,381	3.8%
Lacked ID	12,321	2.0%
No signature	7,949	1.3%
Nonmatching signature	3,980	0.7%

Principal reasons for the rejection of a provisional ballot are summarized in the table above.

ELECTION ADMINISTRATION

Despite the increase in convenience voting options such as no-fault absentee voting and vote-by-mail, 60 percent of Americans cast their vote in the 2008 Presidential election in polling places on Election Day. Providing voting services to these more than 80 million voters requires a massive effort organized through thousands of precincts, polling places, and poll workers across the country.

Polling Places and Precincts

All States employ some system of precincts (bounded geographic areas to which voters are assigned) and polling places (locations where voting actually takes place) to conduct their elections. In 2008, States operated 185,671 precincts and 132,237 physical polling places (see Table 42).

Of all polling places, 107,334 were separate from official election offices (schools, community halls, and so forth), while a reported 1,816 election offices were open for casting ballots. For early voters, States reported that 5,583 locations were available for early voting, including 2,079 election offices.

Poll Books

Electronic poll books, or electronic voter lists, are in use in some fashion in 25 States (see Table 37):

- 19 States reported that a total of 419 jurisdictions used electronic poll hooks to sign in voters;
- 21 States reported that a total of 581 jurisdictions used them to update voter histories;
- 22 States reported that a total of 634 jurisdictions used them to look up polling place assignments for voters; and
- 9 States reported using them for some other purpose.

Most polling places still use preprinted lists of registered voters (see Table 38). In the preponderance of reporting jurisdictions (2,209 cases), these books were printed by local jurisdictions, with 505 cases where the printing was arranged by both the local and State jurisdictions.

Poll Workers

The term "poll worker" encompasses many different names across the United States. Poll workers may be referred to as election judges, booth workers, wardens, commissioners, or other similar terms. As defined in this report, "poll worker" refers to the person or persons who verify the identity of a voter; assist the voter with signing the register, affidavits, or other documents required to cast a ballot; assist the voter by providing a ballot or setting up the voting machine; and serve other functions as dictated by State law. The term does not apply to observers stationed at polling places or to regular election office staff.

The complexity of voting technology and rules in the current era has led States to seek poll workers with specialized technological knowledge. In many States, poll technicians are assigned to help keep voting machines and electronic poll books functioning properly.

Forty-three States and 3 territories reported deploying 878,360 poll workers for Election Day 2008 (see Table 40). California alone used 112,249 poll workers.

The reliance of many jurisdictions on retirees as poll workers has made their age a topic of interest, and for the first time in 2008, the EAC survey asked jurisdictions to report the ages of their poll workers (see Table 40). Thirty States were able to provide at least some data on poll worker ages.

States reported age ranges for 379,926 poll workers. The largest number of poll workers was between 41 and 60 years of age (31.6%). Another 28.7 percent were between 61 and 70 years of age, the second largest group. One-fifth of poll workers were aged 71 years or older. Young poll workers are relatively rare; only 10.5 percent were 25 years or younger.[11]

The 2008 survey also asked for the first time about the difficulty jurisdictions faced in recruiting adequate numbers of poll workers (see Table 41). Of the 2,828 jurisdictions which answered the question, nearly half (45.8%) reported having a somewhat difficult or very difficult time recruiting poll workers, compared with only 31.2 percent that reported having a somewhat easy or very easy time. In 2006, 3.0 percent of polling places were reported as having an insufficient number of poll workers. Staffing the nation's polling places clearly continues to be a challenge for many jurisdictions.

The survey found that there were on average 7 poll workers assigned to each polling place in the United States during the 2008 election (using only those States which reported answers to questions regarding the number of polling places, number of precincts, and number of poll workers). In the 2006 elections, jurisdictions reported an average of 6.1 poll workers per polling place. The additional poll workers were presumably assigned to help with the higher turnout in the Presidential election.

Voting Technology

Voting technology remains highly dynamic in the United States. Through HAVA, Congress appropriated more than $3.1 billion for the EAC to distribute to States to make election administration improvement including the purchase of voting systems.

Voting technology is a difficult topic to measure in the Election Administration and Voting Survey because many jurisdictions use multiple systems. For example, a county may employ a scanner for absentee ballots but an electronic voting machine for in-person voting. Polling places may have more than one type of voting system on Election Day. For this reason, the EAC surveys in 2006 and 2008 have measured the breadth of voting technology being used across the country, and the wealth of local-level data will be of substantial value to researchers.

The 2008 survey collected data on nearly half a million "voting machines." The types of voting technology included the following:

- Direct Recording Electronic (DRE) machines with a voter-verified paper audit trail (VVPAT);
- DRE machines without a VVPAT;
- optical or digital scan systems, in which voters fill out a paper ballot which is then read by a scanner;
- hybrid systems combining a DRE with an optical scanner;
- punch card systems;
- lever machines;
- paper ballots; and
- other systems.

11 The EAC has worked to encourage the recruitment of young poll workers through its College Poll Worker Grant Program, which since 2004 has awarded $1.65 million in grants to colleges and nonprofit organizations to work with election offices to recruit, train, and support college student poll workers.

The most common single type of voting machine was a DRE without a paper trail; 23 States reported using 218,370 such machines. The most widely deployed technology across the States, however, is the optical or digital scanner; 43 States reported using 107,519 of these machines in at least some of their jurisdictions.

Sixteen States reported deploying DREs which produce a paper record that can be checked by the voter. Voters in Arkansas, Nevada, and West Virginia were among those most likely to vote on such machines. Most States use more than one type of voting machine, either because of local options or to accommodate voters with special needs.

Lever machines are in use only in New York, while only Idaho reported using punch cards. Thirteen States and 1 territory reported using paper ballots in at least some of their polling places. Seven States provided no information on their voting system.

Conclusions

The analysis presented above represents only a first step in examining the data contained in the 2008 Election Administration and Voting Survey. Further examination of the State-by-State data, and the county- (or equivalent) level data available at the EAC Web site, will yield further important information on the state of American election administration. As shown by the response rates to the 2008 survey, data collection and reporting in the United States has improved. While users of the data must take into account State differences in definitions and data reporting, and consider the incomplete responses in many categories, the survey is a valuable resource for election administrators, advocates, researchers and the general public.

APPENDIX A

Response Rates

Summarized below are the response rates for selected questions in the 2008 Election Administration and Voting Survey, with comparisons to 2006 response rates where available. Coverage varies significantly across the questions. Not all questions were applicable to all States, and response rates could not be calculated in many instances.

Survey question	Jurisdictions	2008	2006
Domestic absentee ballots transmitted	4,297 of 4,517	95.1%	n/a
Domestic absentee ballots cast/counted	4,258	94.3%	78.2%
Domestic absentee ballots rejected	4,145	91.8%	76.2%
Number of poll workers	3,189	70.6%	74.4%
Number of precincts	4,423	97.9%	95.9%
Number of polling places	4,340	96.1%	85.4%
Provisional ballots submitted	3,753 of 4,063	92.4%	86.9%
Provisional ballots rejected	3,225 of 4,063	79.4%	n/a

APPENDIX B

Tables and Cross Reference of Survey Questions to the Tables

FOOTNOTES TO TABLES

General Notes:

State: In the interest of consistency in these tables, the term State includes the District of Columbia and the four territories of American Samoa, Guam, Puerto Rico and the Virgin Islands.

Jurisdictions in the Survey: For the 2008 survey, information was requested for each local election administration jurisdiction. Generally this would be the county or county equivalent. The following exceptions may apply (exceptions are noted by an asterisk below the State name in Table 1a):

a) in some states the information was initially compiled by town/city or township;

b) in some states independent cities were treated as counties;

c) in some states the only response was one record for the state, and;

d) in some states the information collected from the towns/cities or townships but was summarized by county.

States in which the town/city or township is the initial unit of collection include the six states in New England and a handful of states in the Midwest. Independent cities were treated as county-level reporting units for the states of Maryland, Virginia, Missouri and Nevada. Selected Election Boards in Illinois and Missouri were also treated as county jurisdictions. State-level information was provided for Alaska which does not have counties. Coverage for the territories varied. See Table 6 for more detail.

Missing Data: Information for several items remains unavailable for several reasons. When information is missing this status may be reflected in various ways but generally by a blank data cell or a zero value. Note that a zero value may also indicate that the jurisdiction Dues Not Know, or Does Not Collect, the information. The count of cases, included for most tables but not for all variables, generally reflects the presence of a response from the jurisdiction. For many questions, 0 is a valid response but there is also incoosistency in the entry for the Not Available option. Researchers should consult the jurisdiction-level dataset for more detail. If a calculation is impossible because of missing information, a separate symbol may be indicated, e.g., a series of periods (.....).

Sum of Above: The information listed in the tables below the state detail is, for most columns, simply the addition of the information listed in the table. The number of states providing information is indicated as the count of states with information greater than, or in some cases, less than, 0. The percentages indicated on this line are generally the result of a simple division based upon the appropriate numbers from this line. For the Not Categorized columns, the number and percentage in the Sum of Above line will generally reflect a calculation of the appropriate fields listed on this line.

Specific Notes for Tables:

Notes specific to each table appear following each table or group of sub-tables.

CROSS REFERENCE OF SURVEY QUESTIONS TO TABLES

Section C: Domestic Civilian Absentee Ballots

Question C1: Number of domestic civilian absentee ballots transmitted to voters and the disposition of the ballots

Table 32. Domestic Absentee Ballots Transmitted: Disposition of Ballots

Table 33. Domestic Absentee Ballots: Permanent List; Submitted for Counting: Disposition

Question C2: Existence of a permanent absentee voter registration list

This question was categorical and not coded for tabular display

Question C3: Number of domestic civilian absentee ballots transmitted to voters due to the existence of a permanent list

Table 33. Domestic Absentee Ballots: Permanent List; Submitted for Counting: Disposition

Question C4: Number of domestic civilian absentee ballots submitted for counting and the disposition of the ballots

Table 33. Domestic Absentee Ballots: Permanent List; Submitted for Counting: Disposition

Table 34. Domestic Absentee Ballots: Reasons for Rejection, Parts A, B, and C

Question C5: Number of domestic civilian absentee ballots rejected and the reason for rejection

Table 34. Domestic Absentee Ballots: Reasons for Rejection, Parts A, B, and C

Section D: Election Administration

Question D1: Number of precincts

Table 42. Number and Type of Precincts/Polling Places

Table 44. Summary of Selected Factors per Polling Place

Question D2: Number of polling places, types of polling places

Table 42. Number and Type of Precincts/Polling Places

Table 44. Summary of Selected Factors per Polling Place

Question D3: Number of poll workers used

Table 40. Number and Ages of Poll Workers

Table 44. Summary of Selected Factors per Polling Place

Question D4: Age category for poll workers

Table 40. Number and Ages of Poll Workers

Question D5: Difficulty of obtaining a sufficient number of poll workers

Table 41. Difficulty of Obtaining Sufficient Poll Workers

Section E: Provisional Ballots

Question E1: Number of voters who submitted provisional ballots

Table 35. Provisional Ballots Submitted: Disposition of Ballots

Table 36. Provisional Ballots: Reasons for Rejection, Parts A, B, and C

Table 44. Summary of Selected Factors per Polling Place

Question E2: Number of voters who submitted provisional ballots and disposition of the ballots

Table 35. Provisional Ballots Submitted: Disposition of Ballots

Table 36. Provisional Ballots: Reasons for Rejection, Parts A, B, and C

Question E3: Number of provisional ballots rejected and the reason for rejection

Table 36. Provisional Ballots: Reasons for Rejection, Parts A, B, and C

Section F: Election Day Activities

Question F1: Number of people who participated in the November 2008 general election

Table 29. Ballots Cast by Means of Voting

Table 30. Turnout Rates for Voter Participation Using Different Bases

Table 31. Source Used to Determine Voter Participation

Table 37. Use of Electronic Poll Books/Lists at the Polling Place

Table 38. Source of Poll Books Used at the Polling Place

Table 39. First-Time Mail Registrants; Use of Printed Registration Lists at the Polling Place

Table 41. Difficulty of Obtaining Sufficient Poll Workers

Table 44. Summary of Selected Factors per Polling Place

Question F2: Source of the number of persons participating

Table 31. Source Used to Determine Voter Participation

Question F3: First-time mail registrants who were required to provide identification to vote

Table 39. First-Time Mail Registrants; Use of Printed Registration Lists at the Polling Place

Question F4: Uses of electronic poll books or electronic lists of voters at the polling place

Table 37. Use of Electronic Poll Books/Lists at the Polling Place

Question F5: Existence of printed lists of registered voters at the polls

Table 39. First-Time Mail Registrants; Use of Printed Registration Lists at the Polling Place

Question F6: Source of poll books used at the polling place

Table 38. Source of Poll Books Used at the Polling Place

Question F7: Information on the number and type of voting equipment used

Table 43. Number and Type of Voting Equipment

Tables Included

Table 29. Ballots Cast by Means of Voting

Table 30. Turnout Rates for Voter Participation Using Different Bases

Table 31. Source Used to Determine Voter Participation

Table 32. Domestic Absentee Ballots Transmitted: Disposition of Ballots

Table 33. Domestic Absentee Ballots: Permanent List; Submitted for Counting: Disposition
Table 34a. Domestic Absentee Ballots: Reasons for Rejection, Part A
Table 34b. Domestic Absentee Ballots: Reasons for Rejection, Part B
Table 34c. Domestic Absentee Ballots: Reasons for Rejection, Part C
Table 35. Provisional Ballots Submitted: Disposition of Ballots
Table 36a. Provisional Ballots: Reasons for Rejection, Part A
Table 36b. Provisional Ballots: Reasons for Rejection, Part B
Table 37. Use of Electronic Poll Books/Lists at the Polling Place
Table 38. Source of Poll Books Used at the Polling Place
Table 39. First-Time Mail Registrants; Use of Printed Registration Lists at the Polling Place
Table 40. Number and Ages of Poll Workers
Table 41. Difficulty of Obtaining Sufficient Poll Workers
Table 42. Number and Type of Precincts/Polling Places
Table 43. Number and Type of Voting Equipment
Table 44. Summary of Selected Factors per Polling Place

TABLE 29A. **BALLOTS CAST BY MEANS OF VOTING**

State	Election Jurisdiction in Survey	Total of Voters Participating	Cases	In-Person Voting								
				At the Polls			Early Voting			Provisional		
				Total	Cases	Percent	Total	Cases	Percent	Total	Cases	Percent
Alabama	67	2,105,622	1	0	0	0.0	0	0	0.0	0	0	0.0
Alaska	1	328,957	1	219,111	1	63.6	58,184	1	17.7	20,441	1	6.2
Arizona	15	2,320,851	15	986,579	15	42.5	43,119	13	1.9	107,764	15	4.6
Arkansas	75	1,341,795	66	550,786	65	41.0	397,344	64	29.6	1,662	59	0.1
California	58	13,798,557	58	6,894,572	57	50.0	143,296	36	1.0	693,355	58	5.0
Colorado	64	2,426,253	64	490,535	54	20.2	364,969	64	15.0	47,214	41	1.9
Connecticut	169	1,644,845	169	1,473,294	169	89.6	0	0	0.0	0	0	0.0
Delaware	3	415,696	3	393,565	3	94.7	0	3	0.0	62	3	0.0
District of Columbia	1	226,871	1	228,372	1	100.7	0	0	0.0	10,544	1	4.6
Florida	67	8,514,809	67	3,839,184	67	45.1	2,681,672	67	31.3	35,635	67	0.4
Georgia	159	3,975,986	159	1,821,865	159	45.8	1,783,575	159	44.9	52,124	159	1.3
Hawaii	4	456,009	4	280,537	4	61.5	69,665	4	15.3	145	3	0.0
Idaho	44	667,506	44	470,284	44	70.5	0	0	0.0	0	0	0.0
Illinois	1	5,577,509	1	4,252,680	1	76.2	968,530	1	17.4	41,339	1	0.7
Indiana	92	2,805,986	92	2,143,813	92	76.4	0	92	0.0	3,690	67	0.1
Iowa	99	1,546,483	99	953,797	99	61.7	0	0	0.0	3,921	99	0.3
Kansas	105	1,263,202	105	796,112	104	63.0	0	0	0.0	0	0	0.0
Kentucky	120	1,861,577	120	1,747,096	120	93.9	0	0	0.0	177	120	0.0
Louisiana	64	1,960,814	64	1,691,981	64	85.4	251,221	64	12.7	2,943	64	0.1
Maine	499	744,456	499	513,421	499	69.0	0	0	0.0	291	355	0.0
Maryland	24	2,661,905	24	2,400,570	24	90.2	0	0	0.0	51,163	24	1.9
Massachusetts	351	3,102,995	351	0	0	0.0	0	0	0.0	0	0	0.0
Michigan	83	5,029,080	83	3,756,486	83	74.5	0	0	0.0	3,797	63	0.1
Minnesota	87	2,920,214	87	2,627,668	87	90.0	0	0	0.0	0	0	0.0
Mississippi	82	657,058	45	475,516	37	72.4	3,715	11	0.6	7,825	32	1.2
Missouri	116	2,992,023	116	2,493,249	115	83.3	0	33	0.0	2,854	97	0.1
Montana	56	497,599	56	280,396	56	56.3	0	0	0.0	3,762	56	0.8
Nebraska	93	811,780	93	634,977	93	78.2	0	0	0.0	0	0	0.0
Nevada	17	970,019	17	319,639	17	33.0	561,775	17	57.9	2,785	17	0.3

TABLE 29A. BALLOTS CAST BY MEANS OF VOTING (CONTINUED)

State	Election Jurisdiction in Survey	Total of Voters Participating	Cases	In-Person Voting								
				At the Polls			Early Voting			Provisional		
				Total	Cases	Percent	Total	Cases	Percent	Total	Cases	Percent
New Hampshire	323	719,403	1	647,139	1	90.0	0	0	0.0	0	0	0.0
New Jersey	21	3,910,220	21	3,573,933	21	91.4	0	0	0.0	71,536	21	1.8
New Mexico	33	620,289	19	217,178	19	35.0	248,804	19	40.1	3,568	17	0.6
New York	1	3,722,019	1	7,181,457	1	92.0	0	0	0.0	167,614	1	2.2
North Carolina	100	4,338,197	100	1,682,107	100	38.8	2,421,396	100	55.8	26,507	100	0.6
North Dakota	53	318,420	53	198,704	53	62.4	42,770	53	13.4	0	53	0.0
Ohio	88	5,671,438	86	3,771,194	87	66.5	386,990	80	6.8	172,616	85	3.0
Oklahoma	77	1,474,694	77	1,277,611	77	86.6	114,368	77	7.8	2,817	77	0.2
Oregon	36	1,845,251	36	0	0	0.0	0	0	0.0	3,150	36	0.2
Pennsylvania	67	6,071,357	67	5,593,052	67	92.1	0	0	0.0	10,964	67	0.2
Rhode Island	39	475,428	1	471,376	39	99.1	0	0	0.0	974	39	0.2
South Carolina	46	1,930,359	1	0	0	0.0	0	0	0.0	0	0	0.0
South Dakota	66	387,355	66	270,298	57	69.8	25,064	24	6.5	98	66	0.0
Tennessee	95	2,618,238	95	1,038,278	95	39.7	1,516,031	95	57.9	0	0	0.0
Texas	254	8,059,731	244	2,682,705	244	33.3	4,885,292	241	60.6	96,933	240	1.2
Utah	29	960,299	29	563,656	29	58.7	275,221	29	28.7	35,535	29	3.7
Vermont	246	333,839	246	239,054	246	71.6	0	0	0.0	24	243	0.0
Virginia	134	3,250,065	134	3,241,611	134	86.4	0	0	0.0	4,575	134	0.1
Washington	39	3,071,587	39	306,797	39	10.0	0	39	0.0	40,786	39	1.3
West Virginia	55	736,672	55	499,153	45	67.8	155,033	55	21.0	4,573	54	0.8
Wisconsin	72	2,996,869	72	2,330,569	72	77.8	0	0	0.0	94	72	0.0
Wyoming	23	256,035	23	190,593	23	74.4	0	0	0.0	20	8	0.0
American Samoa	1	12,408	1	10,886	1	87.7	1,244	1	10.0	0	1	0.0
Guam	1	35,092	1	31,948	1	91.0	1,293	1	3.7	114	1	0.3
Puerto Rico	1	1,047,931	1	1,918,696	1	98.8	0	1	0.0	10,292	1	0.5
Virgin Islands	1	29,930	1	29,634	1	99.0	0	1	0.0	165	1	0.6
Sum of Above	4,517	133,944,538	3,974	80,693,815	3,592	60.2	17,379,871	1,425	13.0	1,746,338	2,807	1.3
States Included				51			24			43		
Question		F1a		F1b			F1t			F1e		

TABLE 29B. **BALLOTS CAST BY MEANS OF VOTING**

State	Election Jurisdiction in Survey	Absentee Voting						Other Means			Not Categorized	
		Dom. Civilian Absentee			UOCAVA			Other Means of Voting			Balance	
		Total	Cases	Percent	Total	Cases	Percent	Total	Cases	Percent	Total	Percent
Alabama	67	87,784	0	4.1	0	0	0.0	0	0	0.0	2,018,338	95.9
Alaska	1	29,118	1	8.9	12,103	1	3.7	0	0	0.0	0	0.0
Arizona	15	1,173,499	15	50.6	9,158	15	0.4	722	15	0.0	0	0.0
Arkansas	75	26,758	56	2.0	3,992	59	0.3	576	5	0.0	360,777	26.9
California	58	5,752,869	56	41.7	60,771	53	0.4	247,455	15	1.8	6,439	0.0
Colorado	64	1,510,842	64	62.3	12,375	60	0.5	318	5	0.0	0	0.0
Connecticut	169	125,455	169	7.6	5,341	169	0.3	41,631	169	2.5	(676)	(0.1)
Delaware	3	20,474	3	4.9	1,595	3	0.4	0	0	0.0	0	0.0
District of Columbia	1	14,201	1	6.3	1,390	1	0.6	12,364	1	5.4	(40,000)	(17.6)
Florida	67	1,850,502	67	21.7	97,278	67	1.1	30,536	67	0.4	0	0.0
Georgia	159	266,601	159	7.2	16,094	159	0.4	15,727	159	0.4	0	0.0
Hawaii	4	138,876	3	30.5	61	1	0.0	7,596	1	1.7	(40,871)	(9.0)
Idaho	44	194,557	44	29.1	2,665	44	0.4	0	0	0.0	0	0.0
Illinois	1	0	0	0.0	0	0	0.0	0	0	0.0	314,960	5.6
Indiana	92	662,443	92	23.6	8,145	0	0.3	0	0	0.0	(12,105)	(0.4)
Iowa	99	584,397	99	37.8	4,368	99	0.3	0	0	0.0	0	0.0
Kansas	105	0	0	0.0	6,187	102	0.5	460,339	105	36.4	564	0.0
Kentucky	120	109,078	120	5.9	5,226	120	0.3	0	0	0.0	0	0.0
Louisiana	64	28,855	64	1.5	5,814	64	0.3	0	0	0.0	0	0.0
Maine	499	230,744	499	31.0	0	0	0.0	0	0	0.0	0	0.0
Maryland	24	195,653	24	7.4	14,419	24	0.5	0	0	0.0	0	0.0
Massachusetts	351	0	0	0.0	0	0	0.0	0	0	0.0	3,102,955	100.0
Michigan	83	1,263,321	83	25.1	15,476	83	0.3	0	0	0.0	0	0.0
Minnesota	87	281,291	87	9.6	11,255	87	0.4	0	0	0.0	0	0.0
Mississippi	82	32,711	30	5.0	4,393	32	0.7	3,334	5	0.5	129,564	19.7
Missouri	116	221,169	113	7.4	83,935	115	2.8	30,829	8	1.0	159,987	5.3
Montana	56	210,050	56	42.2	3,391	55	0.7	0	0	0.0	0	0.0
Nebraska	93	174,219	93	21.5	2,584	93	0.3	143	93	0.0	(143)	(0.0)
Nevada	17	81,770	17	8.4	3,488	17	0.4	562	17	0.1	0	0.0

TABLE 29B. BALLOTS CAST BY MEANS OF VOTING (CONTINUED)

State	Election Jurisdiction in Survey	Absentee Voting						Other Means			Not Categorized	
		Dom. Civilian Absentee			UOCAVA			Other Means of Voting			Balance	
		Total	Cases	Percent	Total	Cases	Percent	Total	Cases	Percent	Total	Percent
New Hampshire	323	68,795	1	9.6	3,462	1	0.5	0	0	0.0	7	0.0
New Jersey	21	150,071	21	3.8	12,811	21	0.3	0	0	0.0	101,869	2.6
New Mexico	33	109,543	15	17.7	1,095	15	0.2	9,269	4	1.5	30,832	5.0
New York	1	318,829	1	4.1	54,220	1	0.7	0	0	0.0	0	0.0
North Carolina	100	195,647	100	4.5	12,540	100	0.3	0	0	0.0	0	0.0
North Dakota	53	75,915	53	23.0	1,036	53	0.3	0	53	0.0	0	0.0
Ohio	88	1,288,451	84	22.7	36,913	85	0.7	15,803	22	0.3	71	0.0
Oklahoma	77	73,850	77	5.0	6,049	77	0.4	0	0	0.0	0	0.0
Oregon	36	25,505	36	1.4	0	0	0.0	1,816,596	36	99.4	0	0.0
Pennsylvania	67	278,454	67	4.6	31,818	67	0.5	152,435	67	2.5	4,634	0.1
Rhode Island	39	0	0	0.0	0	0	0.0	0	0	0.0	3,078	0.6
South Carolina	46	0	0	0.0	0	0	0.0	0	0	0.0	1,930,259	100.0
South Dakota	66	51,081	54	13.2	2,937	58	0.8	0	5	0.0	37,887	9.8
Tennessee	95	63,929	95	2.4	0	0	0.0	0	0	0.0	0	0.0
Texas	254	700,757	237	2.5	234,877	245	2.9	0	0	0.0	(40,844)	(0.5)
Utah	29	86,987	29	8.9	0	0	0.0	0	0	0.0	0	0.0
Vermont	246	91,811	246	27.5	2,950	246	0.9	0	0	0.0	0	0.0
Virginia	134	474,621	134	12.7	29,258	134	0.8	0	0	0.0	0	0.0
Washington	39	2,678,075	39	87.2	45,929	39	1.5	0	0	0.0	0	0.0
West Virginia	55	14,573	43	2.0	3,456	38	0.5	0	0	0.0	59,835	8.1
Wisconsin	72	633,600	72	21.1	6,977	72	0.2	0	0	0.0	25,629	0.9
Wyoming	23	64,112	23	25.8	1,310	23	0.5	0	0	0.0	0	0.0
American Samoa	1	0	1	0.0	278	1	2.2	0	0	0.0	0	0.0
Guam	1	1,511	1	4.3	226	1	0.8	0	0	0.0	0	0.0
Puerto Rico	1	12,819	1	0.7	1,224	1	0.1	0	0	0.0	(100)	(0.0)
Virgin Islands	1	14	1	0.8	117	1	0.4	0	0	0.0	0	0.0
Sum of Above	4,517	22,244,396	3,446	16.6	880,995	2,802	0.7	2,846,737	852	2.1	8,152,886	6.1
States Included		49			46			18			25	
Question		F1d			F1c			F1g+h1			calc	

TABLE 29. BALLOTS CAST BY MEANS OF VOTING

Question F1. Number of people who participated in the November 2008 general election.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Alabama: [Information for the total number of voters participating in the State was provided by a follow-up request.]

Arizona: One county included both provisional ballots and conditional provisional ballots that were counted in their answer. In question F1, a percentage of these votes were considered "Voted at physical polling place" so E2 will not match F1. Another county reported the combined F1d and F1f for F1d.

Arkansas: One county did not include 6 provisional ballots in the total. Two counties could not separate a total 621 absentee ballots between UOCAVA and domestic civilian.

California: One county reported that 1332 provisional ballots were counted as absentee ballots. One county commented, "F1d includes all vote-by-mail ballots not included in the other categories."

Colorado: 23 Counties commented, "Fewer than 25 provisional ballots were counted. Colorado law states that when fewer than 25 provisional ballots are counted, the results of voting by provisional ballot shall be included in mail-in ballot statistics."

Connecticut: Provisional Ballot voters not included in turn-out numbers. Connecticut allows individuals who still reside in Connecticut but who are not registered to vote by Presidential Ballot on Election Day. As such, the vote totals appear in the candidate totals but they are not correspondingly included as registered voters "checked off" as having voted on Election Day because they do not appear on any Official Voter List. Thus, the 41, 631 "other means of voting" would include individuals who cast a Presidential Ballot.

Florida: "Includes all persons submitting a provisional ballot. Not all person voting rejected provisional ballot received vote history"

Illinois: [Information for the total number of voters participating in the State was provided by a follow-up request.]

Indiana: a) Indiana does not have 'early voting.' Indiana allows voters to cast absentee ballots prior to Election Day, but all absentee ballots are counted on Election Day. That is why F1f = 0 for all counties. b) Absentee ballots were counted as Cast in this survey if the county user placed the ballot in Received status within the Indiana SVRS prior to marking the ballot as "Accepted (Counted)" or "Rejected (Not Counted)." If the county marked the status of the ballot as "Accepted" or "Rejected" before marking it as "Received" those ballot statistics were not added to the total number of Cast ballots, so that Cast ballot counts were not inflated."

Maryland: Election Day polling place voters would include any UOCAVA voters who voted in person at their polling place.

Michigan: Number of provisional ballots (3,797) reflects those provisional ballots that were counted in the polls on Election Day (1,319) and those provisional ballots that were preserved as "envelope" ballots for later evaluation (2,478).

Minnesota: 933 absentee ballots were added and counted at the state level pursuant to court order, making the statewide total 2,921,147 (933+ 2920214= 2921147). The 933 ballots have not been attributed to any precinct or county in ERS; the survey spreadsheet does not accommodate the addition of this statewide AB total.

Missouri: One county counted rejected provisionals when the state does not. One county excluded rejected absentee, UOCAVA and provisional ballots. Another county did not include rejected domestic civilian absentees.

Nebraska: The New and Former resident numbers are not technically polling place voters. They have been separated from the participant totals. Provisional voters are included in the polling place numbers.

New Hampshire: [Information for the total number of voters participating in the State was provided by a follow-up request.]

North Carolina: "The totals in F1b were calculated by subtracting known absentee totals from the overall ballots cast and reported on

election night. Some absentee ballots were removed (for valid reasons) between Election Day and canvass day, so there may be additional ballots that need to be removed from this total. Also, based on our interpretation of question F1a, we have determined that the survey is really asking about voter history, not just ballots cast. Any voter who showed up and was given a ballot but declined to cast it would not be a part of these totals."

Ohio: For five counties, early voting numbers and absentee numbers were combined into absentee. One county commented, "The difference between F1a and the subtotals is because we operate from two systems — a voter registration system and a vote tabulation system. The numbers do not match because of the combinations of totals from two systems. Both systems needed to be used to identify the numbers requested for this section. We have modified the sources arrived to obtain these totals. in the next section." For one county, 4 provisional ballots counted at the polls with Election Day ballots. One county reported the number civilian absentee ballots that were counted, not that were cast. One county counted 41 absentee transmissions that were not sent back, thus not showing in the breakout.

Oregon: "Absentee figures (F1d) include both Absentee voters as well as UOCAVA voters. Oregon does not have early voting."

Rhode Island: [Information for the total number of voters participating in the State was provided by a follow-up request.]

South Carolina: "Voter Participation statistics are not yet available, but should be available in the next 2-3 weeks. Poll lists are still being processed." [Information for the total number of voters participating in the State was provided by a follow-up request.]

South Dakota: In South Dakota the terms absentee voting and early voting are interchangeable. From the State's submission for the Statutory Overview Section A General states: Absentee — SDCL 12-19-1. Absentee ballot — Persons entitled to vote. A registered voter who is not otherwise disqualified by law from voting in the election may vote by absentee ballot. Early voting — our state law does not reference "early voting". Absentee voting begins six weeks prior to the election and any qualified voter can vote absentee by mail or in-person without providing a reason.

American Samoa: Domestic civilian absentee ballots (F1d) is categorized with early voting (F1f).

Puerto Rico: "In PR we have a special concept of early voting but the ballots and all the statistics are mixed with the regular domestic absentee ballots to protect the secrecy of the vote."

TABLE 30. TURNOUT RATES FOR VOTER PARTICIPATION USING DIFFERENT BASES

State	Elections Juris. in Survey	Voters Participating		Estimated Voting Age			Estimated Citizen Voting Age			Reported Registration			Arranged by Voting Age		Arranged by Citizen Voting Age		Arranged by Registration	
		Total	Cases	Total	%TO	Rank	Total	%TO	Rank	Total	%TO	Rank	Sta	Value	Sta	Value	Sta	Value
Alabama	67	2,105,672	1	3,540,000	59.5	28	3,467,000	60.8	33	2,978,339	70.7	24	MN	73.6	MN	76.9	WY	104.6
Alaska	1	328,957	1	506,000	65.0	11	485,000	67.8	11	495,731	66.4	37	ME	71.4	NH	72.8	OR	85.7
Arizona	15	2,320,851	15	4,793,000	48.4	44	4,205,000	55.2	42	2,987,451	77.7	7	NH	70.4	ME	72.6	WA	84.8
Arkansas	75	1,341,795	66	2,152,000	62.3	...	2,083,000	64.4	...	1,684,240	79.7	...	WI	69.5	WI	71.5	MN	84.1
California	58	13,798,557	58	27,392,000	50.4	42	22,224,000	62.1	31	17,394,200	79.3	5	VT	67.9	CO	70.7	CA	79.3
Colorado	64	2,426,253	64	3,732,000	65.0	10	3,434,000	70.7	5	3,214,382	75.5	11	IA	67.5	IA	69.5	CT	78.7
Connecticut	169	1,644,845	169	2,689,000	61.2	23	2,480,000	66.3	19	2,090,788	78.7	5	MD	66.6	VT	69.3	AZ	77.7
Delaware	3	415,696	3	667,000	62.3	18	632,000	65.8	21	602,725	69.0	30	MT	66.6	MI	68.7	MD	77.5
District of Columbia	1	226,871	1	480,000	47.3	...	433,000	52.4	...	426,671	53.2	...	MI	66.2	MD	68.1	ID	77.4
Florida	67	8,514,809	67	14,324,000	59.4	29	12,643,000	67.3	13	12,562,978	67.8	32	CO	65.0	OR	68.1	SC	75.6
Georgia	159	3,975,988	159	4,137,000	55.7	36	6,614,000	60.1	35	5,755,750	69.1	29	AK	65.0	AK	67.8	CO	75.5
Hawaii	4	456,009	4	1,003,000	45.5	45	919,000	49.6	45	691,356	66.0	38	ND	63.9	VA	67.6	NH	75.1
Idaho	44	667,506	44	1,111,000	60.1	26	1,063,000	62.8	30	861,869	77.4	9	SD	63.9	FL	67.3	VA	74.5
Illinois	1	5,577,509	1	9,722,000	57.4	33	8,830,000	63.2	27	7,700,525	72.4	20	WY	63.4	MD	67.3	MT	74.5
Indiana	92	2,805,986	92	4,792,000	58.6	31	4,643,000	60.4	34	4,515,057	62.1	42	OR	63.2	MT	67.2	WI	74.5
Iowa	99	1,546,483	99	2,290,000	67.5	6	2,226,000	69.5	6	2,143,665	72.1	22	VA	63.1	MA	67.2	MA	73.5
Kansas	105	1,283,202	105	2,102,000	60.1	25	2,005,000	63.0	28	1,749,756	72.2	21	PA	62.7	NJ	66.8	VT	72.5
Kentucky	120	1,861,577	120	3,261,000	57.1	34	3,198,000	58.2	39	2,906,909	64.0	41	DE	62.3	WA	66.6	SD	73.0
Louisiana	64	1,980,814	64	3,303,000	60.0	27	3,237,000	61.2	32	2,942,160	67.3	35	NC	62.2	CT	66.3	NJ	72.6
Maine	499	744,456	499	1,042,000	71.4	2	1,025,000	72.6	3	1,065,064	69.9	26	MD	62.0	NC	65.9	IL	72.4
Maryland	24	2,661,905	24	4,293,000	62.0	20	3,957,000	67.3	14	3,432,645	77.5	8	WA	61.3	DE	65.8	KS	72.2
Massachusetts	351	3,102,995	351	5,071,000	61.2	22	4,621,000	67.1	16	4,220,488	73.5	16	MA	61.2	ND	65.0	IA	72.1
Michigan	83	5,039,080	83	7,613,000	66.2	9	7,334,000	68.7	8	7,470,764	67.5	34	CT	61.2	SD	64.8	MO	72.0
Minnesota	87	2,970,214	87	3,966,000	73.6	1	3,799,000	76.9	1	3,472,312	84.1	4	NE	60.8	PA	64.6	AL	70.7
Mississippi	82	657,058	45	2,172,000	30.3	...	2,145,000	30.6	...	1,895,583	34.7	...	KS	60.1	WY	64.5	NE	70.2
Missouri	116	2,992,073	116	4,490,000	66.6	7	4,391,000	68.1	9	4,154,113	72.0	23	ID	60.1	NE	63.5	ME	69.9
Montana	56	497,599	56	747,000	66.6	8	740,000	67.2	15	668,085	74.5	14	LA	60.0	IL	63.2	NC	69.7
Nebraska	93	811,790	93	1,336,000	60.8	24	1,278,000	63.5	26	1,157,034	70.2	25	AL	59.5	KS	63.0	PA	69.3
Nevada	17	970,019	17	1,932,000	50.2	43	1,685,000	58.3	38	1,446,538	67.1	36	FL	59.4	NI	62.8	GA	69.1

TABLE 30. TURNOUT RATES FOR VOTER PARTICIPATION USING DIFFERENT BASES (CONTINUED)

State	Election Year	Voter Participating	Voting-Age Population		Voting-Age Citizen Population		Registered Voters		Registration Rate		Registered to Vote Citizen Population		Registration Rate Citizen Population	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

TABLE 30. TURNOUT RATES FOR VOTER PARTICIPATION USING DIFFERENT BASES

Question F1. Calculations for rates of voter participation (turnout) based upon voting age population, citizens of voting age, and registration.

General note: This table represents a comparison of the rates of participation based upon the number of voters participating (F1a) by calculating the rate based upon selected bases. Ranks are assigned for jurisdictions for which complete information is provided. Thus, no rank would be assigned if either element of the information needed to undertake the calculation is missing or if this information is missing from some cases in the jurisdiction. In addition, because information for all factors is not available for the four territories, they are not ranked for any factor.

Reported registration is, with a few exceptions, information also taken from the 2008 Election Administration and Voting Survey (see Tables 1a, 1b, 1c, and 1d of the NVRA Report Appendix); inclusion of active vs. inactive voters will vary by state. The Estimated Voting Age (VAP) and the Citizens of Voting Age (CVAP) are also taken from the same source, being generated by information released by the Bureau of the Census. The VAP numbers are as of the estimate date of July 1, 2008. The CVAP numbers are estimated from the ACS information for the 2007 3-year ACS applied to the July 1, 2008 VAP numbers. All the information used here and released by the Bureau of the Census share some data issues: a) they are estimates initially founded upon the 2000 Census and an ongoing review of administrative records or, in the case of the ACS, an ongoing survey; b) the estimates are for the domestic/resident population, thus, UOCAVA voters are not included in the relevant universe of the voting population; and c) these population bases do not address the statutory eligibility of any person to register or to vote.

A handful of States did not respond with voter turnout information or did not respond with turnout information for all jurisdictions. These cases are excluded from the rankings with the exception of a few that provided one updated number for the State. The reader should be cognizant of the impact this missing information has on the overall national values.

North Dakota: North Dakota does not have voter registration. [Editor's notes: a) North Dakota is included in the ranks for the sake of comparability with other States; b) some small discrepancy may be noted in tables with respect to the estimated numbers of voting age persons and citizens of voting age as they are used to approximate the universe of the eligible population.]

TABLE 31. SOURCE USED TO DETERMINE VOTER PARTICIPATION

State	Election Juris. in Survey	Total of Voters Participating	Cases	Voters Checked Off or Poll Book Signatures			Ballots Counted			Vote History			Votes for Highest Office			Other or None Indicated (See Comments)		
				Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
Alabama	67	2,105,622	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Alaska	1	328,957	1	0	0	0.0	328,957	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Arizona	15	2,320,851	15	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	2,320,851	15	100.0
Arkansas	75	1,341,795	66	180,902	19	13.5	419,373	35	31.3	34,199	4	2.5	64,594	3	4.8	642,727	3	47.9
California	58	13,798,557	58	4,244,317	7	30.8	2,966,372	28	21.5	4,684,593	28	33.9	450,485	1	3.3	1,452,790	4	10.5
Colorado	64	2,426,253	64	0	0	0.0	278,343	2	11.5	2,147,910	62	88.5	0	0	0.0	0	0	0.0
Connecticut	169	1,644,845	169	1,644,845	169	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Delaware	3	415,896	3	0	0	0.0	415,896	3	100.0	0	0	0.0	0	0	0.0	0	0	0.0
District of Columbia	1	226,871	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	226,871	1	100.0
Florida	67	8,514,809	67	2,553,700	18	30.0	3,933,958	29	46.2	1,329,194	16	15.6	0	0	0.0	697,957	4	8.2
Georgia	159	3,975,986	159	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	3,975,986	159	100.0
Hawaii	4	456,009	4	52,039	1	11.4	67,258	1	14.7	0	0	0.0	0	0	0.0	336,712	1	73.8
Idaho	44	667,506	44	0	0	0.0	667,506	44	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Illinois	1	5,577,509	1	5,577,509	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Indiana	92	2,805,986	92	2,805,986	92	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Iowa	99	1,546,483	99	0	0	0.0	0	0	0.0	1,546,483	99	100.0	0	0	0.0	0	0	0.0
Kansas	105	1,263,202	105	640,954	64	50.7	547,209	24	43.3	51,703	9	4.1	10,393	7	0.8	13,753	6	1.1
Kentucky	120	1,861,577	120	0	0	0.0	0	0	0.0	1,861,577	120	100.0	0	0	0.0	0	0	0.0
Louisiana	64	1,980,814	64	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	1,980,814	64	100.0
Maine	499	744,456	499	0	0	0.0	744,456	499	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Maryland	24	2,661,905	24	0	0	0.0	0	0	0.0	2,661,905	24	100.0	0	0	0.0	0	0	0.0
Massachusetts	351	3,102,995	351	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	3,102,995	351	100.0
Michigan	83	5,039,080	83	5,039,080	83	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Minnesota	87	2,920,214	87	2,920,214	87	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Mississippi	82	657,058	45	147,864	14	22.5	212,392	15	32.3	64,523	1	9.8	37,841	3	5.8	194,438	10	29.6
Missouri	116	2,992,023	116	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	2,992,023	116	100.0
Montana	56	497,599	56	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	497,599	56	100.0
Nebraska	93	811,780	93	0	0	0.0	811,780	93	100.0	0	0	0.0	0	0	0.0	0	0	0.0

TABLE 31. SOURCE USED TO DETERMINE VOTER PARTICIPATION (CONTINUED)

State	Election Juris. in Survey	Total of Voters Participating	Cases	Voters Checked Off or Poll Book Signatures			Ballots Counted			Vote History			Votes for Highest Office			Other or None Indicated (See Comments)		
				Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
Nevada	17	970,019	17	14,475	2	1.5	740,281	9	76.3	186,801	3	19.3	0	0	0.0	28,482	3	2.9
New Hampshire	323	719,403	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	719,403	0	100.0
New Jersey	21	3,910,220	21	0	0	0.0	0	0	0.0	3,910,220	21	100.0	0	0	0.0	0	0	0.0
New Mexico	33	620,289	19	173,120	6	27.9	353,292	6	57.0	11,705	2	1.9	16,886	1	2.7	65,286	3	10.5
New York	1	7,722,019	1	0	0	0.0	0	0	0.0	0	0	0.0	7,722,019	1	100.0	0	0	0.0
North Carolina	100	4,338,197	100	0	0	0.0	0	0	0.0	4,338,197	100	100.0	0	0	0.0	0	0	0.0
North Dakota	53	318,425	53	0	0	0.0	0	0	0.0	318,425	53	100.0	0	0	0.0	0	0	0.0
Ohio	88	5,671,438	86	362,012	13	6.4	3,535,088	43	62.3	365,026	10	6.4	460,003	5	8.1	949,307	12	16.7
Oklahoma	77	1,474,694	77	0	0	0.0	0	0	0.0	0	0	0.0	1,474,694	77	100.0	0	0	0.0
Oregon	36	1,845,251	36	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	1,845,251	36	100.0
Pennsylvania	67	6,071,357	67	0	0	0.0	0	0	0.0	6,071,357	67	100.0	0	0	0.0	0	0	0.0
Rhode Island	39	475,428	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
South Carolina	46	1,930,359	1	0	46	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
South Dakota	66	387,355	66	0	0	0.0	387,355	66	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Tennessee	95	2,616,238	95	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	2,616,238	95	100.0
Texas	254	8,059,731	244	956,750	91	11.9	6,720,265	126	83.4	169,280	11	2.1	142,937	8	1.8	70,499	5	0.9
Utah	29	960,299	29	0	0	0.0	0	0	0.0	960,299	29	100.0	0	0	0.0	0	0	0.0
Vermont	246	333,839	246	333,839	246	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Virginia	134	3,750,065	134	3,750,065	134	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Washington	39	3,071,587	39	0	0	0.0	3,005,161	35	97.8	41,364	3	1.3	0	0	0.0	25,062	1	0.8
West Virginia	55	736,622	55	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	736,622	55	100.0
Wisconsin	72	2,996,869	72	2,996,869	72	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Wyoming	23	256,035	23	0	0	0.0	256,035	23	100.0	0	0	0.0	0	0	0.0	0	0	0.0
American Samoa	1	12,406	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	12,406	1	100.0
Guam	1	35,092	1	35,092	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Puerto Rico	1	1,942,931	1	1,942,931	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Virgin Islands	1	29,930	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	29,930	1	100.0
Sum of Above	4,517	133,944,538	3,974	36,371,663	1,167	27.2	26,390,847	1,074	19.7	30,754,763	660	23.0	10,376,852	101	7.7	25,536,004	1,002	19.1
States Included				20			19			19			9			24		
Question			F1a	F2.1			F2.2			F2.3			F2.4			F2.5+0		

TABLE 31. SOURCE USED TO DETERMINE VOTER PARTICIPATION

Questions F1, F2. Number of persons participating and the source of the number of voters.

General Note: The responses to F2, which were text, were coded in order to tabulate the number of voters that participated in the election for each source.

California: One county commented that they used multiple sources.

Missouri: "The Secretary of State's office recommended that the local election authorities respond to question F1a by totaling up all ballots cast at the polling place, all domestic civilian absentee ballots cast, all provisional ballots cast, and all UOCAVA ballots cast."

Nevada: One county reported using multiple sources.

TABLE 32. DOMESTIC ABSENTEE BALLOTS TRANSMITTED: DISPOSITION OF BALLOTS

State	Election Juris. in Survey	Total Ballots Transmitted		Domestic Absentee Ballots Transmitted to Voters and Disposition																	Net Categorical Balance (See Notes)	
				Returned and Submitted for Counting			Returned as Unchallengeable			Spoiled or Replaced Ballots			Status Unknown (Not Returned)			Other Disposition (See Comments)				
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
Alabama	67	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...	0	...
Alaska	1	34,853	1	28,118	1	83.5	246	1	0.7	493	1	1.4	5,008	1	14.4	0	0	0.0	0	0.0
Arizona	15	1,308,030	15	1,223,935	15	93.6	78,472	10	1.6	7,138	12	0.5	59,533	14	4.6	1,430	7	0.1	(4,579)	(0.4)
Arkansas	75	30,564	64	25,441	61	83.2	258	46	0.8	131	46	0.4	3,493	49	11.4	0	0	0.0	1,243	4.1
California	58	7,156,841	57	6,000,830	57	83.8	144,244	43	2.0	91,395	32	1.3	784,509	50	11.0	88,220	27	1.0	66,642	0.9
Colorado	64	1,665,701	64	1,516,677	64	91.0	16,323	50	1.0	48,298	63	2.9	85,403	64	5.1	0	0	0.0	0	0.0
Connecticut	169	140,549	169	147,368	169	104.9	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	(6,819)	(4.9)
Delaware	3	21,675	3	20,807	3	96.4	20	3	0.1	0	0	0.0	748	3	3.5	0	0	0.0	0	0.0
District of Columbia	1	28,523	1	27,573	1	96.3	468	1	1.6	512	1	1.8	0	0	0.0	70	1	0.2	0	0.0
Florida	67	2,153,238	67	1,850,502	67	85.9	23,684	67	1.1	21,898	67	1.0	227,809	67	10.6	29,345	67	1.4	0	0.0
Georgia	159	2,117,613	159	2,082,823	159	98.4	554	156	0.0	293	159	0.0	0	159	0.0	33,943	159	1.6	0	0.0
Hawaii	4	113,533	4	96,520	3	85.0	24	1	0.0	277	1	0.2	498	1	0.4	0	0	0.0	16,244	14.3
Idaho	44	202,228	44	195,454	44	96.7	502	44	0.2	594	44	0.3	5,678	44	2.8	0	0	0.0	0	0.0
Illinois	1	338,800	1	315,586	1	93.2	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	23,214	6.8
Indiana	92	645,940	92	622,214	92	96.3	250	92	0.0	1,931	92	0.3	0	0	0.0	0	0	0.0	21,445	3.3
Iowa	99	625,213	99	593,082	99	94.9	1,171	99	0.2	0	0	0.0	30,960	99	5.0	0	0	0.0	0	0.0
Kansas	105	320,093	105	299,168	105	93.5	1,183	93	0.4	1,876	91	0.6	17,004	102	5.3	0	0	0.0	860	0.3
Kentucky	120	117,084	120	110,880	120	94.7	0	0	0.0	0	0	0.0	7,008	120	6.0	0	0	0.0	(72)	(0.0)
Louisiana	64	294,904	64	287,257	64	97.4	210	64	0.1	0	64	0.0	7,263	64	2.5	174	64	0.1	0	0.0
Maine	499	243,162	498	236,434	498	97.2	91	499	0.0	1,535	499	0.6	5,102	499	2.1	0	0	0.0	0	0.0
Maryland	24	215,541	24	195,654	24	90.7	913	24	0.4	0	0	0.0	19,074	24	8.8	0	0	0.0	0	0.0
Massachusetts	351	224,951	351	204,401	351	90.9	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	20,550	9.1
Michigan	83	1,295,753	83	1,263,321	83	97.5	1,726	83	0.1	13,609	83	1.1	17,097	83	1.3	0	0	0.0	0	0.0
Minnesota	87	188,927	85	328,727	87	174.0	210	87	0.1	1,232	87	0.7	14,529	85	7.7	0	0	0.0	(159,771)	(87.5)
Mississippi	87	43,172	41	36,544	37	84.6	173	18	0.4	29	15	0.1	726	18	1.7	0	0	0.0	5,700	13.2
Missouri	116	317,744	116	297,000	115	93.5	659	102	0.2	2,146	98	0.7	10,093	87	3.2	0	0	0.0	7,846	2.5
Montana	56	221,045	56	212,012	56	95.9	696	56	0.3	994	56	0.4	7,433	56	3.4	0	0	0.0	0	0.0
Nebraska	93	183,559	93	176,198	93	96.0	185	93	0.1	3,375	93	1.8	3,807	93	2.1	0	0	0.0	0	0.0

TABLE 32. DOMESTIC ABSENTEE BALLOTS TRANSMITTED: DISPOSITION OF BALLOTS (CONTINUED)

State	Election Juris. in Survey	Total Ballots Transmitted		Domestic Absentee Ballots Transmitted to Voters and Disposition: Returned and Submitted for Counting			Returned as Undeliverable			Spoiled or Replaced Ballots			Status Unknown (Not Returned)			Other Disposition (See Comments)			Net Categorized Balance (See Below)	
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
Nevada	17	94,438	17	86,123	17	91.2	1,269	16	1.4	628	16	0.7	6,387	16	6.8	11	13	0.0	0	0.0
New Hampshire	323	73,551	323	70,064	323	95.3	70	323	0.1	0	0	0.0	3,417	323	4.6	0	0	0.0	0	0.0
New Jersey	21	265,013	21	150,071	21	56.6	0	0	0.0	0	0	0.0	24,094	21	9.1	90,848	16	34.3	0	0.0
New Mexico	33	143,005	20	119,218	17	83.4	267	14	0.2	144	12	0.5	2,452	11	1.7	0	0	0.0	20,324	14.2
New York	1	348,062	1	318,828	1	91.6	0	0	0.0	0	0	0.0	0	0	0.0	12,995	1	3.7	16,239	4.7
North Carolina	100	259,761	100	222,127	100	85.5	588	100	0.2	333	100	0.1	36,715	100	14.1	0	100	0.0	0	0.0
North Dakota	53	81,068	53	75,916	53	93.6	44	53	0.1	107	53	0.1	5,001	53	6.2	0	0	0.0	0	0.0
Ohio	88	1,874,087	85	1,545,618	85	98.3	3,393	67	0.2	8,712	58	0.5	69,594	78	4.2	3,521	29	0.2	(56,741)	(3.4)
Oklahoma	77	98,966	77	73,850	77	83.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	15,116	17.0
Oregon	36	19,782	36	25,505	36	128.9	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	(5,723)	(28.9)
Pennsylvania	67	316,190	67	280,397	67	88.7	420	67	0.1	167	67	0.1	35,206	67	11.1	0	67	0.0	0	0.0
Rhode Island	39	24,252	39	22,894	39	94.4	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	1,358	5.6
South Carolina	46	343,625	46	334,776	46	97.4	0	0	0.0	0	0	0.0	8,849	46	2.6	0	0	0.0	0	0.0
South Dakota	66	103,335	66	100,780	66	97.5	188	38	0.2	35	32	0.0	1,116	40	1.1	0	0	0.0	1,236	1.2
Tennessee	95	63,929	95	63,929	95	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
Texas	254	363,940	245	332,351	244	91.3	1,585	231	0.5	1,733	224	0.5	28,224	235	7.8	0	0	0.0	(62)	(0.0)
Utah	28	109,970	28	82,151	27	74.7	1,464	13	1.3	0	0	0.0	26,355	29	24.0	0	0	0.0	0	0.0
Vermont	246	95,953	246	92,997	246	96.9	66	246	0.1	555	245	0.6	2,553	246	2.7	0	0	0.0	(168)	(0.2)
Virginia	134	549,262	134	509,062	134	92.7	0	0	0.0	0	0	0.0	40,200	134	7.3	0	0	0.0	0	0.0
Washington	39	0	0	0	0		0	0		0	0		0	0		0	0		0	
West Virginia	55	15,933	42	13,007	39	81.6	132	36	0.8	57	34	0.4	718	33	4.5	0	0	0.0	2,019	12.7
Wisconsin	72	675,912	72	639,902	72	94.7	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	36,010	5.3
Wyoming	23	65,928	23	64,112	23	97.2	18	5	0.0	0	0	0.0	1,798	23	2.7	0	0	0.0	0	0.0
American Samoa	1	0	1	0	1		0	1		0	1		0	1		0	1		0	
Guam	1	1,511	1	1,511	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
Puerto Rico	1	15,389	1	12,819	1	83.3	2,570	1	16.7	0	1	0.0	0	1	0.0	0	0	0.0	0	0.0
Virgin Islands	1	14	1	14	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
Sum of Above	4,517	26,044,388	4,297	23,733,438	4,297	91.1	226,438	2,946	0.9	210,730	2,447	0.8	1,605,820	3,219	6.2	241,557	552	0.9	26,604	0.1
States Included		52		52			37			29			37			10			24	
Question		C1a		C1b			C1c			C1d			C1e			C1f+g+h			calc	

TABLE 32. DOMESTIC ABSENTEE BALLOTS TRANSMITTED: DISPOSITION OF BALLOTS

Questions C1. Number of domestic civilian absentee ballots transmitted to voters and the disposition of the ballots.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Arizona: For one county, the spoiled or replaced ballots total for C1d is an amount that is for reference only since these spoiled/replacement ballots issued may or may not have been returned. If they were returned then they would be part of the C1b total. As such, this C1d total is not reflected as part of the grand total shown.

Arkansas: In on county, 13 were too late to count, so total is -13.

California: For one county, 249 Spoiled or Replaced ballots are combined in C1b total). For one county, Spoiled and replaced are not tracked by issue type. No way to determine UOCAVA from Domestic replaced or spoils. For one county, C1f - Only ballots with a return date and a return status of void are included in this number. For two counties, C1g - Replacement Ballots are also included in the other numbers within the same section. For instance Replacement Ballot could also be included in the returned for counting number. For one county, C1d, the difference of 128 is that 128 were 2nd issues requested by voter. For one county, Does not include second ballots.

Connecticut: Connecticut reported that regular absentees & Military absentee ballots were both reported in C1b.

Indiana: Absentee ballots were counted as Cast in this survey if the county user placed the ballot in Received status within the Indiana SVRS prior to marking the ballot as "Accepted (Counted)" or "Rejected (Not Counted)." If the county marked the status of the ballot as "Accepted" or "Rejected" before marking it as "Received" those ballot statistics were not added to the total number of Cast ballots, so that Cast ballot counts were not inflated."

Florida: For one county, C1d Returned spoiled or replaced ballots are included in response to C1b, For one county, C1d is included with C1b total.

Minnesota: 39 counties: Undeliverable and spoiled ballot counts reported as "0" may reflect data not reported.; 25 counties: # issued reflect only ballots the county entered into SVRS application; the count may be under-represented if ballots were issued outside of SVRS Undeliverable and spoiled ballot counts reported as "0" may reflect data not reported. 22 counties: # issued not reported. Undeliverable and spoiled ballot counts reported as "0" may reflect data not reported.

Missouri: St. Clair County reports "C1d - 7 ballots did not reach the voter so replacement ones were sent. These are not included in the total. Daviess Co reports "C1d - 2 spoiled are included in C1b." Christian Co reports "14 ballot envelope not signed; 47 ballot envelope not notarized; 2 voter deceased." Pulaski Co reports "In our initial report we did oot include the 25 spoiled ballots."

Montana: Any marked "spoiled" are actually "Sent\Void".

Nevada: For one county, C1c: undeliverable and spoiled or replaced ballots counted together.

North Carolina: IMPORTANT NOTICE: "Early voting" in North Carolina is actually in-person absentee voting. Over 2.4 million people voted during one-stop voting in the 2008 general election. The amount of absentee ballots noted in C1b comprises the total number of mail-in absentee ballots that were returned by voters. [UPDATE: The State updated the value for C1a tn reflect the count of only ballots actually transmitted.]

Ohio: 3 counties did not track categories, For one county, consists of returned after date & counted; rejected, uncountable & undeliverable; military & non- military OS. For one county, reports did not show spoiled count, so number is increased by 10. For one county, total includes domestic armed forces absentee ballot information.

Oregon: Ballots returned (C1b) includes both absentee voters and UOCAVA voters: unable to separate out.

Puerto Rico: Puerto Rico defines domestic civilian absentee ballots as the voters that are qualified by Puerto Rico Electoral Law or CEE regulations to request to vote in a special early voting process.

TABLE 33. DOMESTIC ABSENTEE BALLOTS: SENT TO PERMANENT LIST; SUBMITTED FOR COUNTING: DISPOSITION

State	Election Juris. in Survey	Total Ballots Transmitted	Permanent List Transmissions	Pct.	Ballots Submitted	Disposition of Domestic Absentee Ballots Submitted for Counting									Not Categorized Balance (See Notes)	
						Counted			Rejected			Other (See Comments)				
		Total	Total		Total	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
Alabama	67	0	0	...	0	0	0	...	0	0	...	0	0	...	0	...
Alaska	1	34,853	0	0.0	29,118	28,505	1	97.9	612	1	2.1	0	0	0.0	0	0.0
Arizona	15	1,308,030	908,902	69.5	1,223,936	1,217,109	15	99.4	6,827	15	0.6	0	14	0.0	0	0.0
Arkansas	75	30,564	4,191	13.7	25,441	23,960	64	94.2	789	55	3.1	0	0	0.0	692	2.7
California	58	7,156,841	5,890,996	82.3	6,000,830	5,920,154	57	98.7	130,730	55	2.2	0	0	0.0	(50,064)	(0.8)
Colorado	64	1,686,701	1,459,090	87.5	1,516,677	1,508,674	64	99.5	8,003	54	0.5	0	0	0.0	0	0.0
Connecticut	169	140,549	0	0.0	147,388	144,295	169	97.9	3,073	169	2.1	0	0	0.0	0	0.0
Delaware	3	21,575	0	0.0	20,807	20,474	3	98.4	333	3	1.6	0	0	0.0	0	0.0
District of Columbia	1	29,623	0	0.0	27,573	25,215	1	91.4	2,358	1	8.6	0	0	0.0	0	0.0
Florida	67	2,153,236	1,087,083	50.5	1,850,502	1,832,045	67	99.0	18,456	67	1.0	0	67	0.0	0	0.0
Georgia	159	2,117,613	0	0.0	2,082,823	2,079,316	159	99.8	3,507	159	0.2	0	159	0.0	0	0.0
Hawaii	5	113,533	0	0.0	96,520	96,548	3	100.0	785	3	0.8	0	0	0.0	(813)	(0.8)
Idaho	44	202,228	0	0.0	195,454	194,557	44	99.5	897	44	0.5	0	0	0.0	0	0.0
Illinois	1	338,900	0	0.0	315,686	312,689	1	99.4	3,179	1	1.0	0	0	0.0	(118)	(0.0)
Indiana	92	645,840	0	0.0	622,214	444,500	92	71.5	68,029	92	10.9	0	0	0.0	109,585	17.6
Iowa	99	675,213	0	0.0	593,082	588,764	99	99.3	4,321	99	0.7	0	0	0.0	0	0.0
Kansas	105	320,093	30,469	9.5	299,168	293,836	103	98.2	4,041	101	1.4	0	0	0.0	1,291	0.4
Kentucky	120	117,664	0	0.0	110,860	114,025	120	103.0	1,890	120	1.7	0	0	0.0	(5,225)	(4.7)
Louisiana	64	294,904	14,682	5.0	287,257	285,380	64	99.3	1,877	64	0.7	0	0	0.0	0	0.0
Maine	499	243,162	0	0.0	236,434	234,600	499	99.2	1,834	499	0.8	0	0	0.0	0	0.0
Maryland	24	215,641	0	0.0	195,654	193,731	24	99.0	1,923	24	1.0	0	0	0.0	0	0.0
Massachusetts	351	224,951	0	0.0	204,401	202,421	351	99.0	1,980	351	1.0	0	0	0.0	0	0.0
Michigan	83	1,295,753	0	0.0	1,263,321	1,254,796	83	99.3	8,525	83	0.7	0	0	0.0	0	0.0
Minnesota	87	188,927	0	0.0	328,727	319,401	87	97.2	9,368	73	2.8	0	0	0.0	(40)	(0.0)
Mississippi	82	43,172	793	1.8	36,544	33,689	35	92.2	1,515	27	4.1	10	6	0.0	1,330	3.6
Missouri	116	317,744	14,931	4.6	297,000	286,674	116	97.2	5,403	112	1.8	33	3	0.0	2,890	1.0
Montana	56	221,045	107,372	48.6	212,012	210,050	56	99.1	1,962	56	0.9	0	0	0.0	0	0.0
Nebraska	93	193,555	1,224	0.7	176,188	174,258	93	98.9	1,866	93	1.1	63	1	0.0	0	0.0
Nevada	17	94,438	0	0.0	86,123	80,670	17	93.7	5,453	17	6.3	0	17	0.0	0	0.0

TABLE 33. DOMESTIC ABSENTEE BALLOTS: SENT TO PERMANENT LIST; SUBMITTED FOR COUNTING: DISPOSITION (CONTINUED)

State	Election Juris. in Survey	Total Ballots Transmitted	Permanent List Transmissions	Pct.	Ballots Submitted	Disposition of Domestic Absentee Ballots Submitted for Counting									Not Categorized Balance (See Notes)	
						Counted			Rejected			Other (See Comments)				
		Total	Total		Total	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
New Hampshire	323	73,551	0	0.0	70,064	68,795	323	98.2	1,269	323	1.8	0	0	0.0	0	0.0
New Jersey	21	765,013	0	0.0	150,071	144,757	20	96.5	0	0	0.0	0	0	0.0	5,314	3.5
New Mexico	33	143,005	3,685	2.6	119,218	124,975	19	104.8	1,009	18	0.8	0	0	0.0	(6,766)	(5.7)
New York	1	348,062	102,983	29.6	318,828	0	0	0.0	17,150	1	5.4	0	0	0.0	301,678	94.6
North Carolina	100	259,761	0	0.0	222,127	195,647	100	88.1	26,480	100	11.9	0	100	0.0	0	0.0
North Dakota	53	81,068	0	0.0	75,918	75,533	53	99.5	383	53	0.5	0	0	0.0	0	0.0
Ohio	88	1,674,687	0	0.0	1,645,618	1,618,577	85	98.4	25,950	85	1.6	1,260	18	0.1	(719)	(0.0)
Oklahoma	77	88,966	0	0.0	73,850	71,842	77	97.3	2,008	77	2.7	0	0	0.0	0	0.0
Oregon	36	19,782	0	0.0	25,505	25,146	36	98.6	359	36	1.4	0	0	0.0	0	0.0
Pennsylvania	67	316,190	4,687	1.5	280,397	278,454	67	99.3	1,943	67	0.7	0	0	0.0	0	0.0
Rhode Island	39	24,252	0	0.0	0	22,513	39		0	0		0	0	...	(22,513)	...
South Carolina	46	343,625	0	0.0	334,776	0	0	0.0	1,079	46	0.3	0	0	0.0	333,697	99.7
South Dakota	56	103,335	7,275	7.0	100,780	71,530	55	71.0	258	25	0.3	0	3	0.0	28,992	28.8
Tennessee	95	63,929	0	0.0	63,929	63,929	95	100.0	2,348	95	2.7	0	0	0.0	(2,348)	(3.7)
Texas	254	363,940	0	0.0	332,351	314,385	243	94.6	15,171	240	4.6	0	1	0.0	2,785	0.8
Utah	29	109,970	0	0.0	82,151	80,485	27	98.0	1,666	27	2.0	0	0	0.0	0	0.0
Vermont	246	95,953	0	0.0	92,997	91,245	246	98.1	1,168	246	1.3	0	0	0.0	583	0.6
Virginia	134	549,262	0	0.0	509,062	502,340	134	98.7	6,722	134	1.3	0	0	0.0	0	0.0
Washington	39	0	0	...	0	2,678,075	39	...	0	0	...	0	0	...	(2,678,075)	...
West Virginia	55	15,933	0	0.0	13,007	12,547	39	96.5	398	35	3.1	0	0	0.0	62	0.5
Wisconsin	72	675,912	0	0.0	639,907	633,600	72	99.0	2,739	72	0.4	0	0	0.0	3,563	0.6
Wyoming	23	65,928	0	0.0	64,112	63,886	23	99.6	226	23	0.4	0	0	0.0	0	0.0
American Samoa	1	0	0	...	0	0	1	...	0	1	...	0	1	...	0	...
Guam	1	1,511	0	0.0	1,511	1,511	1	100.0	0	1	0.0	0	0	0.0	0	0.0
Puerto Rico	1	15,389	0	0.0	12,819	12,819	1	100.0	0	1	0.0	0	0	0.0	0	0.0
Virgin Islands	1	14	0	0.0	14	14	1	100.0	0	1	0.0	0	0	0.0	0	0.0
Sum of Above	4,517	26,044,388	9,838,233	37.0	23,710,545	25,276,095	4,281	106.6	407,862	4,145	1.7	1,366	390	0.0	(1,974,796)	(8.3)
States Included		52	15		51	51			47			4			24	
Question		C1a	C3	calc	C1b	C4a			C4b			C4c+C4d			calc	

TABLE 33. DOMESTIC ABSENTEE BALLOTS: PERMANENT LIST; SUBMITTED FOR COUNTING: DISPOSITION

Questions C1, C3, C4. Number of domestic civilian absentee ballots transmitted to voters due to the existence of a permanent list; and ballots submitted for counting and the disposition of the ballots.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Question C3:

California: For one county, does not include second ballots issued. For one county, vote by mail requests not included. For Solano county, 5,281 ballots were issued to voters in all mail ballot precincts. An indeterminate number of those voters have requested Permanent vote by mail status. It is not possible at this time to present a definitive and accurate number of all ballots issued to Permanent vote by mail voters.

Missouri: Greene Co. reports "This in only the current number of active voters on the Permanently Disabled Absentee List. Due to the different possible classifications of request sources for absentee voters that includes: Illness/Disability, Incapacitated/Caregiver, and Permanently Disabled, the number of voters on the permanent list actually requesting a ballot is not available. Oregon Co. reports "C3: Permanent absentee applicants=15" Butler Co. reports "This is the number list of permanently disabled who are active voters only."

Question C4:

Arkansas: For one county, did not break out absentee from provisional, so 168 provisional ballots may have been counted twice.

California: For two counties, C4h - Rejected ballots not added to total. For one county, they used a two-card ballot for the Nov. 2008 election. Their vote tally system does not increment when only the B card is counted, so they have a total of -177.

Florida: For one county, C4b does not include returned undeliverable.

Indiana: a) Absentee ballots were counted as Cast in this survey if the county user placed the ballot in Received status within the Indiana SVRS prior to marking the ballot as "Accepted (Counted)" or "Rejected (Not Counted)." If the county marked the status of the ballot as "Accepted" or "Rejected" before marking it as "Received" those ballot statistics were not added to the total number of Cast ballots, so that Cast ballot counts were not inflated. b) At the time this data was collected, not all counties had changed the status of the electronic absentee ballot records to "Counted" in the SVRS, although the county manually counted each ballot in their official election results. The purpose of this column is to explain why Indiana has nearly 110,000 absentee ballots neither counted nor rejected in the table.

Minnesota: 3 counties: # rejected may be under-reported due to incomplete responses from administering municipalities. 6 counties: # rejected reflects only ballots the county entered into SVRS application; the count may be under-represented if ballots were not tracked using SVRS. 4 counties: Count only reflects # of mail ballots rejected. # of absentee ballots rejected was not reported.

North Carolina: The amount in C4a reflects civilian mail-in absentee ballots. The amount in C4c reflects the in-person absentee ballots that were cast during one-stop early voting. Together, these figures comprise the total number of absentee ballots that were cast in the 2008 general elections.

Ohio: For one county, total includes domestic armed forces absentee ballot information. Another county commented, "plus one undeliverable, it was not returned by the voter."

Oregon: Ballots counted (C4a) and rejected (C4b) include both absentee voters and UOCAVA voters; unable to separate out.

South Carolina: The state does not distinguish between UOCAVA and domestic civilian absentee ballots when counting ballots. They left column C4a blank since it was asking for only domestic civilian absentee ballots counted. The total number of absentee ballots counted is available. The numbers in C4h reflect the number of domestic civilian absentee ballots returned after the deadline, and rejected by default.

TABLE 34A. DOMESTIC ABSENTEE BALLOTS: REASONS FOR REJECTION, PART A

State	Election Juris. in Survey	Ballots Rejected		Domestic Absentee Ballots Rejected and Reason, Part A														
				Not Received on Time or Missed Deadline			No Voter Signature			No Witness Signature			Non-matching Signature			No Election Official's Signature		
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
Alabama	67	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
Alaska	1	612	1	79	1	12.9	40	1	6.5	240	1	39.2	0	1	0.0	0	1	0.0
Arizona	15	6,827	15	1,611	10	23.6	3,041	14	44.5	0	8	0.0	1,645	13	24.1	0	8	0.0
Arkansas	75	789	55	168	36	21.3	1,112	33	140.9	17	20	2.2	69	21	8.7	0	18	0.0
California	58	130,730	55	20,321	48	15.5	13,018	50	10.0	253	33	0.2	12,800	49	9.8	0	29	0.0
Colorado	64	8,003	54	1,451	41	18.3	1,829	64	22.9	0	0	0.0	2,360	61	29.5	0	0	0.0
Connecticut	169	3,073	169	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Delaware	3	333	3	330	3	99.1	3	3	0.9	0	3	0.0	0	3	0.0	0	3	0.0
District of Columbia	1	2,358	1	70	1	3.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Florida	67	18,456	67	5,633	67	30.5	6,271	67	34.0	0	67	0.0	4,768	67	25.8	0	67	0.0
Georgia	159	3,507	159	1,700	159	48.5	475	159	13.5	0	0	0.0	289	159	8.2	0	0	0.0
Hawaii	4	785	3	83	1	10.6	94	1	12.0	0	0	0.0	98	1	12.2	0	0	0.0
Idaho	44	897	44	600	44	66.9	215	44	24.0	0	0	0.0	5	44	0.6	0	0	0.0
Illinois	1	3,179	1	587	1	18.5	444	1	14.0	0	0	0.0	245	1	7.7	0	0	0.0
Indiana	92	68,029	92	589	92	0.9	352	28	0.5	0	23	0.0	187	25	0.3	43	26	0.1
Iowa	99	4,321	99	758	99	17.5	233	99	5.4	0	0	0.0	0	0	0.0	0	0	0.0
Kansas	105	4,041	101	2,127	82	52.6	1,490	80	36.9	0	0	0.0	74	67	1.8	0	0	0.0
Kentucky	120	1,090	120	378	120	20.0	951	120	50.4	0	120	0.0	84	120	4.4	0	120	0.0
Louisiana	64	1,877	64	1,113	64	59.3	192	64	10.2	369	64	19.7	0	64	0.0	55	64	2.9
Maine	499	1,834	499	234	499	12.8	536	499	29.2	182	499	10.5	10	499	0.5	0	0	0.0
Maryland	24	1,923	24	671	24	34.9	698	24	36.3	0	0	0.0	0	0	0.0	0	0	0.0
Massachusetts	351	1,980	351	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Michigan	83	8,525	83	5,380	83	63.2	613	83	7.2	0	0	0.0	829	83	9.8	0	0	0.0
Minnesota	87	9,368	73	924	73	9.9	3,906	73	41.7	1,308	73	14.0	0	0	0.0	0	0	0.0
Mississippi	82	1,515	27	182	12	12.0	51	7	3.4	58	8	3.8	4	5	0.3	3	5	0.2
Missouri	116	5,403	112	1,471	101	27.2	393	73	7.1	1,046	41	19.4	2	6	0.0	45	7	0.8
Montana	56	1,962	56	194	56	9.9	177	56	9.0	0	0	0.0	54	56	2.8	0	0	0.0
Nebraska	93	1,866	93	1,003	93	53.8	581	93	31.1	1	1	0.1	19	6	1.0	42	13	2.3
Nevada	17	5,453	17	600	15	11.0	514	15	9.4	0	15	0.0	159	15	2.9	0	15	0.0

TABLE 34A. DOMESTIC ABSENTEE BALLOTS: REASONS FOR REJECTION, PART A (CONTINUED)

State	Election Juris. in Survey	Ballots Rejected		Domestic Absentee Ballots Rejected and Reason, Part A													
				Not Received on Time or Missed Deadline			No Voter Signature			No Witness Signature			Non-matching Signature			No Election Official Signature		
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
New Hampshire	323	1,769	323	410	323	32.3	311	323	24.5	0	323	0.0	209	323	16.5	48	323	3.8
New Jersey	21	0	0	1,821	21		0	0		0	0		542	21		0	0	
New Mexico	33	1,009	18	230	11	22.8	430	14	42.6	0	6	0.0	0	6	0.0	0	6	0.0
New York	1	17,150	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
North Carolina	100	26,460	100	0	0	0.0	1,242	100	4.7	0	0	0.0	7	100	0.0	0	0	0.0
North Dakota	53	383	53	1	53	0.3	79	53	20.6	0	53	0.0	167	53	43.6	0	53	0.0
Ohio	88	75,950	85	4,983	82	19.7	1,287	80	5.0	2	62	0.0	453	71	1.7	0	62	0.0
Oklahoma	77	2,008	77	728	77	36.2	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Oregon	36	359	36	198	36	55.2	59	36	16.4	0	0	0.0	61	36	17.0	0	0	0.0
Pennsylvania	67	1,943	67	1,611	67	82.9	0	67	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Rhode Island	39	0	0	0	0	...	64	26	...	19	10	...	1	1	...	0	0	...
South Carolina	46	1,079	46	1,079	46	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
South Dakota	86	258	25	437	39	169.4	59	32	22.9	1	14	0.4	81	21	31.4	0	14	0.0
Tennessee	95	2,348	95	924	92	39.8	300	92	12.8	0	0	0.0	20	90	0.9	0	0	0.0
Texas	254	15,171	240	8,437	212	55.6	2,204	201	14.5	88	187	0.6	1,078	199	7.1	4	187	0.0
Utah	29	1,658	27	462	29	27.7	98	1	5.9	0	1	0.0	79	1	4.7	0	1	0.0
Vermont	246	1,168	246	487	246	41.7	148	246	12.7	0	246	0.0	0	246	0.0	0	246	0.0
Virginia	134	6,722	134	4,562	92	67.9	2,159	115	32.1	0	0	0.0	0	0	0.0	0	0	0.0
Washington	39	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
West Virginia	55	398	35	138	29	34.7	17	17	4.3	0	5	0.0	2	14	0.5	0	2	0.0
Wisconsin	72	2,739	72	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Wyoming	23	228	23	180	22	79.6	17	7	7.5	0	0	0.0	0	0	0.0	0	0	0.0
American Samoa	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	1	...
Guam	1	0	1	0	0		0	0		0	0		0	0		0	0	
Puerto Rico	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	1	...
Virgin Islands	1	0	1	0	0		0	0		0	0		0	0		0	0	
Sum of Above	4,517	407,862	4,145	74,973	3,300	18.4	45,693	3,163	11.2	3,594	1,895	0.9	76,408	2,548	6.5	240	1,272	0.1
States Included		47		43			40			13			31			7		
Question		C4b		C5a			C5b			C5c			C5d			C5e		

TABLE 34B. DOMESTIC ABSENTEE BALLOTS: REASONS FOR REJECTION, PART B

State	Election Juris. in Survey	Ballots Rejected		Domestic Absentee Ballots Rejected and Reason, Part B														
				Ballot Returned in Unofficial Envelope			Ballot Missing from Envelope			Unsealed Envelope			No Resident Address on Envelope			Multiple Ballots Returned in Envelope		
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
Alabama	67	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
Alaska	1	612	1	0	1	0.0	18	1	2.9	0	1	0.0	0	1	0.0	0	1	0.0
Arizona	15	6,877	15	1	9	0.0	171	12	2.5	0	6	0.0	0	9	0.0	4	9	0.1
Arkansas	75	789	55	4	18	0.5	13	21	1.6	0	18	0.0	23	18	2.9	0	18	0.0
California	58	130,730	55	0	29	0.0	41	32	0.0	0	30	0.0	67	33	0.1	109	33	0.1
Colorado	64	6,003	54	0	0	0.0	44	10	0.5	0	0	0.0	0	0	0.0	49	10	0.6
Connecticut	169	3,073	169	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Delaware	3	333	3	0	3	0.0	0	3	0.0	0	3	0.0	0	3	0.0	0	3	0.0
District of Columbia	1	2,358	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Florida	67	18,456	67	8	67	0.0	9	67	0.0	8	67	0.0	0	67	0.0	7	67	0.0
Georgia	159	3,507	159	15	159	0.4	0	0	0.0	0	0	0.0	374	159	10.7	0	159	0.0
Hawaii	4	785	3	1	1	0.1	9	1	1.1	0	0	0.0	0	0	0.0	3	1	0.4
Idaho	44	897	44	0	44	0.0	2	44	0.2	0	44	0.0	0	0	0.0	1	44	0.1
Illinois	1	3,178	1	5	1	0.2	39	1	1.2	0	0	0.0	1	1	0.0	1	1	0.0
Indiana	92	68,029	92	0	23	0.0	5	23	0.0	2	24	0.0	0	23	0.0	0	23	0.0
Iowa	99	4,321	99	0	0	0.0	0	0	0.0	343	99	7.9	310	99	7.2	0	99	0.0
Kansas	105	4,041	101	0	55	0.2	6	53	0.1	0	0	0.0	5	54	0.1	4	53	0.1
Kentucky	170	1,990	170	6	170	0.3	9	170	0.5	71	170	3.8	0	170	0.0	0	170	0.0
Louisiana	64	1,877	64	0	64	0.0	0	64	0.0	0	64	0.0	0	64	0.0	0	64	0.0
Maine	499	1,834	499	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Maryland	24	1,923	24	0	0	0.0	0	0	0.0	0	24	0.0	0	0	0.0	0	0	0.0
Massachusetts	351	1,980	351	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Michigan	83	8,525	83	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Minnesota	87	9,269	73	0	0	0.0	0	0	0.0	0	0	0.0	344	73	3.7	0	0	0.0
Mississippi	87	1,515	27	18	6	1.2	2	6	0.1	2	6	0.1	0	6	0.0	3	6	0.2
Missouri	116	5,403	112	0	4	0.0	4	7	0.1	10	5	0.2	0	4	0.0	0	3	0.0
Montana	56	1,962	56	0	56	0.0	0	56	0.0	0	56	0.0	0	56	0.0	0	56	0.0
Nebraska	93	1,868	93	3	1	0.2	1	1	0.1	0	0	0.0	14	2	0.8	5	5	0.3
Nevada	17	5,453	17	0	15	0.0	11	15	0.2	7	15	0.1	0	15	0.0	0	15	0.0

TABLE 34B. DOMESTIC ABSENTEE BALLOTS: REASONS FOR REJECTION, PART B (CONTINUED)

State	Election Juris. in Survey	Ballots Rejected		Domestic Absentee Ballots Rejected and Reason, Part B														
				Ballot Returned in Unofficial Envelope			Ballot Missing from Envelope			Unsealed Envelope			No Resident Address on Envelope			Multiple Ballots Returned in Envelope		
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
New Hampshire	323	1,269	323	8	323	0.6	7	323	0.6	0	323	0.0	0	323	0.0	1	323	0.1
New Jersey	21	0	0	0	0		43	21		0	0		0	0		0	0	
New Mexico	33	1,009	18	0	6	0.0	6	7	0.6	0	6	0.0	0	6	0.0	0	6	0.0
New York	1	17,150	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
North Carolina	100	26,480	100	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
North Dakota	53	383	53	0	53	0.0	0	53	0.0	0	53	0.0	0	53	0.0	0	53	0.0
Ohio	88	25,950	85	1,617	72	6.7	451	70	1.7	4,091	67	15.8	149	65	0.6	16	66	0.1
Oklahoma	77	2,008	77	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Oregon	36	359	36	0	0	0.0	0	0	0.0	0	36	0.0	0	0	0.0	0	0	0.0
Pennsylvania	67	1,943	67	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Rhode Island	39	0	0	1	1	...	0	0	...	0	0	...	0	0	...	0	0	...
South Carolina	46	1,079	46	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
South Dakota	65	258	25	0	13	0.0	6	16	2.3	0	14	0.0	0	14	0.0	0	14	0.0
Tennessee	95	2,348	95	0	0	0.0	57	89	2.4	0	0	0.0	48	89	2.0	0	0	0.0
Texas	254	15,171	240	33	188	0.2	34	190	0.2	2	187	0.0	94	187	0.6	93	189	0.6
Utah	29	1,066	77	21	1	1.3	8	1	0.5	0	1	0.0	0	1	0.0	0	1	0.0
Vermont	246	1,168	246	0	246	0.0	0	246	0.0	0	246	0.0	0	246	0.0	0	246	0.0
Virginia	134	6,722	134	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Washington	39	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
West Virginia	55	398	35	0	2	0.0	0	2	0.0	0	2	0.0	0	2	0.0	0	2	0.0
Wisconsin	72	2,739	72	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Wyoming	23	728	23	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
American Samoa	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	1	...
Guam	1	0	1	0	0		0	0		0	0		0	0		0	0	
Puerto Rico	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	1	...
Virgin Islands	1	0	1	0	0		0	0		0	0		0	0		0	0	
Sum of Above	4,517	407,862	4,145	1,749	1,583	0.4	996	1,557	0.2	4,534	1,521	1.1	1,479	1,795	0.4	296	1,694	0.1
States Included		47		15			24			9			11			13		
Question		C4b		C5f			C5g			C5h			C5i			C5j		

TABLE 34C. DOMESTIC ABSENTEE BALLOTS: REASONS FOR REJECTION, PART C

State	Election Juris. in Survey	Ballots Rejected		Domestic Absentee Ballots Rejected and Reason, Part C																	Not Categorized Balance (See Notes)	
				Voter Deceased			Already Voted in Person			First-time Voter without Proper Identification			No Ballot Application on Record			Other (See Comments)				
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
Alabama	67	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...	0	...
Alaska	1	612	1	0	1	0.0	25	1	4.7	0	1	0.0	0	1	1.0	203	1	33.2	0	0.0
Arizona	15	6,827	15	3	9	0.0	74	10	1.1	0	9	0.0	0	9	0.0	1,762	15	25.8	(1,485)	(21.8)
Arkansas	75	789	55	16	27	2.0	14	22	1.8	3	18	0.4	2	19	0.3	0	0	0.0	(657)	(82.6)
California	58	130,730	55	1,090	35	0.8	1,170	37	0.9	15	30	0.0	0	28	0.0	81,757	37	62.5	68	0.1
Colorado	64	9,003	64	40	5	0.5	3	1	0.0	2,029	21	75.4	0	0	0.0	188	5	2.3	0	0.0
Connecticut	169	3,073	169	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	3,073	100.0
Delaware	3	333	3	0	3	0.0	0	3	0.0	0	3	0.0	0	3	0.0	0	0	0.0	0	0.0
District of Columbia	1	2,358	1	0	0	0.0	512	1	21.7	0	0	0.0	0	0	0.0	1,776	1	75.3	0	0.0
Florida	67	10,456	67	48	67	0.3	103	67	0.6	548	67	3.0	0	67	0.0	1,055	67	5.7	0	0.0
Georgia	159	3,507	159	0	0	0.0	0	159	0.0	213	159	6.1	0	0	0.0	441	159	12.6	0	0.0
Hawaii	4	786	3	0	0	0.0	3	1	0.4	0	0	0.0	0	0	0.0	493	2	62.8	3	0.4
Idaho	44	897	44	5	44	0.6	17	44	1.9	0	0	0.0	0	0	0.0	52	44	5.8	0	0.0
Illinois	1	2,179	1	35	1	1.1	0	0	0.0	0	0	0.0	249	1	7.8	0	0	0.0	1,573	49.5
Indiana	92	68,029	92	32	25	0.0	14,966	27	21.9	17	24	0.0	105	25	0.2	195	13	0.2	51,936	75.9
Iowa	99	4,321	99	68	99	1.6	3	99	0.1	4	99	0.1	0	0	0.0	2,835	99	65.6	(239)	(5.5)
Kansas	105	4,041	101	54	66	1.3	77	61	1.9	298	67	7.4	78	53	1.9	506	73	12.5	(986)	(17.0)
Kentucky	120	1,890	120	31	120	1.6	0	120	0.0	0	120	0.0	0	120	0.0	360	120	19.0	0	0.0
Louisiana	64	1,877	64	0	64	0.0	0	64	0.0	0	64	0.0	0	64	0.0	149	64	7.9	0	0.0
Maine	499	1,834	499	0	0	0.0	66	499	3.6	18	499	1.0	0	0	0.0	778	499	42.4	0	0.0
Maryland	24	1,923	24	20	24	1.0	81	24	4.2	82	24	4.3	0	24	0.0	371	24	19.3	0	0.0
Massachusetts	351	1,980	351	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	1,980	100.0
Michigan	83	8,525	83	525	83	6.2	741	83	8.7	0	0	0.0	0	0	0.0	417	83	4.9	0	0.0
Minnesota	87	9,368	73	43	73	0.5	98	73	1.0	0	0	0.0	148	71	1.6	2,597	73	27.7	0	0.0
Mississippi	82	1,515	27	13	10	0.9	9	10	0.6	0	6	0.0	19	6	1.3	37	2	2.4	1,114	73.5
Missouri	116	5,403	112	68	54	1.3	8	4	0.1	0	2	0.0	0	2	0.0	2,032	94	37.6	334	6.2
Montana	56	1,962	56	0	56	0.0	0	56	0.0	0	56	0.0	0	56	0.0	1,537	56	78.3	0	0.0
Nebraska	93	1,866	93	12	6	0.6	7	3	0.4	57	1	3.1	22	2	1.2	87	7	4.7	13	0.7
Nevada	17	5,453	17	9	15	0.2	3,918	15	71.9	64	15	1.2	0	15	0.0	171	17	3.1	0	0.0

TABLE 34C. DOMESTIC ABSENTEE BALLOTS: REASONS FOR REJECTION, PART C (CONTINUED)

State	Election Juris. in Survey	Ballots Rejected		Domestic Absentee Ballots Rejected and Reason, Part C																	Not Categorized Balance (See Notes)	
				Voter Deceased			Already Voted in Person			First-time Voter without Proper Identification			No Voter Application on Record			Other (See Comments)					
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
New Hampshire	323	1,269	323	19	323	1.5	81	323	6.4	4	323	0.3	7	323	0.6	164	323	12.9	0	0.0
New Jersey	21	0	0	0	0		0	0		141	21		0	0		0	0		(2,547)	
New Mexico	33	1,009	18	3	7	0.3	2	6	0.2	3	6	0.3	0	5	0.0	301	3	29.8	34	3.4
New York	1	17,150	1	0	0	0.0	1,110	1	6.5	0	0	0.0	0	0	0.0	0	0	0.0	16,034	93.5
North Carolina	100	26,480	100	0	0	0.0	0	100	0.0	67	100	0.3	3	100	0.0	25,141	100	94.9	0	0.0
North Dakota	53	383	53	0	53	0.0	0	53	0.0	0	53	0.0	0	53	0.0	136	53	35.5	0	0.0
Ohio	88	25,950	85	137	68	0.5	74	85	0.3	298	63	1.0	70	84	0.1	12,365	71	47.6	47	0.2
Oklahoma	77	2,008	77	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	1,282	77	63.8	0	0.0
Oregon	36	359	36	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	41	36	11.4	0	0.0
Pennsylvania	67	1,943	67	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	332	67	17.1	0	0.0
Rhode Island	39	0	0	0	0	...	0	0	...	7	6	...	0	0	...	0	0	...	(92)	...
South Carolina	46	1,079	46	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
South Dakota	66	256	25	34	22	13.2	1	16	0.4	1	15	0.4	1	15	0.4	3	4	1.2	(166)	(141.3)
Tennessee	95	2,348	95	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	989	42.1
Texas	254	15,171	240	13	187	0.1	3,518	190	23.2	137	186	0.9	23	184	0.2	68	5	0.4	(655)	(4.3)
Utah	29	1,665	27	378	1	22.7	9	1	0.5	380	6	22.8	0	1	0.0	231	16	13.9	0	0.0
Vermont	246	1,168	246	0	246	0.0	0	246	0.0	0	246	0.0	0	246	0.0	199	246	17.0	334	28.6
Virginia	134	6,722	134	1	1	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
Washington	39	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...	0	...
West Virginia	55	398	35	0	3	0.0	21	29	5.3	24	15	6.0	50	11	12.6	54	4	13.6	92	23.1
Wisconsin	72	2,739	72	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	2,739	100.0
Wyoming	23	276	23	1	1	0.4	2	1	0.9	0	0	0.0	0	0	0.0	26	3	11.5	0	0.0
American Samoa	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	1	...	0	...
Guam	1	0	1	0	0		0	0		0	0		0	0		0	0		0	
Puerto Rico	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	0	...	0	...
Virgin Islands	1	0	1	0	0		0	0		0	0		0	0		0	0		0	
Sum of Above	4,517	407,862	4,145	2,698	1,801	0.7	28,620	2,503	6.5	4,390	2,318	1.1	733	1,570	0.2	140,141	2,528	34.4	73,368	18.0
States Included		47		26			28			22			14			37			24	
Question		C4b		C5k			C5l			C5m			C5n			C5o-v			calc	

TABLE 34. DOMESTIC ABSENTEE BALLOTS: REASONS FOR REJECTION, PARTS A, B AND C

Questions C4, C5. Number of domestic civilian absentee ballots rejected and the reason for rejection. [This table is broken into parts due to the large number of reasons tabulated.]

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Question C5:

Arizona: For one county, "C5a ballots not received on time are not considered viable ballots that could be counted. As such, these 1,485 ballots are accounted for but were not classified as rejects that were decision or voter error based (e.g. bad signature or no signature). The TOTAL does not reflect the late returns since they are technically not considered ballots that could have been counted in the first place.

California: For one county, C5i also includes those with different resident address then what is on file. For one county, their system comingles challenged vote by mail ballots with challenged provisional ballots. For one county, many challenged ballots were not returned, such as suspended ballots and failsafe challenged ballots, yet the report include these ballots in the category.

Indiana: a) Absentee ballots were counted as Cast in this survey if the county user placed the ballot in Received status within the Indiana SVRS prior to marking the ballot as "Accepted (Counted)" or "Rejected (Not Counted)." If the county marked the status of the ballot as "Accepted" or "Rejected" before marking it as "Received" those ballot statistics were not added to the total number of Cast ballot, so that Cast ballot counts were not inflated. b) Also, a ballot is marked as Rejected in the Indiana SVRS for two reasons; (1) if the ballot was received and not counted or (2) if the ballot was not received back from the voter. Therefore, an absentee ballot marked as "Rejected" in SVRS is not necessarily a "Cast" ballot.

Minnesota: For C5d, cannot distinguish non-matching signature from no signature; combined with A5b. For C5m, cannot distinguish from Not Registered as counted in C5o.

Missouri: Shannon Co reports "Mistake was made on certification of domestic civilian absentees. Total counted equals 498 with 11 rejected." Pike Co. reports "Spoiled/replaced ballots were included in original rejection count - actual total rejected is 22".

North Dakota: The reasons for the Other rejections include: Other 1: No postmark, received before canvassing; and Other 2: postmarked on Election Day or after.

Ohio: For two counties, totals include UOCAVA voters. For one county, C5b ballot was a ballot without signature, address or identification provided. For one county, C5h includes ballot not inside Id Envelope & Id Envelope not sealed.

Oregon: Ballots rejected (C5a-o) includes both absentee voters and UOCAVA voters: unable to separate out.

Tennessee: One county noted 11 rejections, which were military rejections; these were also reported in section B.

Puerto Rico: Puerto Rico defines domestic civilian absentee ballots as the voters that are qualified by Puerto Rico Electoral Law or CEE regulatinns to request to vote in a special early voting process.

TABLE 35. PROVISIONAL BALLOTS SUBMITTED: DISPOSITION OF BALLOTS

State	Election Juris. in Survey	Total Ballots Submitted		Provisional Ballots Submitted by Voters and Disposition												Not Categorized Balance (See Notes)	
				Counted the Full Ballot			Counted Part of the Ballot			Rejected the Ballot			Other Disposition (See Comments)				
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
Alabama	67	7,242	67	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	7,242	100.0
Alaska	1	20,441	1	5,666	1	27.7	14,518	1	71.0	257	1	1.3	0	0	0.0	0	0.0
Arizona	15	151,799	15	107,326	15	70.7	0	13	0.0	44,473	15	29.3	0	28	0.0	0	0.0
Arkansas	75	2,654	67	844	57	31.8	34	38	1.3	1,209	59	45.5	0	0	0.0	568	21.4
California	58	798,332	58	518,170	51	64.9	78,243	44	9.8	136,286	58	17.1	60,640	8	7.6	4,993	0.6
Colorado	64	51,824	41	36,896	41	71.2	6,694	41	12.9	8,234	41	15.9	0	0	0.0	0	0.0
Connecticut	169	715	169	268	169	37.5	0	0	0.0	447	168	62.5	0	0	0.0	0	0.0
Delaware	3	394	3	62	3	15.7	0	0	0.0	332	3	84.3	0	0	0.0	0	0.0
District of Columbia	1	14,713	1	10,544	1	71.7	0	0	0.0	4,169	1	28.3	0	0	0.0	0	0.0
Florida	67	35,825	67	17,312	67	48.6	2	67	0.0	18,321	67	51.4	0	134	0.0	0	0.0
Georgia	159	17,365	159	8,371	159	48.2	0	0	0.0	8,994	159	51.8	0	0	0.0	0	0.0
Hawaii	4	523	4	120	4	22.9	0	4	0.0	403	4	77.1	0	0	0.0	0	0.0
Idaho	44	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	...
Illinois	1	41,339	1	14,806	1	35.8	0	0	0.0	26,573	1	64.3	0	0	0.0	(40)	(0.1)
Indiana	92	3,900	68	626	67	17.0	0	92	0.0	3,102	69	84.1	0	0	0.0	(28)	(1.0)
Iowa	99	4,307	99	3,921	99	91.0	0	0	0.0	386	99	9.0	0	0	0.0	0	0.0
Kansas	105	40,214	105	24,839	104	61.8	2,969	88	7.4	12,408	102	30.9	0	0	0.0	(2)	(0.0)
Kentucky	120	855	120	178	120	20.8	0	120	0.0	677	120	79.2	0	0	0.0	0	0.0
Louisiana	64	8,071	64	3,359	64	41.6	0	64	0.0	4,712	64	58.4	0	0	0.0	0	0.0
Maine	409	291	356	291	356	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
Maryland	24	51,163	24	33,311	24	65.1	701	24	1.4	17,151	24	33.5	0	0	0.0	0	0.0
Massachusetts	351	11,712	351	3,193	351	27.3	85	351	0.7	8,434	351	72.0	0	0	0.0	0	0.0
Michigan	83	3,797	83	1,823	83	48.0	0	0	0.0	1,974	83	52.0	0	0	0.0	0	0.0
Minnesota	87	0	0	0	0		0	0		0	0		0	0		0	
Mississippi	82	15,513	39	7,053	35	45.5	3	15	0.0	5,079	35	32.7	631	3	4.1	2,747	17.7
Missouri	116	8,934	116	1,737	86	25.3	0	60	0.0	5,162	85	74.4	35	1	0.5	0	0.0
Montana	56	3,762	56	3,643	55	96.8	0	0	0.0	100	55	2.7	0	0	0.0	19	0.5
Nebraska	93	15,478	93	12,069	93	78.0	0	0	0.0	3,409	93	22.0	0	0	0.0	0	0.0
Nevada	17	6,693	17	2,780	17	42.1	1	17	0.0	3,872	17	57.9	0	17	0.0	0	0.0

TABLE 35. PROVISIONAL BALLOTS SUBMITTED: DISPOSITION OF BALLOTS (CONTINUED)

| State | Average Turnout Rate | Total Ballots Submitted | Percent of Ballots Submitted by Voters Who Were Registered | | | Percent of Ballots Submitted by Voters Who Were Registered | | |

TABLE 35. PROVISIONAL BALLOTS SUBMITTED: DISPOSITION OF BALLOTS

Questions E1, E2. Number of voters who submitted provisional ballots and disposition of the ballots.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Also, the term provisional is used here generically though the meaning, availability, and use will vary by State.

Question E1:

Colorado: 23 Counties commented, "Fewer than 25 provisional ballots were counted. Colorado law states that when fewer than 25 provisional ballots are counted, the results of voting by provisional ballot shall be included in mail-in ballot statistics."

Idaho: Idaho is exempt from having Provisional Ballots because we have Election Day Registration.

Maine: Provisional numbers gathered from a survey of the Clerks.

Minnesota: "Minnesota does not have provisional ballots. (Minnesota is an Election Day Registration State described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)) and is exempt from provisional voting requirements under HAVA.

Montana: One county reported, "Former EA deleted all data except total # of provisionals".

New Mexico: One county commented, "The number of ballots may be incorrect as the envelopes & ballots were put in boxes with regular ballots".

North Dakota: "Provisional ballots in North Dakota are those which are cast after the regular poll closing time in an election which a federal office appears as a result of a federal or state court order or any other order extending the time established for poll closings under state law in effect ten days before the date of that election"

Ohio: One county commented, "The total number of provisional ballnts on our official count is 151. The difference of 10 is, due to lack of funding, we did not have enough optical scan memory cards to account for every situation during the General Election. The ten extra ballots were the military/ overseas/ absentees postmarked by November 3rd and received at a later date."

Oregon: One county commented, "Data incomplete. Did not track the number of all provisional ballots returned and unable to separate from regular ballots at this time."

Question E2:

Arizona: One county included both provisional ballots and conditional provisional ballots that were counted in their answer. In question F1, a percentage of these votes were considered "Voted at physical polling place" so E2 will not match F1.

California: One county reported that 1332 provisional ballots were counted as absentee ballots.

Colorado: 23 Counties commented, "Fewer than 25 provisional ballots were counted. Colorado law states that when fewer than 25 provisional ballots are counted, the results of voting by provisional ballot shall be included in mail-in ballot statistics."

Florida: "23 Provisional Ballots were not included because no registration record existed on FVRS for these people."

Idaho: Idaho is exempt from having Provisional Ballots because we have Election Day Registration.

Iowa: If the provisional ballot is accepted for counting in Iowa, the entire ballot is tabulated.

Nevada: "In Nevada, provisional ballots only have Federal contests".

Ohio: One county commented, "The total number of provisional ballots on our official count is 151. The difference of 10 is, due to lack of funding, we did not have enough optical scan memory cards to account for every situation during the General Election. The ten extra ballots were the military/ overseas/ absentees postmarked by November 3rd and received at a later date."

Oregon: Two counties commented, "Data incomplete. Did not track the number of all provisional ballots returned and unable to separate from regular ballots at this time."

TABLE 36A. **PROVISIONAL BALLOTS: REASONS FOR REJECTION, PART A**

State	Election Jurs. in Survey	Ballots Rejected		Provisional Ballots Rejected and Reason, Part A														
				Voter Not Registered in State			Voter Registered but in Wrong Jurisdiction			Voter Registered but in Wrong Precinct			Failure to Provide Sufficient Identification			Incomplete/Illegible Envelope/Ballot		
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
Alabama	67	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
Alaska	1	257	1	97	1	37.7	0	1	0.0	0	1	0.0	0	1	0.0	100	1	38.9
Arizona	15	44,473	15	14,542	15	32.7	44	14	0.1	14,985	15	33.5	2,547	15	5.7	2,125	14	4.8
Arkansas	75	1,208	59	951	49	78.7	151	33	12.5	111	25	9.2	6	22	0.5	56	22	4.6
California	56	136,286	58	81,119	43	59.5	5,878	26	4.3	241	23	0.2	139	28	0.1	1,170	32	0.9
Colorado	64	8,234	41	4,810	39	58.4	1,611	31	19.6	0	0	0.0	319	20	3.9	343	26	4.2
Connecticut	169	447	168	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Delaware	3	332	3	299	3	90.1	0	3	0.0	23	3	6.9	0	3	0.0	4	3	1.2
District of Columbia	1	4,169	1	3,173	1	76.1	0	0	0.0	996	1	23.9	0	0	0.0	0	0	0.0
Florida	67	18,321	67	10,447	67	57.0	151	67	0.8	1,287	67	7.0	394	18	2.2	173	67	0.9
Georgia	159	8,994	159	0	0	0.0	0	0	0.0	0	0	0.0	1,052	159	11.7	3,041	159	33.8
Hawaii	4	403	4	227	4	56.3	2	2	0.5	104	4	25.8	0	3	0.0	0	2	0.0
Idaho	44	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
Illinois	1	26,573	1	12,249	1	46.1	455	1	1.7	5,290	1	19.9	54	1	0.2	1,155	1	4.3
Indiana	92	3,107	89	873	34	28.1	747	47	24.1	423	33	13.6	440	46	14.2	157	23	5.1
Iowa	99	386	99	97	99	25.1	0	99	0.0	57	99	14.8	59	99	15.3	9	99	2.3
Kansas	105	12,408	102	0	0	0.0	8,065	100	65.0	617	64	5.0	1,152	68	9.3	1,063	50	8.6
Kentucky	120	677	120	242	120	35.7	339	120	50.1	27	120	4.0	6	120	0.9	0	120	0.0
Louisiana	64	4,712	64	2,651	64	56.3	564	64	12.0	157	64	3.3	22	64	0.5	140	64	3.0
Maine	499	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
Maryland	24	17,151	24	8,094	24	47.2	0	0	0.0	0	0	0.0	2,416	24	14.1	77	24	0.4
Massachusetts	351	8,434	351	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Michigan	83	1,974	83	0	0	0.0	0	0	0.0	516	83	26.1	267	83	13.5	0	0	0.0
Minnesota	87	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
Mississippi	82	5,079	35	1,704	22	33.5	281	15	5.5	1,149	21	22.6	3	7	0.1	10	6	0.2
Missouri	116	5,162	85	3,916	78	75.9	217	30	4.2	397	20	7.7	2	6	0.0	196	13	3.8
Montana	56	100	55	19	56	19.0	16	56	16.0	8	56	8.0	17	56	17.0	2	56	2.0
Nebraska	93	3,409	93	1,605	93	47.1	804	93	23.6	0	0	0.0	0	0	0.0	0	0	0.0
Nevada	17	3,822	17	3,247	17	85.0	12	17	0.3	447	17	11.7	52	17	1.4	39	17	1.0

TABLE 36A. PROVISIONAL BALLOTS: REASONS FOR REJECTION, PART A (CONTINUED)

State	Election Jurs. in Survey	Ballots Rejected		Provisional Ballots Rejected and Reason, Part A														
				Voter Not Registered in State			Voter Registered but in Wrong Jurisdiction			Voter Registered but in Wrong Precinct			Failure to Provide Sufficient Identification			Incomplete/Ineligible Envelope/Ballot		
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
New Hampshire	323	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
New Jersey	21	19,032	21	15,837	21	87.8	0	0	0.0	0	0	0.0	59	21	0.3	0	0	0.0
New Mexico	33	1,739	18	1,245	15	71.6	127	12	7.3	98	6	5.6	2	4	0.1	11	4	0.6
New York	1	111,843	1	69,679	1	62.3	0	0	0.0	23,791	1	21.3	0	0	0.0	7,362	1	6.6
North Carolina	100	27,469	100	21,860	100	79.6	102	100	0.4	0	0	0.0	483	100	1.8	0	0	0.0
North Dakota	53	0	53	0	0	...	0	0	...	0	0	...	0	53	...	0	53	...
Ohio	88	39,390	86	18,263	86	46.4	617	69	1.6	10,187	93	25.9	1,962	81	5.0	1,107	78	2.8
Oklahoma	77	2,348	77	1,671	77	71.2	0	77	0.0	675	77	28.7	2	77	0.1	0	0	0.0
Oregon	36	144	34	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Pennsylvania	67	14,527	67	10,922	67	75.2	2,288	67	15.7	211	67	1.5	0	0	0.0	1,135	67	7.8
Rhode Island	39	356	39	276	0	77.5	0	0	0.0	25	0	7.0	0	0	0.0	55	0	15.4
South Carolina	48	4,890	38	959	38	19.2	92	37	1.8	2,004	37	40.2	99	37	2.0	705	38	14.1
South Dakota	66	159	41	127	38	79.9	33	29	20.8	39	25	24.5	1	18	0.6	0	18	0.0
Tennessee	95	2,770	95	2,118	93	76.5	0	0	0.0	499	84	18.0	0	0	0.0	0	0	0.0
Texas	254	31,739	215	20,140	195	63.5	4,751	177	15.0	4,100	174	12.9	371	170	1.2	628	166	2.0
Utah	29	6,853	21	2,229	15	32.5	0	0	0.0	306	7	4.5	215	11	3.1	97	9	1.4
Vermont	246	3	246	14	246	466.7	0	246	0.0	0	246	0.0	0	0	0.0	0	0	0.0
Virginia	134	9,738	134	3,576	110	53.1	1,111	66	16.5	737	32	10.9	7	8	0.1	97	17	1.4
Washington	39	11,547	39	4,535	27	39.3	3,338	24	28.9	0	22	0.0	23	23	0.2	11	24	0.1
West Virginia	55	4,177	43	2,050	35	49.1	0	0	0.0	1,069	30	25.6	8	20	0.2	0	0	0.0
Wisconsin	72	117	72	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Wyoming	23	35	11	1	1	2.8	1	1	2.8	1	1	2.8	27	10	75.0	0	0	0.0
American Samoa	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	1	...
Guam	1	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...
Puerto Rico	1	7,903	1	290	1	3.7	0	0	0.0	0	0	0.0	53	1	0.7	2,297	1	29.0
Virgin Islands	1	0	0	0	0	...	0	0	...	100	1	...	65	1	...	0	0	...
Sum of Above	4,517	609,023	3,225	326,154	1,997	53.8	31,797	1,726	5.2	70,567	1,612	11.6	12,321	1,496	2.0	23,391	1,224	3.8
States Included		46		39			26			33			33			29		
Question		E2c		E3a			E3b			E3c			E3d			E3e		

TABLE 36B. PROVISIONAL BALLOTS: REASONS FOR REJECTION, PART B

State	Election Juris. in Survey	Ballots Rejected		Provisional Ballots Rejected and Reason, Part B																	Not Categorized Balance (See Notes)	
				Ballot Missing from Envelope			No Signature			Non-matching Signature			Voter Already Voted			Other (See Comments)				
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
Alabama	67	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...	0	...
Alaska	1	257	1	2	1	0.8	0	1	0.0	0	1	0.0	12	1	4.7	46	1	17.9	0	0.0
Arizona	15	44,473	15	420	14	0.9	163	14	0.4	368	14	0.8	802	15	1.8	8,878	15	20.0	(3,221)	(35.7)
Arkansas	75	1,208	59	11	19	0.9	73	21	6.0	43	19	3.6	3	20	0.2	329	9	27.2	(626)	(92.5)
California	58	136,286	58	3,130	31	2.3	2,629	43	1.9	1,966	38	1.4	2,408	49	1.8	37,192	35	27.3	514	0.4
Colorado	64	8,234	41	196	10	2.4	143	22	1.7	0	0	0.0	601	41	7.3	211	41	2.6	0	0.0
Connecticut	169	447	168	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	447	100.0
Delaware	3	332	3	6	3	1.8	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
District of Columbia	1	4,169	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
Florida	67	18,321	67	36	67	0.2	47	67	0.3	73	67	0.4	365	67	2.0	5,348	67	29.2	0	0.0
Georgia	159	8,994	159	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	686	159	7.6	4,215	46.9
Hawaii	4	403	4	0	2	0.0	0	2	0.0	0	2	0.0	0	2	0.0	70	2	17.4	0	0.0
Idaho	44	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...	0	...
Illinois	1	26,573	1	0	0	0.0	13	1	0.0	1	1	0.0	30	1	0.1	0	0	0.0	7,326	27.6
Indiana	92	3,102	69	0	21	0.0	24	25	0.8	2	23	0.1	6	22	0.2	236	29	9.5	134	4.3
Iowa	99	366	99	0	99	0.0	19	99	4.9	0	0	0.0	43	99	11.1	102	99	26.4	0	0.0
Kansas	105	12,408	102	20	49	0.2	309	66	2.5	146	54	1.2	116	56	0.9	1,344	71	10.8	(424)	(3.4)
Kentucky	120	677	120	0	120	0.0	37	120	5.5	0	120	0.0	0	120	0.0	26	120	3.8	0	0.0
Louisiana	64	4,712	64	30	64	0.6	15	64	0.3	5	64	0.1	19	64	0.4	1,109	64	23.5	0	0.0
Maine	499	0	0	0	0		0	0		0	0		0	0		0	0		0	...
Maryland	24	17,151	24	45	24	0.3	1,042	24	6.1	0	0	0.0	216	24	1.3	5,261	24	30.7	0	0.0
Massachusetts	351	8,434	351	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	8,434	100.0
Michigan	83	1,974	83	0	0	0.0	132	83	6.7	0	0	0.0	0	0	0.0	1,059	83	53.6	0	0.0
Minnesota	87	0	0	0	0		0	0		0	0		0	0		0	0		0	
Mississippi	82	5,079	35	4	6	0.1	10	9	0.2	4	6	0.1	0	2	0.0	811	10	16.0	1,102	21.7
Missouri	116	5,162	85	70	5	1.4	0	3	0.0	0	3	0.0	6	8	0.2	160	13	3.0	(7)	(0.1)
Montana	56	100	55	0	56	0.0	10	56	10.0	0	56	0.0	26	56	26.0	2	56	2.0	0	0.0
Nebraska	93	3,409	93	0	0	0.0	450	93	13.2	0	0	0.0	45	93	1.3	506	93	14.8	0	0.0
Nevada	17	3,822	17	0	17	0.0	16	17	0.4	0	17	0.0	9	17	0.2	9	17	0.0	0	0.0

TABLE 36B. **PROVISIONAL BALLOTS: REASONS FOR REJECTION, PART B (CONTINUED)**

State	Election Juris. in Survey	Ballots Rejected		Provisional Ballots Rejected and Reason, Part B																	Not Categorized Balance (See Notes)	
				Ballot Missing From Envelope			No Signature			Non-matching Signature			Voter Already Voted			Other (See Comments)				
		Total	Cases	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Pct.
New Hampshire	323	0	0	0	0	...	0	0	...	0	0	...	0	0	...	0	0	...	0	...
New Jersey	21	18,032	21	0	0	0.0	0	0	0.0	45	21	0.2	0	0	0.0	2,095	21	11.6	0	0.0
New Mexico	33	1,729	18	0	3	0.0	32	7	1.8	0	2	0.0	5	7	0.3	13	6	0.7	206	11.9
New York	1	111,843	1	0	0	0.0	520	1	0.5	0	0	0.0	0	0	0.0	21,927	1	19.6	110,445	100.0
North Carolina	100	27,468	100	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	5,024	100	18.3	0	0.0
North Dakota	53	0	53	0	53		0	53		0	53		0	53		0	0		0	...
Ohio	88	39,390	86	350	71	0.9	1,131	77	2.9	123	71	0.3	572	80	1.5	4,762	52	12.1	316	0.8
Oklahoma	77	2,348	77	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0.0
Oregon	35	144	34	0	34	0.0	7	34	4.9	33	34	22.9	0	0	0.0	104	34	72.2	0	0.0
Pennsylvania	67	14,527	67	0	0	0.0	0	0	0.0	3	67	0.0	122	67	0.8	(152)	67	(1.0)	(7)	(0.0)
Rhode Island	39	369	39	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	369	100.0
South Carolina	45	4,960	36	0	0	0.0	205	37	4.1	17	37	0.3	30	37	0.6	878	49	17.6	0	0.0
South Dakota	66	159	41	0	18	0.0	0	18	0.0	0	18	0.0	2	19	1.3	18	8	11.3	(61)	(38.4)
Tennessee	95	2,770	95	0	0	0.0	90	83	3.2	0	81	0.0	34	82	1.2	0	0	0.0	29	1.0
Texas	254	31,729	215	75	163	0.2	58	165	0.2	5	162	0.0	172	164	0.5	335	6	1.1	1,104	3.5
Utah	23	6,869	21	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	4,016	16	58.5	0	0.0
Vermont	246	3	246	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	(11)	(366.7)
Virginia	134	6,738	134	23	9	0.3	112	20	1.7	0	3	0.0	65	17	1.0	1,010	25	15.0	0	0.0
Washington	39	11,547	39	8	24	0.1	18	25	0.2	1,237	25	10.7	344	25	3.0	1,533	9	13.3	500	4.3
West Virginia	55	4,177	43	0	0	0.0	0	9	0.0	5	15	0.1	5	28	0.1	262	19	6.3	776	18.6
Wisconsin	72	117	72	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	117	72	100.0	0	0.0
Wyoming	23	36	11	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	3	16.7	0	0.0
American Samoa	1	0	1	0	1	...	0	1	...	0	1	...	0	1	...	0	1	...	0	...
Guam	1	0	0	0	0	...	0	0		0	0		0	0		0	0		0	
Puerto Rico	1	7,903	1	0	1	0.0	524	1	6.6	4	1	0.1	0	1	0.0	4,740	1	60.0	0	0.0
Virgin Islands	1	0	0	0	0		0	0		0	0		0	0		0	0		(105)	
Sum of Above	4,517	609,016	3,225	4,426	962	0.7	7,849	1,352	1.3	3,980	1,076	0.7	6,061	1,330	1.0	110,324	1,904	18.1	12,512	2.1
States Included		46		16			27			18			26			35			23	
Question		E2c		E2d			E3g			E3h			E3i			E3j-p			calc	

TABLE 36. PROVISIONAL BALLOTS: REASONS FOR REJECTION, PARTS A AND B

Questions E2, E3. Number of provisional ballots rejected and the reason for rejection. [This table is broken into parts due to the large number of reasons tabulated.]

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Question E3:

Arizona: One county reported, "E3f. The "Ballot missing from envelope" total (322) is not included in the grand total since these ballots were presumptively already counted so they cannot be considered as a provisional that would be counted at central tabulation."

Nebraska: The reported 450 rejected provisional ballots for no signature came from the Voter Registration system. The system reports combine both rejections for no signature, and for an incomplete application. That 450 figure includes both reasons, and not just missing signature.

Wisconsin: Provisional ballots are issued only when (1) an election-day registrant has not provided a valid driver's license number, or (2) a by-mail registrant failed to provide proof of residence. All rejected provisional ballots are for failure to timely provide the missing information.

TABLE 37. USE OF ELECTRONIC POLL BOOKS/LISTS AT THE POLLING PLACE

State	Election Juris. in Survey	Total of Voters Participating	Cases	Sign Voters In				Update Vote History				Lookup Polling Places				Other Use (See Comments)			
				Yes		No		Yes		No		Yes		No		Yes		No	
				Total	Cases	Total	Cases	Total	Cases	Total	Cases	Total	Cases	Total	Cases	Total	Cases	Total	Cases
Alabama	67	2,105,622	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Alaska	1	328,957	1	0	0	328,957	1	0	0	328,957	1	0	0	328,957	1	0	0	0	0
Arizona	15	2,320,851	15	0	0	2,315,180	14	0	0	2,315,180	14	0	0	2,315,180	14	0	0	0	0
Arkansas	75	1,341,795	66	198,779	10	602,470	54	169,318	10	483,173	51	125,085	10	975,414	52	45,022	1	123,967	7
California	58	13,798,557	58	162,638	1	13,633,907	56	469,988	2	13,326,557	55	162,638	1	13,633,907	56	123,585	3	6,805,871	33
Colorado	64	2,426,253	64	1,606,511	44	819,742	20	1,139,711	40	1,273,287	21	521,165	11	1,882,320	49	0	0	2,426,253	64
Connecticut	169	1,644,845	169	0	0	1,644,845	169	1,644,845	169	0	0	1,644,845	169	0	0	0	0	0	0
Delaware	3	415,696	3	0	0	415,696	3	0	0	415,696	3	0	0	415,696	3	0	0	0	0
District of Columbia	1	226,871	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Florida	67	8,914,809	67	3,052,042	21	5,461,967	46	2,914,545	21	5,550,585	45	4,877,997	29	4,036,144	38	2,879,826	10	1,903,383	20
Georgia	159	3,975,986	159	3,975,986	159	0	0	3,975,986	159	0	0	3,975,986	159	0	0	0	0	0	0
Hawaii	4	456,009	4	0	0	456,009	4	0	0	456,009	4	0	0	456,009	4	0	0	456,009	4
Idaho	44	667,506	44	0	0	667,506	44	0	0	667,506	44	0	0	667,506	44	0	0	0	0
Illinois	1	5,577,509	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Indiana	92	2,805,986	92	114,676	3	2,691,310	89	114,676	3	2,691,310	89	0	0	0	0	0	0	0	0
Iowa	99	1,546,483	99	0	0	1,546,483	99	0	0	1,546,483	99	69,323	2	0	0	0	0	1,546,483	99
Kansas	105	1,263,202	105	13,786	4	1,218,542	95	16,287	2	1,213,049	96	112,864	4	1,116,472	94	0	0	0	0
Kentucky	120	1,861,577	120	0	0	1,861,577	120	0	0	1,861,577	120	0	0	1,861,577	120	0	0	0	0
Louisiana	64	1,960,914	64	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Maine	499	744,456	499	0	0	744,456	499	0	0	744,456	499	0	0	744,456	499	0	0	0	0
Maryland	24	2,661,905	24	2,661,905	24	0	0	2,661,905	24	0	0	2,661,905	24	0	0	2,661,905	24	0	0
Massachusetts	351	3,107,985	351	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Michigan	83	5,039,080	83	874,859	21	4,164,221	62	874,859	21	4,164,221	62	874,859	21	4,164,221	62	0	0	0	0
Minnesota	87	2,920,214	87	0	0	2,920,214	87	0	0	2,920,214	87	0	0	2,920,214	87	0	0	0	0
Mississippi	82	657,058	45	53,231	5	499,639	37	58,543	5	429,804	35	158,918	8	392,952	33	0	0	218,873	23
Missouri	116	2,992,021	116	207,022	8	2,669,963	105	49,628	5	2,827,357	109	1,676,936	22	1,189,310	90	268,875	4	0	0
Montana	56	497,599	56	0	0	497,599	56	0	0	497,599	56	0	0	497,599	56	0	0	0	0
Nebraska	93	811,780	93	0	0	811,780	93	0	0	811,780	93	0	0	811,780	93	0	0	0	0
Nevada	17	970,019	17	23,746	1	946,273	16	4,708	3	985,311	14	885,578	5	84,441	12	886,068	5	83,951	12

TABLE 37. USE OF ELECTRONIC POLL BOOKS/LISTS AT THE POLLING PLACE (CONTINUED)

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

TABLE 37. USE OF ELECTRONIC POLL BOOKS/LISTS AT THE POLLING PLACE

Questions F1, F4. Use of electronic poll books at the polling place and the number of voters participating in these polling places.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Question F4:

California: 2 counties commented that they were vote by mail only. Another county reported they were piloting 5 electronic poll books.

Colorado: For Colorado, all counties were required to use the "early voting module" through SCORE (the statewide database) as an electronic poll book for early voting purposes. This module allows the user to sign the voter in and to update vote history in real time. Some counties answered "Yes" for certain options based of the "early voting module," not the Election Day module.

Florida: Several counties commented that electronic poll books were only used for early voting. Other counties commented that only a few places in their county used them.

Indiana: The State is aware that some counties setup PCs at polling locations to allow staff or voters to look up polling locations on the SVRS Public Portal (www.indianavoters.in.gov). They used the public portal to reduce security concerns, rather than setting up a PC linked to SVRS. However, the State did not collect this information as part of the 2008 General Election survey.

Maryland: Electronic poll books were used to update polling place voting history but not for provisional or absentee voting credit.

Michigan: Electronic poll book numbers: these numbers were adjusted to reflect true participation of the 40 individual jurisdictions within the 21 counties in the pilot program vs. 21 complete counties (somehow the entire participation for the entire county was reflected vs. the 40 individual jurisdictions).

Missouri: One county signed voters in and updated voter history "at super precincts only".

North Carolina: "To clarify our response to F4d, all one-stop precincts used electronic voter lists during the one-stop registration and absentee voting period. The electronic database was used to sign voters in, print an authorization to vote form (ATV) with appropriate ballot assignment, update voter records, and to process new voter registrations."

North Dakota: With respect to the Total Participants for the participating counties: Electronic poll books were not used to process absentees. Also, electronic poll books were used for Early Voting Use Only in one case, Election Day Use Only in one case, and Both Early and Election Day Use in four cases.

Oregon: "Oregon is a Vote by Mail state. We do not have polling places."

South Dakota: One county only used for absentee voters.

Washington: 39 counties commented, "no poll books".

TABLE 28. SOURCE OF POLL BOOKS USED AT THE POLLING PLACE

State	Election Juris. in Survey	Total of Voters Participating	Cases	State Printed Poll Books and Shipped to Jurisdiction			Jurisdiction Arranged for Printing of Poll Books			Combination of State and Local Jurisdiction			Information Unavailable			Other or None Indicated (See Comments)		
				Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
Alabama	67	2,105,622	1	0	0	0.0	0	67	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Alaska	1	328,957	1	328,957	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Arizona	15	2,320,851	15	0	0	0.0	2,320,851	15	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Arkansas	75	1,341,795	66	0	0	0.0	1,341,795	69	100.0	0	0	0.0	0	0	0.0	0	0	0.0
California	58	13,795,857	58	0	0	0.0	13,795,848	56	100.0	0	0	0.0	0	0	0.0	2,709	2	0.0
Colorado	64	2,426,253	64	0	0	0.0	1,979,417	35	81.6	0	0	0.0	176,183	4	7.3	270,653	25	11.2
Connecticut	169	1,644,845	169	0	0	0.0	1,644,845	169	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Delaware	3	415,696	3	415,696	3	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
District of Columbia	1	226,671	1	0	0	0.0	226,671	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Florida	67	8,514,809	67	0	0	0.0	8,514,809	67	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Georgia	159	3,975,986	159	3,975,986	159	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Hawaii	4	456,009	4	308,443	1	67.6	147,566	3	32.4	0	0	0.0	0	0	0.0	0	0	0.0
Idaho	44	667,506	44	0	0	0.0	667,506	44	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Illinois	1	5,577,509	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	5,262,579	1	94.4
Indiana	92	2,805,986	92	0	0	0.0	2,805,986	92	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Iowa	99	1,546,483	99	0	0	0.0	1,546,483	99	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Kansas	105	1,763,702	105	0	0	0.0	1,763,702	105	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Kentucky	120	1,861,577	120	1,861,577	120	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Louisiana	64	1,980,814	64	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	1,980,814	64	100.0
Maine	499	744,456	499	0	0	0.0	0	0	0.0	744,456	499	100.0	0	0	0.0	0	0	0.0
Maryland	24	2,661,905	24	0	0	0.0	2,661,905	24	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Massachusetts	351	3,102,995	351	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	3,102,995	351	100.0
Michigan	83	5,039,080	83	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	5,039,080	83	100.0
Minnesota	87	2,970,214	87	1,694,619	24	50.0	1,225,595	63	42.0	0	0	0.0	0	0	0.0	0	0	0.0
Mississippi	82	657,058	45	0	0	0.0	559,540	37	85.2	23,138	4	3.5	0	0	0.0	74,380	6	11.3
Missouri	116	2,992,223	116	0	0	0.0	2,949,573	113	98.5	4,653	1	0.2	0	0	0.0	38,947	2	1.3
Montana	56	497,599	56	0	0	0.0	497,599	56	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Nebraska	93	811,780	93	0	0	0.0	811,780	93	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Nevada	17	970,019	17	0	0	0.0	970,019	17	100.0	0	0	0.0	0	0	0.0	0	0	0.0

TABLE 38. SOURCE OF POLL BOOKS USED AT THE POLLING PLACE (CONTINUED)

State	Election Juris. in Survey	Total of Voters Participating	Cases	State Printed Poll Books and Shipped to Jurisdiction			Jurisdiction Arranged for Printing of Poll Books			Combination of State and Local Jurisdiction			Information Unavailable			Other or None Indicated (See Comments)		
				Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.	Total	Cases	Pct.
New Hampshire	323	719,403	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
New Jersey	21	3,910,220	21	0	0	0.0	2,122,831	12	54.3	0	0	0.0	0	0	0.0	1,787,389	9	45.7
New Mexico	33	620,289	19	23,207	1	3.7	549,980	18	96.7	38,049	1	6.1	0	0	0.0	9,053	2	1.5
New York	1	7,722,019	1	0	0	0.0	7,722,019	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0
North Carolina	100	4,338,197	100	0	0	0.0	4,338,197	100	100.0	0	0	0.0	0	0	0.0	0	0	0.0
North Dakota	53	318,475	53	0	0	0.0	235,108	51	73.8	0	0	0.0	83,317	2	26.2	0	0	0.0
Ohio	88	5,671,438	86	0	0	0.0	5,572,827	81	98.3	0	0	0.0	5,893	1	0.1	92,718	4	1.6
Oklahoma	77	1,474,694	77	0	0	0.0	1,474,694	77	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Oregon	36	1,845,251	36	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	1,845,251	36	100.0
Pennsylvania	67	6,071,357	67	0	0	0.0	6,071,357	67	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Rhode Island	39	475,428	1	0	0	0.0	0	39	0.0	0	0	0.0	0	0	0.0	0	0	0.0
South Carolina	46	1,530,359	1	0	46	0.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
South Dakota	66	387,355	66	0	0	0.0	387,355	66	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Tennessee	95	2,618,238	95	0	0	0.0	2,615,202	94	99.9	0	0	0.0	3,036	1	0.1	0	0	0.0
Texas	254	8,059,731	244	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	8,059,731	243	100.0
Utah	29	960,299	29	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	960,299	29	100.0
Vermont	246	333,639	246	0	0	0.0	333,639	246	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Virginia	134	3,750,065	134	3,750,065	134	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Washington	39	3,071,587	39	0	0	0.0	1,263,862	2	41.1	0	0	0.0	0	0	0.0	1,807,725	37	58.9
West Virginia	55	736,622	55	375,915	18	51.0	360,707	37	49.0	0	0	0.0	0	0	0.0	0	0	0.0
Wisconsin	72	2,996,869	72	0	0	0.0	2,996,869	72	100.0	0	0	0.0	0	0	0.0	0	0	0.0
Wyoming	23	256,035	23	0	0	0.0	256,035	23	100.0	0	0	0.0	0	0	0.0	0	0	0.0
American Samoa	1	12,408	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	12,408	1	100.0
Guam	1	35,092	1	35,092	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Puerto Rico	1	1,942,931	1	1,942,931	1	100.0	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0
Virgin Islands	1	29,930	1	0	0	0.0	0	0	0.0	0	0	0.0	0	0	0.0	29,930	1	100.0
Sum of Above	4,517	133,944,538	3,974	14,712,488	509	11.0	92,231,022	2,209	61.4	810,196	505	0.6	288,429	8	0.2	30,376,861	898	22.7
States Included				11			34			4			4			17		
Question			F1a	F6.1			F6.2			F6.3			F6.4			F6.rem		

TABLE 38. SOURCE OF POLL BOOKS USED AT THE POLLING PLACE

Questions F1, F6. Source of poll books used at the polling place and the number of voters participating in these polling places.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Question F6:

Indiana: 12 counties took advantage of the State-provided option to have the SVRS vendor create and ship a disc with the county's poll book files on it. Although the vendor created the files, the county was still responsible for printing them.

Michigan: Counties purchase poll books designed by State from commercial vendors and supply to local jurisdictions.

Nevada: "Clark County prints own poll books at their Election Center".

North Dakota: Three counties commented that electronic poll books are used in one polling location, printed poll books used in all others. With respect to Information Unavailable: two counties used electronic poll books in all polling locations.

Ohio: Two counties had their poll books printed by their boards of election.

Oregon: "Oregon is a Vote by Mail state. We do not have poll books."

Washington: 39 counties commented, "no poll books".

Virgin Islands: For the Virgin Islands, "District Registers were forwarded to the various polls."

TABLE 39. FIRST-TIME MAIL REGISTRANTS; USE OF PRINTED REGISTRATION LISTS AT THE POLLING PLACE

State	Election Jurisdiction in Survey	Total of Voters Participating	Cases	Number of First-time Mail Registrants (Voted or Not)		Use of Printed Lists at the Polls					
						Yes		No		Info. Unavailable	
				Total	Cases	Total	Cases	Total	Cases	Total	Cases
Alabama	67	2,105,622	1	0	0	0	0	0	0	0	0
Alaska	1	328,957	1	0	0	328,957	1	0	0	0	0
Arizona	15	2,320,851	15	1,208	2	2,320,851	15	0	0	0	0
Arkansas	75	1,341,795	56	6,066	16	1,341,795	69	0	0	0	0
California	58	13,798,557	58	58,593	45	13,795,848	56	2,709	2	0	0
Colorado	64	2,428,753	64	47,485	64	1,740,984	36	480,251	8	0	0
Connecticut	169	1,644,845	169	125,977	169	1,644,845	169	0	0	0	0
Delaware	3	415,696	3	0	0	415,696	3	0	0	0	0
District of Columbia	1	226,871	1	0	0	226,871	1	0	0	0	0
Florida	67	8,514,809	67	2,751	67	7,837,798	60	677,011	7	0	0
Georgia	159	3,975,986	159	302,256	159	3,975,986	159	0	0	0	0
Hawaii	4	456,009	4	0	0	456,009	4	0	0	0	0
Idaho	44	667,506	44	0	0	667,506	44	0	0	0	0
Illinois	1	5,577,509	1	0	0	0	0	0	0	5,577,509	1
Indiana	92	2,805,986	92	514,081	92	2,691,310	89	114,676	3	0	0
Iowa	99	1,546,483	99	0	0	1,546,483	99	0	0	0	0
Kansas	105	1,263,202	105	50,690	86	1,263,202	105	0	0	0	0
Kentucky	120	1,861,577	120	0	0	1,861,577	120	0	0	0	0
Louisiana	64	1,980,814	64	121,008	64	0	0	0	0	0	0
Maine	499	744,456	499	13,934	499	744,456	499	0	0	0	0
Maryland	24	2,661,905	24	4,074	24	2,661,905	24	0	0	0	0
Massachusetts	351	3,102,995	351	0	0	0	0	0	0	0	0
Michigan	83	5,039,080	83	0	0	5,039,080	83	0	0	0	0
Minnesota	87	2,920,214	87	926	87	2,920,214	87	0	0	0	0
Mississippi	82	657,058	45	7,147	20	549,761	41	24,038	2	0	0
Missouri	116	2,992,023	116	31,542	17	2,924,583	111	41,308	3	0	0
Montana	56	497,599	56	0	0	497,599	56	0	0	0	0
Nebraska	93	811,780	93	0	0	811,780	93	0	0	0	0
Nevada	17	970,019	17	33,204	3	970,019	17	0	0	0	0

TABLE 39. FIRST-TIME MAIL REGISTRANTS; USE OF PRINTED REGISTRATION LISTS AT THE POLLING PLACE (CONTINUED)

State	Election Jurisdiction in Survey	Total of Voters Participating	Cases	Number of First-time Mail Registrants (Voted or Not)		Use of Printed Lists at the Polls					
						Yes		No		Info. Unavailable	
				Total	Cases	Total	Cases	Total	Cases	Total	Cases
New Hampshire	323	719,403	1	0	0	0	0	0	0	0	0
New Jersey	21	3,910,220	21	0	0	2,122,831	12	0	0	0	0
New Mexico	33	620,289	19	1,811	6	620,289	20	0	0	0	0
New York	1	7,722,019	1	55,552	1	7,722,019	1	0	0	0	0
North Carolina	100	4,338,197	100	203,947	100	4,338,197	100	0	0	0	0
North Dakota	53	318,425	53	9	0	158,547	47	158,878	6	0	0
Ohio	88	5,671,436	86	18,873	16	5,626,587	84	33,064	1	0	0
Oklahoma	77	1,474,694	77	0	0	1,474,694	77	0	0	0	0
Oregon	36	1,845,251	36	7,636	36	0	0	1,845,251	36	0	0
Pennsylvania	67	6,071,357	67	0	0	6,071,357	67	0	0	0	0
Rhode Island	39	475,428	1	0	0	0	39	0	0	0	0
South Carolina	46	1,930,258	1	0	0	0	45	0	1	0	0
South Dakota	66	387,355	66	193	4	387,355	66	0	0	0	0
Tennessee	95	2,618,238	95	0	0	2,615,202	94	3,036	1	0	0
Texas	254	8,059,731	244	62,612	159	7,704,638	235	318,038	6	0	0
Utah	29	960,299	29	0	0	0	0	889,097	25	0	0
Vermont	246	333,839	246	499	107	333,839	246	0	0	0	0
Virginia	134	3,750,065	134	0	0	2,863,707	110	886,358	24	0	0
Washington	39	3,071,587	39	364	11	1,263,862	2	0	0	0	0
West Virginia	55	736,822	55	0	0	0	0	0	0	0	0
Wisconsin	72	2,996,669	72			2,996,669	72	0	0	0	0
Wyoming	23	256,035	23	0	0	256,035	23	0	0	0	0
American Samoa	1	12,408	1	0	1	0	0	0	0	0	0
Guam	1	35,092	1	0	0	35,092	1	0	0	0	0
Puerto Rico	1	1,942,931	1	0	1	1,942,931	1	0	0	0	0
Virgin Islands	1	29,930	1	0	0	0	0	29,930	1	0	0
Sum of Above	4,517	133,944,538	3,974	1,672,029	1,856	107,770,148	3,383	5,503,640	127	5,577,509	1
States Included						43		14		1	
Question		F1a		F3		F5.1		F5.2		F5.3	

TABLE 39. FIRST-TIME MAIL REGISTRANTS; USE OF PRINTED REGISTRATION LISTS AT THE POLLING PLACE

Questions F1, F3, F5. First-time mail registrants. Uses of printed registration lists at the polling place with the number of voters participating in these polling places.

Question F3:

Alabama: In Alabama, all voters must show ID at the polling place.

Arizona: One county reported that "In Arizona everyone who votes at a polling place must provide identification."

California: Two counties reported the number for all first time voters, not just those that registered by mail.

Colorado: Colorado reported, "this was a state-generated statistic based on first time voters marked for ID verification who attempted to vote in the 2008 general election."

Minnesota: Includes only first time voter mail registrants with an existing identification requirement at the time of the election. Indicates the registration information had not been successfully verified.

Missouri: One county only had new voters to their county, not state. Another county reported the number nf first time registrations, but doesn't know how many voted.

Montana: Montana has an all-ID provision in law, not just for first-time voters.

Nebraska: When the voters information is matched against other state databases, then the first time voter flag is removed.

Nevada: Two counties commented that if drivers' license number or last 4 of SSN do not match DMV/SSA records, first-time voter must show ID.

North Carolina: "These numbers consist of all first time voters in the November 2008 general election who registered by mail. Not all of these voters were required to provide ID. If a new registrant includes a copy of an acceptable ID source or if the county was able to validate the registrants North Carolina drivers license number, state-issued identification number, or the last four digits of their social security number, no additional ID was required from the voter when he presented himself to vote."

North Dakota: North Dakota does nnt have voter registration.

Ohio: 14 counties reported that Ohio requires all voters to show ID.

South Dakota: One county commented, "All voters are asked for ID at the polling place. If they do not have an ID with them, they are asked to complete an ID Affidavit."

Puerto Rico: "Poerto Rico, which is exempt from the NVRA, does not permit voters to register by mail except for those voters covered under the UOCAVA. Such voters who register by mail are only allowed to vote in federal elections, however. Consequently, since voters covered by UOCAVA are exempt from the requirement affecting first-time, mail-in registrants and no other voters register by mail, section 303(b) does not apply to Puerto Rico."

Question F5:

California: 2 counties commented that they were vote by mail only.

Colorado: Multiple counties reported yes, for F5 because they had printed poll books ready as backup. One county commented that they left the answer blank because they did use printed lists but not poll books. Several counties report "no" and commented that they use signature cards. One county reported "Yes" and commented that signature cards were their poll books in F6.

Florida: Multiple counties printed poll bouks for backup nnly.

Georgia: Printed poll books are used as a backup for the electronic list.

Maryland: Printed poll books were made as backup for the electronic poll books in Maryland.

Nevada: Some of Nevada's jurisdictions used printed lists of registered voters at the polls.

Oregon: "Oregon is a Vote by Mail state. We do not have polling places."

TABLE 40. **NUMBER AND AGES OF POLL WORKERS**

State	Election Juris. in Survey	Number of Poll Workers Total	Cases	Under 18		18 to 25		26 to 40		41 to 60		61 to 70		71 and Over		Balance (See Notes)	
				Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
Alabama	67	9,672	31	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	9,672	100.0
Alaska	1	2,891	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2,891	100.0
Arizona	15	17,040	15	630	3.7	545	3.2	773	4.5	3,028	17.8	2,160	18.5	2,539	15.5	6,266	36.8
Arkansas	75	9,459	65	91	1.0	39	0.4	105	1.1	506	5.3	953	10.1	1,028	10.9	6,737	71.2
California	58	112,249	58	8,034	7.2	4,756	4.2	3,909	3.5	15,521	13.8	12,473	11.1	10,370	9.2	57,186	50.9
Colorado	64	16,276	57	1,418	8.7	462	2.8	985	6.1	4,465	27.4	3,805	23.4	2,256	13.9	2,885	17.7
Connecticut	169	5,208	169	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	5,208	100.0
Delaware	3	4,385	3	462	10.5	293	6.7	420	9.6	1,537	35.1	947	21.6	726	16.6	0	0.0
District of Columbia	1	0	0	165		0		0		0		0		0		(165)	
Florida	67	69,199	67	57	0.1	1,726	2.5	3,159	4.6	12,856	18.6	13,363	19.3	12,419	17.9	25,619	37.0
Georgia	159	0	0	0		0		0		0		0		0		0	
Hawaii	4	4,130	4	407	9.9	319	7.7	373	9.0	1,669	40.4	337	8.2	492	11.9	533	12.9
Idaho	44	5,899	44	66	1.1	309	5.2	651	11.0	1,801	30.5	1,918	32.5	1,154	19.6	0	0.0
Illinois	1	60,181	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	60,181	100.0
Indiana	92	26,057	76	163	0.6	769	3.0	1,156	4.4	3,709	14.2	3,332	12.8	2,338	9.0	14,589	56.0
Iowa	99	10,245	94	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	10,245	100.0
Kansas	105	10,106	104	342	3.4	295	2.9	385	3.8	2,250	22.3	3,284	32.5	3,613	35.8	(63)	(0.6)
Kentucky	120	16,323	120	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	16,323	100.0
Louisiana	64	17,623	64	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	17,623	100.0
Maine	499	5,771	374	11	0.2	120	2.1	372	6.4	1,987	34.4	1,409	24.4	898	15.6	974	16.9
Maryland	24	26,730	24	301	1.1	1,697	6.3	2,981	11.2	11,648	43.6	6,587	24.6	3,516	13.2	0	0.0
Massachusetts	351	0	0	0		0		0	...	0	...	0	...	0	...	0	...
Michigan	83	42,137	83	1,880	4.5	2,338	5.5	3,676	8.7	11,941	28.3	13,243	31.4	9,059	21.5	0	0.0
Minnesota	87	32,669	87	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	32,669	100.0
Mississippi	82	5,826	41	0	0.0	65	1.1	2,279	39.1	4,872	83.6	5,039	86.5	673	11.6	(1,102)	(21.1)
Missouri	116	24,953	112	156	0.6	401	1.6	290	1.2	1,303	5.2	1,733	6.9	1,675	6.7	19,395	77.7
Montana	56	4,912	54	8	0.2	64	1.3	262	5.3	1,386	28.2	1,608	32.7	1,162	23.7	422	8.6
Nebraska	93	9,293	93	176	1.9	199	2.1	734	7.9	2,872	30.9	2,502	26.9	2,321	25.0	487	5.2
Nevada	17	5,894	17	5	0.1	6	0.1	35	0.6	92	1.6	112	1.9	111	1.9	5,533	93.9

TABLE 40. NUMBER AND AGES OF POLL WORKERS (CONTINUED)

State	Election Juris. in Survey	Number of Poll Workers Total	Cases	Under 18		18 to 25		26 to 40		41 to 60		61 to 70		71 and Over		Balance (See Notes)	
				Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
New Hampshire	323	0	0	0		0		0	...	0		0	...	0		0	
New Jersey	21	0	0	0	...	0	...	0	...	0	...	0	...	0	...	0	...
New Mexico	33	6,517	21	1	0.0	362	5.6	621	9.5	1,451	22.3	741	11.4	717	11.0	2,624	40.3
New York	1	84,819	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	84,819	100.0
North Carolina	100	25,473	100	976	3.8	625	2.5	1,637	6.4	8,263	32.8	7,989	31.4	5,449	21.4	435	1.7
North Dakota	53	2,404	52	14	0.6	32	1.3	197	8.2	466	19.4	675	28.1	278	11.6	742	30.9
Ohio	88	56,705	87	3,372	5.9	2,569	4.5	2,707	4.8	12,612	22.2	9,532	16.8	8,702	15.3	17,211	30.4
Oklahoma	77	7,538	77	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	7,538	100.0
Oregon	36	1,585	36	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1,585	100.0
Pennsylvania	67	0	0	0		0	...	0	...	0		0	...	0	...	0	
Rhode Island	39	0	0	0		0		0		0		0	...	0		0	
South Carolina	46	14,898	45	1,588	10.7	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	13,310	89.3
South Dakota	66	3,058	66	0	0.0	7	0.2	42	1.4	420	13.7	572	18.7	584	19.1	1,433	46.9
Tennessee	95	17,823	94	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	17,823	100.0
Texas	254	44,630	244	6	0.0	473	1.1	1,235	2.8	4,572	10.2	5,364	12.0	2,873	6.4	30,107	67.5
Utah	29	8,084	15	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	8,084	100.0
Vermont	246	4,136	246	17	0.4	18	0.4	145	3.5	922	22.3	697	16.9	385	9.3	1,952	47.2
Virginia	134	28,132	134	344	1.2	611	2.2	1,616	5.7	6,153	21.9	5,791	20.6	2,957	10.5	10,660	37.9
Washington	39	4,455	39	13	0.3	19	0.4	16	0.4	122	2.9	137	3.1	143	3.2	4,000	89.8
West Virginia	55	9,326	48	1	0.0	61	0.7	180	1.9	721	7.7	715	7.7	393	4.2	7,255	77.8
Wisconsin	72	0	0	0		0		0		0		0		0		0	
Wyoming	23	2,564	23	58	2.3	46	1.8	198	7.7	891	34.8	873	34.0	523	20.4	(25)	(1.0)
American Samoa	1	322	1	0	0.0	80	24.8	145	45.0	80	24.8	17	5.3	0	0.0	0	0.0
Guam	1	313	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	313	100.0
Puerto Rico	1	0	0	0		0		0		0		0		0		0	
Virgin Islands	1	450	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	450	100.0
Sum of Above	4,517	878,360	3,189	20,764	2.4	19,308	2.2	31,284	3.6	120,212	13.7	108,906	12.4	79,452	9.0	498,434	56.7
States Included				29		30		30		30		30		29		42	
Question		D3		D4a		D4b		D4c		D4d		D4e		D4f		calc	

TABLE 40. NUMBER AND AGES OF POLL WORKERS

Questions D3, D4. Number of poll workers used and age category.

Question D3:

Arizona: One county reported that they also hired 178 additional staff as "citizen board Troubleshooters that do not serve as polling place board workers but are assigned several specific polling place locations to assist the board workers at these locations with any issues that arose on Election Day."

Arkansas: One county commented that they reported 100, (7 early voting and 93 Election Day). 7 workers for early voting also worked on Election Day. So, only 93 different people working in this election. Another county commented that their answers were only approximations.

Maine: Answers for D3 and D4 were from a survey of poll workers in main.

Minnesota: Number of poll workers as reported by municipal surveys for municipalities and by county survey for mail ballot and unorganized precincts. Where survey information was not supplied, the statutory minimum of judges was assumed.

Mississippi: One county estimated 75 to 100.

Nevada: Does not include 70 high school students from Goveroment Classes helping on Election Day in one county.

Virginia: One county provided approximations.

Washington: One county provided approximations.

Wyoming: One county commented that the total does not include 21 county employees assigned to voter registration.

Question D4:

Arizona: One county reported that the "numbers reflect all poll workers, night boards, early boards, etc. They may or may not have worked this election."

Arkansas: 2 counties reported that their numbers were approximations: 9 counties were unable to answer the question but commented that the majority of their poll workers were over the age of 60.

California: Multiple counties commented that their answers were only partial answers.

Florida: One county provided estimates. Another county was missing the ages for 13 people.

Indiana: 2 counties reported that their numbers were approximations: 9 counties were unable to answer the question but commented that the majority of their poll workers were over the age of 60.

Mississippi: One county provided estimates.

Missouri: One county reported that most of their staff were over 70.

South Carolina: Poll workers under 18 are considered assistant poll managers. They may have the same responsibilities as other poll managers, but must be assigned in a ratio of no greater than 1 assistant to 2 regular poll managers. The number is D4a represent the assistant poll managers. All other poll managers are 18+, and no other age breakdown is available.

Virginia: Three counties provided estimates..

Washington: 39 counties commented, "No poll workers; vote by mail".

TABLE 41. **DIFFICULTY OF OBTAINING SUFFICIENT POLL WORKERS**

State	Election Juris. in Survey	Total of Voters Participating	Cases	Very Difficult		Somewhat Difficult		Neither Diff./Easy		Somewhat Easy		Very Easy		Not Enough Information		Balance (See Notes)	
				Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.
Alabama	67	2,105,627	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
Alaska	1	326,957	1	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Arizona	15	2,320,851	15	5	33.3	4	26.7	2	13.3	2	13.3	2	13.3	0	0.0	0	0.0
Arkansas	75	1,341,795	66	7	10.6	17	25.8	25	37.9	9	13.6	10	15.2	0	0.0	(2)	(3.0)
California	58	13,798,957	58	1	1.7	11	19.0	17	29.3	10	17.2	17	29.3	0	0.0	2	3.4
Colorado	64	2,426,253	64	3	4.7	21	32.8	5	7.8	8	12.5	5	7.8	0	0.0	22	34.4
Connecticut	169	1,644,845	169	0	0.0	169	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Delaware	3	415,696	3	0	0.0	2	66.7	0	0.0	1	33.3	0	0.0	0	0.0	0	0.0
District of Columbia	1	226,871	1	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Florida	67	8,514,809	67	1	1.5	20	29.9	25	37.3	15	22.4	6	9.0	0	0.0	0	0.0
Georgia	159	3,975,996	159	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	159	100.0
Hawaii	4	456,009	4	2	50.0	2	50.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Idaho	44	667,506	44	1	2.3	14	31.8	11	25.0	5	11.4	13	29.5	0	0.0	0	0.0
Illinois	1	5,577,509	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
Indiana	92	2,905,996	92	6	6.5	35	38.0	13	14.1	12	13.0	6	6.5	4	4.3	16	17.4
Iowa	99	1,546,483	99	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	99	100.0
Kansas	105	1,263,202	105	10	9.5	38	36.2	32	30.5	20	19.0	5	4.8	0	0.0	0	0.0
Kentucky	120	1,861,577	120	0	0.0	120	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Louisiana	64	1,980,814	64	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	64	100.0
Maine	499	744,456	499	11	2.2	96	19.2	65	13.0	87	17.4	115	23.0	0	0.0	125	25.1
Maryland	24	2,661,905	24	0	0.0	7	29.2	4	16.7	10	41.7	3	12.5	0	0.0	0	0.0
Massachusetts	351	3,102,995	351	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	351	100.0
Michigan	83	5,036,060	83	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	83	100.0	0	0.0
Minnesota	87	2,920,214	87	0	0.0	1	1.1	15	17.2	69	79.3	2	2.3	0	0.0	0	0.0
Mississippi	82	657,058	45	0	0.0	10	22.2	9	20.0	6	13.3	3	6.7	0	0.0	17	37.8
Missouri	116	2,992,023	116	5	4.3	38	32.8	32	27.6	28	24.1	13	11.2	0	0.0	0	0.0
Montana	56	497,589	56	15	26.8	21	37.5	6	10.7	5	8.9	4	7.1	1	1.8	4	7.1
Nebraska	93	811,780	93	10	10.8	40	43.0	17	18.3	10	10.8	6	6.5	6	6.5	4	4.3
Nevada	17	970,019	17	0	0.0	3	17.6	5	29.4	6	35.3	3	17.6	0	0.0	0	0.0

TABLE 41. DIFFICULTY OF OBTAINING SUFFICIENT POLL WORKERS (CONTINUED)

State	Election Juris. in Survey	Total of Voters Participating	Cases	Very Difficult		Somewhat Difficult		Neither Diff./Easy		Somewhat Easy		Very Easy		Not Enough Information		Balance (See Notes)	
				Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.	Cases	Pct.
New Hampshire	323	719,403	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
New Jersey	21	3,910,220	21	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	21	100.0
New Mexico	33	620,289	19	3	15.8	10	52.6	3	15.8	5	26.3	1	5.3	0	0.0	(2)	(15.8)
New York	1	7,722,019	1	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
North Carolina	100	4,338,197	100	9	9.0	31	31.0	14	14.0	9	9.0	4	4.0	0	0.0	33	33.0
North Dakota	53	318,425	53	3	5.7	12	22.6	9	17.0	13	24.5	1	1.9	15	28.3	0	0.0
Ohio	88	5,671,438	86	5	5.8	37	42.0	27	31.4	13	15.1	4	4.7	0	0.0	0	0.0
Oklahoma	77	1,474,694	77	0	0.0	77	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Oregon	36	1,845,251	36	0	0.0	0	0.0	0	0.0	0	0.0	36	100.0	0	0.0	0	0.0
Pennsylvania	67	6,071,357	67	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	67	100.0
Rhode Island	39	475,428	1	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
South Carolina	46	1,930,359	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
South Dakota	66	387,355	66	4	6.1	25	37.9	16	24.2	13	19.7	0	0.0	0	0.0	8	12.1
Tennessee	95	2,618,238	95	13	13.7	49	51.6	16	16.8	12	12.6	4	4.2	0	0.0	1	1.1
Texas	254	8,059,731	244	34	13.9	110	45.1	61	25.0	29	11.9	10	4.1	0	0.0	0	0.0
Utah	29	960,299	29	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	29	100.0
Vermont	246	333,839	246	4	1.6	23	9.3	65	26.4	53	21.5	100	40.7	0	0.0	1	0.4
Virginia	134	3,750,065	134	4	3.0	37	27.6	41	30.6	23	17.2	25	18.7	3	2.2	1	0.7
Washington	39	3,071,587	39	0	0.0	0	0.0	1	2.6	0	0.0	1	2.6	0	0.0	37	94.9
West Virginia	55	736,622	55	21	38.2	12	21.8	0	0.0	0	0.0	9	16.4	0	0.0	13	23.6
Wisconsin	72	2,996,869	72	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	72	100.0
Wyoming	23	256,035	23	2	8.7	17	73.9	3	13.0	1	4.3	0	0.0	0	0.0	0	0.0
American Samoa	1	17,408	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0
Guam	1	35,092	1	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Puerto Rico	1	1,947,931	1	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Virgin Islands	1	29,930	1	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Sum of Above	4,517	133,944,539	3,974	179	4.5	1,115	28.1	538	13.5	474	11.9	409	10.3	117	2.9	1,146	28.8
States Included				24		38		27		27		28		6		29	
Question			F1a	D5.1		D5.2		D5.3		D5.4		D5.5		D5.6		calc	

TABLE 41. DIFFICULTY OF OBTAINING SUFFICIENT POLL WORKERS

Questions F1, D5. Difficulty of obtaining a sufficient number of poll workers for the election.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. For this table, the total used for comparison is the number of cases in the State. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting.

Question D5:

Arkansas: One county had people calling wanting to work. Another county commented, "this was the first time in 10 years that so many people volunteered to serve as poll workers".

Idaho: This election was very easy, which is not really normal.

Indiana: For Indiana, the political parties are responsible for recruiting poll workers. Many counties commented a need for younger volunteers.

Maryland: Very easy for Democrats; somewhat difficult for Republicans.

Minnesota: The county responses to this question were averages of municipal responses within the counties.

Nebraska: Two counties commented that it was difficult finding Democrats.

Rhode Island: "Applies to each city and town".

South Dakota: Corson County: "Workers are more difficult to find in some precincts than in other precincts." Jackson County: "No interest." Todd County: "Especially interpreters."

American Samoa: Family ties to candidates running for office made recruitment of poll workers somewhat difficult.

TABLE 42. **NUMBER AND TYPE OF PRECINCTS/POLLING PLACES**

State	Election Juris. in Survey	Number of Precincts		Number of Polling Places		Election Day Voting						Early Voting						Balance (See Notes)	
						Non-election Office		Election Office		Other Type		Non-election Office		Election Office		Other Type			
		Total	Cases	Total	Cases	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
Alabama	67	2,635	67	2,319	67	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2,319	88.0
Alaska	1	436	1	523	1	446	85.3	0	0.0	0	0.0	72	13.8	5	1.0	0	0.0	0	0.0
Arizona	15	2,239	15	1,999	15	1,950	97.5	0	0.0	0	0.0	17	0.9	23	1.2	10	0.5	(1)	(0.0)
Arkansas	75	2,360	69	1,842	69	1,452	88.4	7	0.4	19	1.2	51	3.1	49	3.0	2	0.1	62	2.6
California	58	24,612	58	15,435	58	15,335	99.4	55	0.4	3	0.0	29	0.2	39	0.3	6	0.0	(32)	(0.1)
Colorado	64	3,234	64	1,854	57	1,541	83.1	69	3.7	43	2.3	119	6.4	63	3.4	19	1.0	0	0.0
Connecticut	169	744	169	744	169	744	100.0	169	22.7	0	0.0	0	0.0	0	0.0	0	0.0	(169)	(22.7)
Delaware	3	438	3	283	3	280	98.9	3	1.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
District of Columbia	1	143	1	143	1	143	100.0	0	0.0	0	0.0	9	0.0	0	0.0	0	0.0	0	0.0
Florida	67	6,992	67	5,598	67	5,323	95.1	6	0.1	0	0.0	164	2.9	105	1.9	0	0.0	0	0.0
Georgia	159	2,988	159	3,064	159	2,988	97.5	0	0.0	0	0.0	73	2.4	159	5.2	0	0.0	(156)	(5.7)
Hawaii	4	340	4	348	4	339	97.1	0	0.0	0	0.0	11	3.2	4	1.1	1	0.3	(3)	(1.0)
Idaho	44	921	44	834	44	786	94.2	0	0.0	0	0.0	4	0.5	44	5.3	0	0.0	0	0.0
Illinois	1	11,407	1	7,259	1	7,259	100.0	0	0.0	0	0.0	234	3.2	142	2.0	0	0.0	(376)	(5.3)
Indiana	92	5,353	92	3,372	76	3,252	96.4	375	11.1	0	0.0	77	2.3	61	1.8	0	0.0	(293)	(7.3)
Iowa	99	1,873	99	1,873	99	1,774	94.7	99	5.3	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Kansas	105	3,318	105	1,620	105	1,464	90.4	30	1.9	0	0.0	50	3.1	288	17.8	0	0.0	(212)	(6.4)
Kentucky	120	3,550	120	2,535	120	2,535	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Louisiana	64	3,966	64	2,261	64	2,181	96.5	0	0.0	0	0.0	4	0.2	76	3.4	0	0.0	0	0.0
Maine	499	580	499	562	499	562	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Maryland	24	1,830	24	1,618	24	1,618	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Massachusetts	351	2,174	351	2,174	351	2,174	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Michigan	83	5,103	83	3,720	83	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3,720	72.9
Minnesota	87	4,130	87	3,085	87	2,992	97.0	93	3.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Mississippi	82	922	46	943	47	733	77.7	32	3.4	22	2.3	36	3.8	12	1.3	2	0.2	106	11.5
Missouri	116	4,933	116	3,944	115	2,949	96.9	49	1.6	7	0.2	0	0.0	30	1.0	5	0.2	4	0.1
Montana	56	861	56	492	56	492	100.0	56	11.4	0	0.0	0	0.0	0	0.0	0	0.0	(56)	(6.5)
Nebraska	93	1,652	93	1,260	93	1,240	98.4	93	7.4	0	0.0	0	0.0	93	7.4	0	0.0	(186)	(10.0)
Nevada	17	2,028	17	638	17	494	77.4	6	0.9	1	0.2	118	18.5	12	1.9	1	0.2	6	0.3

TABLE 42. NUMBER AND TYPE OF PRECINCTS/POLLING PLACES (CONTINUED)

State	Election Juris. in Survey	Number of Precincts		Number of Polling Places		Election Day Voting						Early Voting						Balance (See Notes)	
						Non-election Office		Election Office		Other Type		Non-election Office		Election Office		Other Type			
		Total	Cases	Total	Cases	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.	Total	Pct.
New Hampshire	323	340	323	311	323	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	311	91.5
New Jersey	21	6,308	21	3,328	21	3,328	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
New Mexico	33	1,074	22	794	22	762	96.0	9	1.1	0	0.0	42	5.3	23	2.9	0	0.0	(42)	(3.9)
New York	1	16,364	1	6,007	1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	6,007	36.7
North Carolina	100	2,755	100	3,241	100	2,773	85.6	100	3.1	0	0.0	301	9.3	100	3.1	0	0.0	(33)	(1.7)
North Dakota	53	528	53	346	53	319	92.2	24	6.9	0	0.0	2	0.6	4	1.2	0	0.0	(3)	(0.6)
Ohio	88	10,897	87	5,769	87	5,653	98.0	55	1.0	0	0.0	3	0.1	78	1.4	0	0.0	(20)	(0.7)
Oklahoma	77	2,139	77	2,180	77	2,103	96.5	0	0.0	0	0.0	0	0.0	77	3.5	0	0.0	0	0.0
Oregon	36	1,494	36	36	36	0	0.0	36	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Pennsylvania	67	9,324	67	9,309	66	3,405	36.6	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	5,904	63.3
Rhode Island	39	0	0	577	39	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	577	...
South Carolina	46	2,094	46	2,094	46	2,094	100.0	46	2.2	0	0.0	0	0.0	0	0.0	0	0.0	(46)	(2.2)
South Dakota	66	799	66	604	66	545	90.2	53	8.8	1	0.2	21	3.5	64	10.6	0	0.0	(80)	(10.0)
Tennessee	95	2,262	94	0	0	2,165		144		0		209		0		0		(2,509)	(111.0)
Texas	254	8,379	254	7,559	245	6,514	86.2	79	1.0	0	0.0	813	10.8	195	2.6	0	0.0	(143)	(2.5)
Utah	29	2,358	29	1,185	29	1,095	92.4	0	0.0	0	0.0	58	4.9	29	2.4	0	0.0	3	0.1
Vermont	246	273	246	418	246	177	42.3	88	21.1	0	0.0	0	0.0	246	58.9	0	0.0	(143)	(34.1)
Virginia	134	2,349	134	2,435	134	2,435	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Washington	39	6,722	39	489	39	450	92.0	39	8.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
West Virginia	55	1,890	55	1,676	54	1,622	96.7	0	0.0	0	0.0	0	0.0	55	3.3	0	0.0	1	0.1
Wisconsin	72	3,428	72	2,834	69	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	2,834	82.7
Wyoming	23	490	23	332	23	332	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
American Samoa	1	17	1	45	1	44	97.8	1	2.2	0	0.0	0	0.0	1	2.2	0	0.0	(1)	(5.9)
Guam	1	58	1	21	1	21	100.0	0	0.0	0	0.0	0	0.0	1	4.8	0	0.0	(1)	(1.7)
Puerto Rico	1	1,562	1	9,369	1	8,418	89.8	0	0.0	0	0.0	228	2.4	1	0.0	722	7.7	0	0.0
Virgin Islands	1	15	1	33	1	33	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Sum of Above	4,517	185,671	4,423	132,237	71	107,334	57.8	1,816	1.0	86	0.1	2,736	1.5	2,079	1.1	768	0.6	17,408	9.4
States Included				54		48		27		7		24		30		9		34	
Question			D1		D2a		D2b		D2c		D2d		D2e		D2f		D2g		calc

TABLE 42. NUMBER AND TYPE OF PRECINCTS/POLLING PLACES

Questions D1, D2. Number of precincts, number of polling places, types of polling places.

General note: The Balance/Not Categorized column on the table compares the sum of all the categorical responses with the total indicated. If the balance is a positive number the difference is treated as uncategorized responses. If the balance is a negative number (indicated by the parentheses) the difference indicates the sum of the responses is greater than the total indicated; this could occur by an error in data entry or by the inability to correctly categorize some responses, resulting in some over-counting. Note: in this case there appears to be much double-counting which merely indicates the multiple purposes of some polling places, e.g., an election office being used for both Early Voting and Election Day Voting.

Question D1:

California: Multiple counties included Vote By Mail precincts in their response. One county included 13 No Eligible Voter Precincts.

Florida: There are 8 precincts in one county that have no voters and are strictly designed to keep the geography contiguous over space. Two other counties included precinct splits.

Iowa: Includes one absentee precinct per county.

Missouri: Two counties reported a total of 104 non-voting precincts were included.

Nevada: One county commented, "on Election Day there is voting available in the Election Office only for non-residents voting for President/Vice President"

Puerto Rico: "The Islands of Puerto Rico electoral jurisdiction after the 2000 Census is divided and described as follows. There are eight senate districts and forty legislative districts in Puerto Rico. Each of the representative districts may include from one to six precincts. There are 110 precincts in Puerto Rico, but these precincts are not equivalent to precincts as the term is traditionally used in the United States and within HAVA. Within these precincts there are currently 1562 election units. These elections units are equivalent to precincts as the term is normally used, as each election unit is one physical polling place location."

Question D2:

Alaska: In Alaska, the same election offices are open for early voting beginning 15 days prior to Election Day through Election Day. Therefore all election offices were placed in the early voting category.

Arizona: One county reported that "in certain areas some precinct polling places were co-located within the same facility and that is why the "physical polling place location totals is less than the number of precincts existing. A co-located polling place does consist of two different boards specific to a given precinct."

California: California does not have early voting sites, but California does open their election offices 29 days before elections for early voting. Multiple counties counted their election offices twice as an early voting polling place and an Election Day polling place. Two counties (Alpine and Sierra) reported 0 in D2 because they are all mail counties. Two counties reported counting early votes as absentee ballots.

Illinois: D2a is number of polling places on Election Day only – does not include early voting.

Indiana: Indiana does not have 'early voting.' Indiana allows voters to cast absentee ballots prior to Election Day, but all absentee ballots are counted on Election Day. Responses to questions D2e and D2f refer to locations where voters would cast an absentee ballot prior to Election Day.

Maine: Maine does not have Early Voting.

Maryland: No early voting.

Minnesota: Minnesota does not have early voting.

Mississippi: Two counties reported numbers on absentee voting for early voting. They do not have early voting.

Missouri: "Many local election authorities provided a response to question D2f even though Missouri does not have early voting. It appears that many local election authorities responded to question D2f because Missouri law provides for absentee voting (excuse required) that begins six weeks prior to Electinn Day and may be conducted in the local election authority's office." Kansas City reports "22 Sites were Double Polls. We administered 5 (including our central polling location) satellite voting centers for absentee voting three weeks prior to Election Day."

New York: "early voting is not permitted"

Ohio: Multiple counties counted the election office twice, once for early voting and once for the Election Day. Many counties commented that they did not.

Oregon: Oregon is a vote-by-mail state. The only "polling place" is the County Elections Office. Oregon does not have early voting.

Rhode Island: "By State law, each polling place is required to have 6 poll workers in each precinct"

South Carolina: "S.C. does not have early voting."

South Dakota: Multiple counties commented that early voting (interchangeable with absentee voting, see note following) is done only at the election office. [Editor's note: This may represent a double counting of the polling places in the table.] In South Dakota the terms absentee voting and early voting are interchangeable. From the State's submission for the Statutory Overview Section A General states: Absentee – SDCL 12-19-1. Absentee ballot—Persons entitled to vote. A registered voter who is not otherwise disqualified by law from voting in the election may vote by absentee ballot. Early voting – our state law does not reference "early voting". Absentee voting begins six weeks prior to the election and any qualified voter ean vote absentee by mail or in-person without providing a reason.

TABLE 43. NUMBER AND TYPE OF VOTING EQUIPMENT

State	Election Juris. in Survey	Sum of All Voting Equipment (See Notes)	DRE w/o VVPAT		DRE w/ VVPAT		Hybrid of DRE/Optical Scan		Optical or Digital Scan		Optical or Digital Scan		Punch Card		Punch Card		Lever		Paper		Other-1		Other-2	
			Total	Pct.	Total	Pct.	Total	Pct.	Counters	Pct.	Booths	ExC	Counters	Pct.	Booths	ExC	Total	Pct.	Booths	Pct.	Total	Pct.	Total	Pct.
Alabama	67	4,889	0	0.0	0	0.0	2,270	46.4	2,619	53.6	0	0	0	0.0	0		0	0.0	0	0.0	0	0.0	0	0.0
Alaska	1	893	0	0.0	438	49.0	0	0.0	322	36.1	0	0	0	0.0	0	...	0	0.0	133	14.9	0	0.0	0	0.0
Arizona	15	4,022	0	0.0	1,917	47.7	84	2.1	2,017	50.1	12,193	9	0	0.0	0		0	0.0	0	0.0	4	0.1	0	0.0
Arkansas	75	4,459	110	2.5	3,920	87.9	0	0.0	429	9.6	0	0	0	0.0	0	...	0	0.0	0	0.0	0	0.0	0	0.0
California	58	32,661	0	0.0	20,508	62.8	6,778	20.8	5,281	16.2	108,012	20	0	0.0	0		0	0.0	0	0.0	94	0.3	0	0.0
Colorado	64	5,732	1,295	22.6	3,439	60.0	0	0.0	997	17.4	0	0	0	0.0	0	...	0	0.0	0	0.0	0	0.0	0	0.0
Connecticut	169	2,322	0	0.0	0	0.0	0	0.0	1,578	68.0	8,448	5	0	0.0	0		0	0.0	0	0.0	744	32.0	0	0.0
Delaware	3	1,756	1,301	74.1	0	0.0	0	0.0	17	1.0	0	0	0	0.0	0	...	0	0.0	438	24.9	0	0.0	0	0.0
District of Columbia	1	435	149	34.3	0	0.0	0	0.0	286	65.7	0	0	0	0.0	0		0	0.0	0	0.0	0	0.0	0	0.0
Florida	67	14,805	5,232	35.3	0	0.0	1,113	7.5	8,285	56.0	64,368	9	0	0.0	0	...	0	0.0	110	0.7	64	0.4	1	0.0
Georgia	159	26,138	25,576	97.7	0	0.0	0	0.0	601	2.3	0	0	0	0.0	0		0	0.0	0	0.0	0	0.0	0	0.0
Hawaii	4	816	0	0.0	407	49.9	0	0.0	409	50.1	0	0	0	0.0	0	...	0	0.0	0	0.0	0	0.0	0	0.0
Idaho	44	1,475	0	0.0	0	0.0	830	56.3	48	3.3	5,559	116	8	0.5	1,431	179	0	0.0	588	39.9	0	0.0	0	0.0
Illinois	1	0	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...
Indiana	92	6,962	5,066	72.8	0	0.0	361	5.2	1,550	22.3	4,997	3	0	0.0	0		0	0.0	7	0.1	0	0.0	0	0.0
Iowa	99	3,746	0	0.0	0	0.0	1,873	50.0	1,873	50.0	0	0	0	0.0	0	...	0	0.0	0	0.0	0	0.0	0	0.0
Kansas	105	5,152	3,108	60.1	840	16.3	411	8.0	538	10.4	0	0	0	0.0	0		0	0.0	273	5.3	0	0.0	0	0.0
Kentucky	120	7,494	3,806	50.8	400	5.3	0	0.0	1,302	17.4	0	0	0	0.0	0	...	0	0.0	0	0.0	1,986	26.5	0	0.0
Louisiana	64	9,216	9,129	99.1	0	0.0	0	0.0	79	0.9	0	0	0	0.0	0		0	0.0	0	0.0	0	0.0	0	0.0
Maine	499	0	0	...	0		0		0	...	0	...	0	...	0	...	0	...	0	...	0		0	...
Maryland	24	18,760	18,678	99.6	0	0.0	0	0.0	82	0.4	0	0	0	0.0	0		0	0.0	0	0.0	0	0.0	0	0.0
Massachusetts	351	0	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...	0	...
Michigan	83	10,507	0	0.0	0	0.0	4,271	40.6	6,236	59.4	0	0	0	0.0	0		0	0.0	0	0.0	0	0.0	0	0.0
Minnesota	87	8,716	0	0.0	0	0.0	3,085	35.4	3,085	35.4	15,654	5	0	0.0	0	...	0	0.0	2,546	29.2	0	0.0	0	0.0
Mississippi	82	3,084	1,453	47.1	1,327	43.0	195	6.3	97	3.1	0	0	0	0.0	0		0	0.0	1	0.0	11	0.4	0	0.0
Missouri	116	7,350	0	0.0	4,116	56.0	159	2.2	3,075	41.8	0	0	0	0.0	0	...	0	0.0	0	0.0	0	0.0	0	0.0
Montana	56	1,141	0	0.0	0	0.0	558	48.9	358	31.4	3,614	10	0	0.0	0		0	0.0	225	19.7	0	0.0	0	0.0
Nebraska	93	227	0	0.0	0	0.0	0	0.0	227	100.0	0	0	0	0.0	0	...	0	0.0	0	0.0	0	0.0	0	0.0
Nevada	17	7,036	0	0.0	7,005	99.6	0	0.0	31	0.4	5	0	0	0.0	0		0	0.0	0	0.0	0	0.0	0	0.0

TABLE 43. NUMBER AND TYPE OF VOTING EQUIPMENT (CONTINUED)

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

TABLE 43. NUMBER AND TYPE OF VOTING EQUIPMENT

Questions F7. Information on the number and type of voting equipment used in the elections and the purposes for which they are used.

Note: This table is a simple summary of a complex set of information. Researchers are advised to consult the dataset for complete information. The "Sum of All Voting Equipment" is a calculated estimate to enable comparative percentage values. This sum is determined by using the number of machines or counters as well as the number of booths for paper ballots and the "other" types of equipment.

Question F7:

California: Three counties commented, "There was at least one Hart eSlate available at each polling place for voters with disabilities, however, the VVPATs from those voting units were remade onto Mark-A-Vote ballots for tally at the central location."

Michigan: Question F7d: Absentee ballots are processed at central locations or the precinct/polling place at the discretion of local jurisdiction.

Missouri: "F7d is our only counter. It is at the central location for all ballot tallying."

Nebraska: For section F7, all jurisdictions use the AutoMark voter assist terminal for any voters who may be physically, visually, or hearing impaired. This information was placed in F7c to better describe the purpose of these machines.

New Mexico: One county commented, "F7i, Special device accessible to disabled voters was crossed out, and 'Election System and Software' was written".

New York: For F7d: 12 counties use an OpScan central count Absentee System.

TABLE 44. **SUMMARY OF SELECTED FACTORS PER POLLING PLACE**

State	Election Juris. in Survey	Polling Places Total	Precincts		Registrants		Voters		Election Day Voters (exc. Provisionals)		Provisional Ballots		Poll Workers		Voting Equipment	
			Total	per PP	Total	per PP	Total	per PP	Total	per PP	Total	per PP	Total	per PP	Total	per PP
Alabama	67	2,319	2,635	1.1	2,978,339	1,284	2,105,622	908	0	0	7,242	3	9,672	4	4,889	2
Alaska	1	573	438	0.8	495,731	948	328,957	629	209,111	400	20,441	39	2,891	6	893	2
Arizona	15	1,999	2,239	1.1	2,987,451	1,494	2,320,851	1,161	986,579	494	151,799	76	17,040	9	4,022	2
Arkansas	75	1,642	2,380	1.4	1,684,240	1,026	1,341,795	817	550,786	335	2,654	2	9,459	6	4,459	3
California	58	15,435	24,612	1.6	17,394,200	1,127	13,798,557	894	6,894,572	447	798,332	52	112,249	7	32,661	2
Colorado	64	1,854	3,234	1.7	3,214,382	1,734	2,426,253	1,309	490,535	265	51,824	28	16,276	9	5,732	3
Connecticut	169	744	744	1.0	2,090,788	2,810	1,644,845	2,211	1,473,294	1,980	715	1	5,208	7	2,322	3
Delaware	3	283	438	1.5	602,726	2,130	415,696	1,469	393,565	1,391	394	1	4,385	15	1,756	6
District of Columbia	1	143	143	1.0	426,671	2,984	226,871	1,587	226,372	1,587	14,713	103	0	0	435	3
Florida	67	5,598	6,992	1.2	12,562,978	2,244	8,514,808	1,521	3,838,184	686	35,635	6	69,199	12	14,519	3
Georgia	159	3,064	2,988	1.0	5,750,758	1,879	3,975,986	1,298	1,821,865	595	17,365	6	0	0	26,730	9
Hawaii	4	349	340	1.0	691,356	1,981	456,009	1,307	280,537	804	573	1	4,130	12	816	2
Idaho	44	834	921	1.1	861,869	1,033	667,506	800	470,294	564	0	0	5,889	7	2,906	3
Illinois	1	7,259	11,407	1.6	7,700,525	1,061	5,577,509	768	4,252,680	586	41,339	6	60,181	8	0	0
Indiana	92	3,372	5,353	1.6	4,615,057	1,339	2,805,988	832	2,143,813	636	3,690	1	26,057	8	6,992	2
Iowa	99	1,873	1,873	1.0	2,143,665	1,145	1,546,483	826	953,797	509	4,307	2	10,245	5	3,746	2
Kansas	105	1,678	3,318	2.0	1,749,758	1,080	1,263,202	780	796,112	491	40,214	25	10,106	6	5,162	3
Kentucky	120	2,535	3,550	1.4	2,906,809	1,147	1,861,577	734	1,747,096	689	855	0	16,323	6	7,494	3
Louisiana	64	2,261	3,956	1.7	2,942,160	1,301	1,980,814	876	1,691,981	748	8,071	4	17,623	8	9,218	4
Maine	499	567	580	1.0	1,065,064	1,895	744,456	1,325	513,421	914	291	1	5,771	10	0	0
Maryland	24	1,618	1,830	1.1	3,432,645	2,122	2,661,905	1,645	2,400,670	1,484	51,163	32	28,730	17	18,760	12
Massachusetts	351	2,174	2,174	1.0	4,220,486	1,941	3,102,995	1,427	0	0	11,712	5	0	0	0	0
Michigan	83	3,720	5,103	1.4	7,470,764	2,008	5,039,080	1,355	3,756,486	1,010	3,797	1	42,137	11	10,507	3
Minnesota	87	3,085	4,130	1.3	3,472,317	1,126	2,920,214	947	2,627,668	852	0	0	32,669	11	8,716	3
Mississippi	82	943	927	1.0	1,868,776	1,133	857,058	697	475,516	504	15,513	16	5,626	6	3,084	3
Missouri	116	3,044	4,933	1.6	4,154,113	1,365	2,992,023	983	2,493,249	819	6,934	2	24,953	8	7,350	2
Montana	56	492	861	1.8	668,085	1,358	497,589	1,011	280,398	570	3,762	8	4,912	10	1,141	2
Nebraska	93	1,260	1,652	1.3	1,157,034	918	811,780	644	634,977	504	15,478	12	9,293	7	227	0
Nevada	17	638	2,026	3.2	1,446,538	2,267	970,019	1,520	319,639	501	6,603	10	5,894	9	7,036	11

TABLE 44. SUMMARY OF SELECTED FACTORS PER POLLING PLACE (CONTINUED)

State	Registered Voters in Jurisdiction	Polling Places Used	Provisions		Registrants		Ballots		Provisional Ballots Cast / Ballots Cast		Provisional Ballots		Poll Workers		Polling Equipment	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

TABLE 44. SUMMARY OF SELECTED FACTORS PER POLLING PLACE

Questions A1, D1, D2, D3, E1, F1, F7. Calculations for selected factors per polling place.

Note: This table summarizes information from several tables and calculates the value of each per polling place. These values are provided to give an overview of the distribution of these factors amongst the States and are merely illustrative.

APPENDIX C

Questionnaire

U.S. ELECTION ASSISTANCE COMMISSION

2008 Election Administration & Voting Survey

The ongoing process of improving America's election systems relies in part on having accurate data about the way Americans cast their ballots. In 2002, Congress chartered the U.S. Election Assistance Commission to collect information on the state of American elections and make it widely available to policy makers, advocates, scholars, journalists and the general public. Since 2004, the Commission has sponsored an Election Day Survey as its primary tool for fulfilling that mission. We are pleased to present the 2008 Election Day Survey, and we ask for your help in making it the most complete and accurate survey in its history.

The questions below ask for information about ballots cast; voter registration; overseas and military voting; Election Day activities; voting technology; and other important issues. Many of these questions are mandated by the Help America Vote Act and other federal laws, while other questions were included at the request of the research community or policy makers. The EAC recognizes the burden that asking for this data places on state and local election officials, and we have worked to minimize that burden as much as possible.

In advance, we thank you for your cooperation and look forward to answering any questions you might have.

Information supplied by:

Name		Title	
Office/Agency name			
Address 1			
Address 2			
City		State	Zip Code
E-mail address			
Telephone (area code and number)	Extension	Fax number (area code and number)	

Instructions for Completing the 2008 Election Administration & Voting Survey

1. This survey collects information on election administration issues in local election offices (typically counties or townships) that are responsible for the administration of the November 2008 general election. As such, all data should be reported at the level of the local jurisdiction. However, if a State or Territory desires, a State or Territorial level election office may fill out any or all of the information on behalf of the local election offices under its jurisdiction.

2. Don't leave items blank - always provide an answer to the question asked using the "Data not available" or "Other" categories discussed below, if needed.

3. Use the "Data not available" box if the question asks for details that are not required by your state law or the question asks for information that is not currently collected.

4. You may find it helpful to read an entire section before answering any of the questions in that section.

5. Please attempt to record data according to the categories as they are defined in the question. If your jurisdiction uses a different data classification scheme (for instance, collects data in such a way that combines two or more categories listed in a question), you can use the space provided for "Other" to provide numbers and details on these categories. Use as many "Other" categories as you need to adequately report the relevant statistics for your jurisdiction. If you enter information into the "Other" field, please use the comments field to provide an explanation for the answer.

In the example below, the jurisdiction does not collect separate statistics on the number of duplicate and rejected registration forms, but instead has only one number that represents the total number of registration forms that are either duplicated/or rejected.

EXAMPLE:

A5. In order to evaluate the workflow of your office over the last election cycle, enter the total number of registration forms your jurisdiction received from all sources during the period from the close of registration for the November 2008 general election until the close of registration for the November 2008 general election. Include here any Election Day or Same Day registrations, if applicable. Also include any special categories of voters who may have extended deadlines, such as returning military personnel, if applicable.

A5a. Total ..... 5000 ..... ☐ Data not available

Next, divide the total number of registration application forms received (as entered in A5a) into the following categories. The amounts should sum to the total provided in A4a.

		Data not available ▼
A5b. New registrations	4000	☐
A5c. Invalid or rejected (other than duplicates)		☒
A5d. Duplicate of existing registration		☒
A5e. Changes to name, party or within-jurisdiction address change	500	☐
A5f. Moved into jurisdiction but was registered elsewhere in the state	200	☐
A5g. Other→ comments: duplicate and invalid registrations combined	300	
A5h. Other→ comments: _____		
TOTAL	5000	

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SECTION A **VOTER REGISTRATION**

Roadmap to Section A:

- **A1, A2 and A3** ask for information about the number of registered voters in your jurisdiction and how you calculate those statistics.
- **A4** asks for information about registration activity on days in which it was possible for a person to both register and vote on the same day.
- **A5** asks for information on all registration forms for all types of registration transactions (successful and unsuccessful) received by your office.
- **A6** asks for the sources of all registration forms (both successful and unsuccessful).
- **A7** asks for the sources of new registrations.
- **A8** asks for the sources of duplicate registrations.
- **A9** asks for the sources of invalid or rejected registrations.
- **A10** asks for information on removal notices sent under NVRA Section 8(d) 2.
- **A11** asks for the number of voters removed from the voter registration rolls and the reason for their removal.

A1. Enter the total number of persons in your jurisdiction who were registered and eligible to vote in the November 2008 general election. Include all persons eligible to vote in the election including special categories of voters with extended deadlines (such as returning military) or any person who may have been able to register and vote on Election Day. Do not include any persons under the age of 18 who may be registered under a "pre-registration" program.

Total ..... [ ] ..... ☐ Data not available

A1 Comments

A2. When, for other official purposes, you report the number of registered voters in your jurisdiction for the November 2008 general election (as in A1) do you include both active and inactive voters in the count, or does your jurisdiction only include active voters? (Select only one)

Jurisdiction uses both active and inactive registered voters ..... ☐

Jurisdiction only uses active registered voters ..... ☐

Other → comments: _____ ..... ☐

A2 Comments

A3. Enter the total number of persons who were registered and eligible to vote in the November 2008 general election into the following categories. Do not include any persons under the age of 18 who may be registered under a "pre-registration" program.

		Data not available ▼
A3a. Active	[ ]	☐
A3b. Inactive	[ ]	☐

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A3 Comments

A4. If your state's laws allowed any voters to register and then to vote on the same day (either on or prior to Election Day), enter the total number of registration forms received on those days in which it was possible to both register for and vote in the November 2008 general election. This question includes jurisdictions in states that permit Election Day registration for voting for office of President, such as Connecticut and Rhode Island.

A4a. Total..... [ ] ..... ☐ Data not available

..... ☐ Do not allow any voters to register and vote on the same day →skip to A5.

Next, divide the total number of registration forms received on days in which it was possible for a person to both register for and vote in the November 2008 general election (as entered in A4a) into the following categories. The amounts should sum to the total provided in A4a.

		Data not available
A4b. New registrations		☐
A4c. Changes to existing registrations (e.g., name, address, etc.)		☐
A4d. Duplicate of existing registration		☐
A4e. Invalid or rejected (other than duplicates)		☐
A4f. Other → comments: _____		
A4g. Other → comments: _____		
A4h. Other → comments: _____		
TOTAL	A4a	

A4 Comments

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A5. In order to evaluate the workflow of your office over the last election cycle, enter the total number of registration forms your jurisdiction received from all sources during the period from the close of registration for the November 2008 general election until the close of registration for the November 2008 general election. Include here any Election Day or Same Day registrations, if applicable. Also include any special categories of voters who may have extended deadlines such as returning military personnel, if applicable.

A5a. Total..... [ ] ..... ☐ Data not available

Next, divide the total number of registration application forms received (as entered in A5a) into the following categories. The amounts should sum to the total provided in A5a.

		Data not available ▼
A5b. New valid registrations (excluding pre-registrations of persons under 18)	[ ]	☐
A5c. New "pre" registrations of persons under age 18	[ ]	☐
A5d. Duplicate of existing valid registration	[ ]	☐
A5e. Invalid or rejected (other than duplicates)	[ ]	☐
A5f. Changes to name, party or within-jurisdiction address change	[ ]	☐
A5g. Address changes that cross jurisdiction borders	[ ]	☐
A5h. Other → comments: _____	[ ]	
A5i. Other → comments: _____	[ ]	
A5j. Other → comments: _____	[ ]	
A5k. Other → comments: _____	[ ]	
A5l. Other → comments: _____	[ ]	
TOTAL	A5a	

A5 Comments

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A6a thru A6o: Divide the total number of all registration forms received (as entered in A5a), into the following sources.
A7a thru A7o: Divide the total number of new registration forms received (as entered in A5b), into the following sources.
A8a thru A8o: Divide the total number of duplicate registration forms received (as entered in A5d), into the following sources.
A9a thru A9o: Divide the total number of invalid or rejected registration forms (as entered in A5e), received into the following sources.

			Of the total received (as entered in A5), how many were:							
	A6. Total forms received	NA ▼	**A7. New registrations**	NA ▼	**A8. Duplicate of existing registrations**	NA ▼	**A9. Invalid or rejected**	NA ▼
a. Individual voters submitting applications by mail, fax, or email		☐		☐		☐		☐
b. Individual voters registering in person at the election/registrar's office		☐		☐		☐		☐
c. Individual voters submitting registration forms via the Internet		☐		☐		☐		☐
d. Motor vehicle offices or other offices that issue drivers licenses		☐		☐		☐		☐
e. Public assistance offices mandated as registration sites under NVRA		☐		☐		☐		☐
f. State funded agencies primarily serving persons with disabilities		☐		☐		☐		☐
g. Armed forces recruitment offices		☐		☐		☐		☐
h. Other agencies designated by the state not mandated by NVRA		☐		☐		☐		☐
i. Registration drives from advocacy groups or political parties		☐		☐		☐		☐
j. Other → comments: _____								
k. Other → comments: _____								
l. Other → comments: _____								
m. Other → comments: _____								
n. Other → comments: _____								
o. Other → comments: _____								
TOTAL	A5a		A5b		A5d		A5e	

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A6 Comments (total forms)

A7 Comments (new forms)

A8 Comments (duplicate forms)

A9 Comments (Invalid or rejected forms)

A10. Enter the total number of removal notices sent to voters in the period between the close of registration for the November 2006 general election and the close of registration for the November 2008 general election, because the person had not voted or appeared to vote in the two previous federal elections (per NVRA Section 8 (d) (2)).

A10a. Total ..... ☐ Data not available

Next, divide the total number of removal/confirmation notices mailed (as entered in A10a) into the following categories. The amounts should sum to the total provided in A10a.

		Data not available
A10b. Received back from voters confirming registration		☐
A10c. Received back confirming registration should be invalidated		☐
A10d. Returned back as undeliverable		☐
A10e. Status unknown (neither received confirmation nor returned undeliverable)		☐
A10f. Other → comments: _____		
A10g. Other → comments: _____		
A10h. Other → comments: _____		
TOTAL	A10a	

A10 Comments

A11. Enter the total number of voters removed from the voter registration rolls in your jurisdiction in the period between the close of registration for the November 2006 general election and the close of registration for the November 2008

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general election. Note this question asks for those now ineligible to vote, not merely those moved into an "inactive" status.

A11a. Total ..... [ ] ..... ☐ Data not available

Next, divide the total number of voters removed (as entered in A11a) into the following categories. The amounts should sum to the total provided in A11a.

		Data not available ▼
A11b. Moved outside jurisdiction	[ ]	☐
A11c. Death	[ ]	☐
A11d. Disqualifying felony conviction	[ ]	☐
A11e. Failure to respond to notice sent and failure to vote in the two most recent federal elections	[ ]	☐
A11f. Declared mentally incompetent	[ ]	☐
A11g. Voter requested to be removed for reasons other than felony conviction, mental status, or moved outside jurisdiction	[ ]	☐
A11h. Other → comments: _____	[ ]	
A11i. Other → comments: _____	[ ]	
A11j. Other → comments: _____	[ ]	
A11k. Other → comments: _____	[ ]	
TOTAL	A11a	

A11 Comments

[ ]

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SECTION B [illegible]

Roadmap to Section B:

- B1 and B2 ask for information about the number and type of UOCAVA absentee ballots transmitted.
- B3 asks for the number and type of full UOCAVA ballots returned and accepted for counting.
- B4, B5, B6, and B7 ask for information on the type of UOCAVA ballots returned by type of UOCAVA voter.
- B8 asks for the number and type of all UOCAVA ballots counted.
- B9, B10, B11, and B12 ask for information on the type of UOCAVA ballots counted by type of UOCAVA voter.
- B13 asks for the number and type of all UOCAVA ballots rejected.
- B14 asks for the information on reasons why UOCAVA ballots were rejected.
- B15, B16, B17, and B18 ask for information on the type of UOCAVA ballots rejected by type of UOCAVA voter.
- B19 asks for information on how ballots were transmitted to UOCAVA voters.
- B20 asks for information on the [illegible] of ballots electronically transmitted to UOCAVA voters.

B1. Enter the total number of absentee ballots transmitted to UOCAVA voters for the November 2008 general election.

B1a. Total ..... [ ] ..... ☐ Data not available

Next, divide the total number of absentee ballots transmitted to UOCAVA voters (as entered in B1a) into the following categories. The amounts should sum to the total provided in B1a.

		Data not available ▼
B1b. Uniformed services voters – domestic or foreign		☐
B1c. Non-military/civilian overseas voters		☐
B1d. Other → comments: _____		
B1e. Other → comments: _____		
TOTAL	B1a	

B1 Comments

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B2. Of the UOCAVA absentee ballots transmitted (as entered in B1a) how many were:

Data not available ▼

B2a. Returned by voter and submitted for counting (include both those that were counted and those that were rejected) ..... ☐

B2b. Returned as undeliverable ..... ☐

B2c. Spoiled or replaced ballots ..... ☐

B2d. Status unknown (neither returned undeliverable nor returned from voter) ..... ☐

B1e. Other → comments: _____ .....

B2f. Other → comments: _____ .....

B1g. Other → comments: _____ .....

TOTAL **B1a**

B2 Comments

B3. Enter the total number of all UOCAVA ballots (including regular UOCAVA absentee ballots and FWAB) returned by UOCAVA voters and submitted for counting for the November 2008 general election. Please include both those ballots that were later counted and those that were rejected. Do not include ballots that were returned undeliverable.

Total ..... ☐ Data not available

B3 Comments

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B4a thru B4c. Divide the total number of UOCAVA ballots returned by UOCAVA voters and submitted for counting (as entered in B3), into each category of UOCAVA voter below.

Next, for each type of UOCAVA voter, enter the number of:

- **B5a thru B5c: Regular UOCAVA absentee ballots returned and submitted for counting.**
- **B6a thru B6c: Federal Write-in Absentee Ballots (FWAB) returned and submitted for counting.**
- **B7a thru B7c: Other type of ballots returned and submitted for counting.**

		Of the total UOCAVA ballots returned (as entered in B3), how many were ballots of each of the following ballot types:		
	B4. All UOCAVA ballots	**B5. Absentee ballots**	**B6. FWAB**	**B7. Other type of ballot →**
	NA ▼	NA ▼	NA ▼	NA ▼
Type of UOCAVA voter:				
a. Uniform services voters – domestic or foreign	☐	☐	☐	☐
b. Non-military/civilian overseas voters	☐	☐	☐	☐
c. Other type of voter → comments: _____	☐	☐	☐	☐
TOTAL	B3			

B4 Comments

B5 Comments

B6 Comments

B7 Comments

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B8. Enter the total number of all UOCAVA ballots (including regular UOCAVA absentee ballots and FWAB) counted in the November 2008 general election.

Total ..... [ ] ..... ☐ Data not available

B8 Comments

B9a thru B9c. Divide the total number of UOCAVA ballots counted (as entered in B8) into each category of UOCAVA voter below.

Next, for each type of UOCAVA voter, enter the number of:

- **B10a thru B10c: Regular UOCAVA absentee ballots counted.**
- **B11a thru B11c: Federal Write-in Absentee Ballots (FWAB) counted.**
- **B12a thru B12c: Other type of ballots counted.**

			Of the total UOCAVA ballots counted (as entered in B8), how many were ballots of each of the following ballot types:					
	B9. All UOCAVA ballots	NA ▼	**B10. Absentee ballots**	NA ▼	**B11. FWAB**	NA ▼	**B12. Other type of ballot →**	NA ▼
Type of UOCAVA voter:								
a. Uniform services voters – domestic or foreign		☐		☐		☐		☐
b. Non-military/civilian overseas voters		☐		☐		☐		☐
c. Other type of voter → comments: _____		☐		☐		☐		☐
TOTAL	B8							

B9 Comments

B10 Comments

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B11 Comments

B12 Comments

B13. Enter the total number of UOCAVA ballots (including regular UOCAV absentee ballots and FWAB) rejected in the November 2008 general election.

Total ..... ☐ Data not available

B13 Comments

B14. Please divide the total number of all UOCAVA ballots rejected (as entered in B13a) into the following categories indicating the reason why the absentee ballots were rejected. The amounts should sum to the total provided in B13a.

		Data not available ▼
B14a. Ballot not received on time/missed deadline		☐
B14b. Problem with voter signature		☐
B14c. Ballot lacked a postmark		☐
B14d. Other → comments: _____		
B14e. Other → comments: _____		
B14f. Other → comments: _____		
TOTAL	B13a	

B14 Comments

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B15a thru B15c. Divide the total number of UOCAVA ballots rejected (as entered in B13a), into each category of UOCAVA voter below.

Next, for each type of UOCAVA voter, enter the number of:

- **B16a thru B16c: Regular UOCAVA absentee ballots rejected.**
- **B17a thru B17c: Federal Write-In Absentee Ballots (FWAB) rejected.**
- **B18a thru B18c: Other type of ballots rejected.**

	B15. All UOCAVA ballots		*Of the total UOCAVA ballots rejected (as entered in B13), how many were ballots of each of the following ballot types:* B16. Absentee ballots		B17. FWAB		B18. Other type of ballot →	
		NA ▼		NA ▼		NA ▼		NA ▼
Type of UOCAVA voter:								
a. Uniform services voters – domestic or foreign		☐		☐		☐		☐
b. Non-military/civilian overseas voters		☐		☐		☐		☐
c. . Other type of voter → comments: _____		☐		☐		☐		☐
TOTAL	B13a							

B15 Comments

B16 Comments

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B17 Comments

B18 Comments

B19. Returning back to UOCAVA ballots transmitted, divide the total number UOCAVA ballots that were transmitted for the November 2008 general election (as entered in B1a) into the following categories. The amounts should sum to the total provided in B1a.

Data not available ▼

B19a. In response to a one-time request by the voter for the November 2008 general election ..... ☐

B19b. As part of the two-election cycle of automatic requests ..... ☐

B19c. Other → comments: _____ .....

TOTAL B1a

B19 Comments

B20. Of the UOCAVA ballots automatically transmitted (as entered in B19b), how many were:

Data not available ▼

B20a. Returned by voter and submitted for counting ..... ☐

B20b. Returned as undeliverable ..... ☐

B20c. Spoiled or replaced ballots ..... ☐

B20d. Status unknown (neither returned undeliverable nor returned from voter) ..... ☐

B20e. Other → comments: _____ .....

B20f. Other → comments: _____ .....

B20g. Other → comments: _____ .....

TOTAL B19b

B20 Comments

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SECTION C [illegible]

[illegible]

C1. Enter the total number of domestic civilian absentee ballots transmitted to voters for the November 2008 general election. Do not include absentee ballots transmitted to UOCAVA voters

C1a. Total ..... [ ] ..... ☐ Data not available

Next, divide the total number of absentee ballots transmitted to voters (as entered in C1a) into the following categories. The amounts should sum to the total provided in C1a.

		Data not available ▼
C1b. Returned by voters and submitted for counting (include both those that were later counted and those that were rejected)		☐
C1c. Returned as undeliverable		☐
C1d. Spoiled or replaced ballots		☐
C1e. Status unknown (neither returned undeliverable nor returned from voter)		☐
C1f. Other → comments: _____		
C1g. Other → comments: _____		
C1h. Other → comments: _____		
TOTAL	C1a	

C1 Comments

C2. Does your jurisdiction have a permanent absentee voter registration list in which voters may apply to receive an absentee (or mail) ballot for subsequent elections without further application? Do not include UOCAVA voters.

☐ ..... Yes → Continue to question C3.
☐ ..... No → Skip to question C4.

C2 Comments

C3. Of the total number of domestic civilian absentee ballots transmitted (as entered in C1) how many ballots were sent to voters in your jurisdiction because they appear on a permanent absentee (or mail) ballot voter registration list?

Total ..... [ ] ..... ☐ Data not available

C3 Comments

C4. Of the total number of absentee ballots returned by voters and submitted for counting (as entered in C1b) how many ballots were:

		Data not available ▼
C4a. Counted in the November 2008 general election	[ ]	☐
C4b. Rejected in the November 2008 general election	[ ]	☐
C4c. Other → comments: _____	[ ]	
C4d. Other → comments: _____	[ ]	
TOTAL	C1b	

C4 Comments

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C5. Please divide the total number of domestic civilian absentee ballots rejected (as entered in C4b) into the following categories indicating the reason why the absentee ballots were rejected. The amounts should sum to the total provided in C4b.

		Data not available ▼
C5a. Ballot not received on time/missed deadline.		☐
C5b. No voter signature		☐
C5c. No witness signature		☐
C5d. Non-matching signature		☐
C5e. No election official's signature on ballot		☐
C5f. Ballot returned in an unofficial envelope		☐
C5g. Ballot missing from envelope		☐
C5h. Envelope not sealed		☐
C5i. No resident address on envelope		☐
C5j. Multiple ballots returned in one envelope.		☐
C5k. Voter deceased.		☐
C5l. Voter already voted in person		☐
C5m. First-time voter without proper identification		☐
C5n. No ballot application on record		☐
C5o. Other → comments: _____		
C5p. Other → comments: _____		
C5q. Other → comments: _____		
C5r. Other → comments: _____		
C5s. Other → comments: _____		
C5t. Other → comments: _____		
C5u. Other → comments: _____		
C5v. Other → comments: _____		
TOTAL	C4b	

C5 Comments

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OMB Control No. 3265-0005

Expiration Date: 3/31/2009

SECTION D	Election Administration

- D1 asks for the information on the number of precincts in your jurisdiction
- D2 asks for the information on the number and type of polling places in your jurisdiction
- D3, D4, and D5 ask for the information poll workers utilized in the November 2008 general election.

D1. Enter the total number of precincts in your jurisdictions for the November 2008 general election.

Total ..... [ ] ..... ☐ Data not available

D1 Comments

[ ]

D2. Enter the total number of physical polling places in your jurisdiction for the November 2008 general election. Please include physical polling places in operation on Election Day and physical polling places in operation before Election Day (such as early vote centers).

D2a. Total ..... [ ] ..... ☐ Data not available

Next, divide the total physical polling places in your jurisdiction (as entered in D2a) into the following categories. The amounts should sum to the total provided in D2a. If you do not include election offices in your count of polling places, enter 0.

		Data not available ▼
Election Day voting		
D2b. Physical polling places other than election offices	[ ]	☐
D2c. Election offices	[ ]	☐
D2d. Other → comments: _____	[ ]	
Early voting		
D2e. Physical polling places other than election offices	[ ]	☐
D2f. Election offices	[ ]	☐
D2g. Other → comments: _____	[ ]	
TOTAL	D2a	

D2 Comments

[ ]

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D3. Enter the total number of poll workers used in your jurisdiction for the November 2008 general election.

- Poll workers may include election judges, booth workers, wardens, commissioners, or other similar terms that refer to persons who verify the identity of a voter; assist the voter with signing the register, affidavits or other documents required to cast a ballot; assist the voter by providing the voter with a ballot or setting up the voting machine for the voter; and serving other functions as dictated by state law.
- Include all people recruited specifically for the purposes of working at physical polling places in operation on and/or before Election Day, but, do not include observers stationed at the polling places or regular office staff.

Total..... [ ] ..... ☐ Data not available

D3 Comments

D4. If your jurisdiction has data on the ages of its poll workers (for example, from voter registration records, payroll records or from poll worker applications), enter the total number of poll workers in each age category.

D4a. Under 18 years old..... [ ]
D4b. 18 to 25 ..... [ ]
D4c. 26 to 40..... [ ]
D4d. 41 to 60..... [ ]
D4e. 61 to 70 ..... [ ]
D4f. 71 years old and over..... [ ]

..... ☐ Data not available

D4 Comments

D5. How difficult or easy was it for your jurisdiction to obtain a sufficient number of poll workers for the November 2008 general election?

☐..... Very difficult
☐..... Somewhat difficult
☐..... Neither difficult nor easy
☐..... Somewhat easy
☐..... Very easy
☐..... Not enough information to answer

D5 Comments

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SECTION E	Provisional Ballots
• E1 and E2 asks for the information on the number and status of provisional ballots submitted. • E3 asks for the information on reasons why provisional ballots were rejected.	

E1. Enter the total number of voters who submitted provisional ballots in the November 2008 general election.

Total ..... [ ] ..... ☐ Data not available

E1 Comments

E2. Next, divide the total number of voters who submitted provisional ballots in the November 2008 general election (as entered in E1) into the following categories.

		Data not available
E2a. Counted the full ballot		☐
E2b. Counted part of the ballot		☐
E2c. Rejected ballot		☐
E2d. Other → comments: _____		
E2e. Other → comments: _____		
TOTAL	E1a	

E2 Comments

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E3. Please divide the total number of provisional ballots rejected (as entered in E2c) into the following categories indicating the reason why the provision ballots were rejected. The amounts should sum to the total provided in E2c.

		Data not available ▼
E3a. Voter not registered in the state		☐
E3b. Voter registered in state but attempted to vote in the wrong jurisdiction		☐
E3c. Voter registered in state but attempted to vote in the wrong precinct		☐
E3d. Failure to provide sufficient identification		☐
E3e. Envelop and/or ballot was incomplete and/or illegible		☐
E3f. Ballot missing from envelope		☐
E3g. No signature		☐
E3h. Non-matching signature		☐
E3i. Voter already voted		☐
E3j. Other → comments: _____		
E3k. Other → comments: _____		
E3l. Other → comments: _____		
E3m. Other → comments: _____		
E3n. Other → comments: _____		
E3o. Other → comments: _____		
E3p. Other → comments: _____		
TOTAL	E2c	

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SECTION F	Election Day Activities

- F1 and F2 ask for turnout figures for the November 2008 general election and the source used to arrive at this number.
- F3 asks for the number of first time voters who registered to vote by mail and, under HAVA 303(b), were subject to provide identification.
- F4 asks for information on electronic poll books or electronic lists of voters that may have been used.
- F5 and F6 ask for information on printed poll books or printed lists of voters that may have been used.
- F7 asks for the type of primary voting equipment used.
- F8 solicits any additional comments jurisdictions may wish to share regarding their Election Day experiences

F1. Enter the total number of people in your jurisdiction who participated in the November 2008 general election. Include all type of voters (civilian and military) by all types of ballots. Include rejected provisional ballots only if your jurisdiction credits the person's vote history even though the provisional ballot was rejected.

F1a. Total..... [ ] ..... ☐ Data not available

Next, divide the total number people who participated in the November 2008 general election (as entered in F1a) into the following categories. The amounts should sum to the total provided in F1a.

		Data not available ▼
F1b. Voted at a physical polling place on Election Day (not including provisional ballots or absentee ballots dropped off at the polls)		☐
F1c. UOCAVA voters who voted via absentee or FWAB (as in B2)		☐
F1d. Voted using a domestic civilian absentee ballot (as in D7c)		☐
F1e. Voted using a provisional ballot (as in E2)		☐
F1f. Voted at an early vote center		☐
F1g. Other → comments: _____		
F1h. Other → comments: _____		
F1i. Other → comments: _____		
TOTAL	F1a	

F1 Comments

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F2. Indicate the source used to arrive at the total number of voters entered in F1a. (Select only one source.)

- ☐ ..... Number of voters checked off by poll workers or who signed poll books at physical polling places plus the number of UOCAVA and other absentee or early voters.
- ☐ ..... Number of ballots counted at precincts and/or at a central location (including UOCAVA and other absentee or early vote ballots)
- ☐ ..... Number of voters generated after "vote history" has been added.
- ☐ ..... Number of votes cast for the highest office on the ballot.
- ☐ ..... Other:→ comments: _____

F2 Comments

F3. Enter the number of voters in your jurisdiction who were first time voters in the state and who registered to vote by mail, and therefore, under HAVA 303(b), were required to provide identification in order to vote and/or have their ballot counted in the November 2008 general election.

Total ..... [ ] ..... ☐ Data not available
..... ☐ Not applicable

F3 Comments

F4. Were electronic poll books or electronic lists of voters used at the polling place for the November 2008 general election in your jurisdiction to (select either Yes or No for each item):

	Yes	No
a. Sign voters in	☐	☐
b. Update voter history	☐	☐
c. Look up polling places	☐	☐
d. Other → comments: _____	☐	☐
e. Information unavailable	☐	☐

F4 Comments

F5. Did your jurisdiction use printed lists of registered voters at the polls in the November 2008 Federal general election?

Yes ..... ☐ → Continue to F6
No ..... ☐ → Skip to F7
Information unavailable ..... ☐ → Skip to F7

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F5 Comments

F6. Did your state print and ship the printed poll books to your local jurisdiction or did your jurisdiction arrange for the printing of the poll books? (Select only one.)

- State printed poll books and shipped to jurisdiction ☐
- Jurisdiction arranged for printing of poll books ☐
- Combination of printing by the state and local jurisdiction ☐
- Information unavailable ☐

F6 Comments

F7. Enter information on the number and type of voting equipment used for the 2008 November general election. Then, for each type of voting equipment, please identify how the machines were used in the voting process and where the ballots from that machine type were tallied. Do not include backup systems that were not actually used.

Type of Equipment	Number used	Make	Model	Version	Vendor	Machine use (select all that apply)	Location of Vote Tally (select all that apply)
F7a. Direct Recording Electronic (DRE) (Not Equipped with VVPAT)	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Not Available	
F7b. Direct Recording Electronic (DRE) (Equipped with VVPAT)	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Not Available	

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Type of Equipment	Number used	Make	Model	Version	Vendor	Machine use (select all that apply)	Location of Vote Tally (select all that apply)
F7c. Electronic system that prints voter choices on an optical scan ballot (hybrid of a DRE and optical scan system)	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Not Available	
F7d. Optical/Digital Scan	Number of counters: _____ Number of booths: _____ ☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Absentee	☐ A Central Location ☐ Not Available
						☐ Not Available	

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Type of Equipment	Number used	Make	Model	Version	Vendor	Machine use (select all that apply)	Location of Vote Tally (select all that apply)
F7e. Punch Card	Number of counters: _____ Number of booths: _____ ☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available Place
						☐ Absentee	☐ A Central Location ☐ Not Available
						☐ Not Available	
F7f. Lever	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Not Available	

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Type of Equipment	Number used	Make	Model	Version	Vendor	Machine use (select all that apply)	Location of Vote Tally (select all that apply)
F7g. Hand Counted Paper Ballots (not optical scan system)	Number of booths: _____ ☐ Not Available	[redacted]	[redacted]	[redacted]	[redacted]	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available Place
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available Place
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available Place
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Absentee	☐ A Central Location ☐ Not Available
						☐ Not Available	[redacted]
F7h. Other	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available Place
						☐ Absentee	☐ A Central Location ☐ Not Available
						☐ Not Available	[redacted]

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Type of Equipment	Number used	Make	Model	Version	Vendor	Machine use (select all that apply)	Location of Vote Tally (select all that apply)
F7i. Other						☐ In-Precinct regular ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Special Device accessible to disabled voters	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Provisional Ballot voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available
						☐ Early Vote Site voting	☐ A Central Location ☐ Precinct/Polling Place ☐ Not Available Place
						☐ Absentee	☐ A Central Location ☐ Not Available
	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	☐ Not Available	

F8. The U.S. Election Assistance Commission welcomes any general comments the jurisdiction may wish to share regarding its Election Day experiences (e.g., problems with machines, recounts, staffing, challenges to eligibility, long lines, etc.), or note worthy success in administering the November 2008 general election. Please feel free to attach additional pages as necessary.

END OF SURVEY

THANK YOU FOR RESPONDING TO THIS SURVEY

* This information collection is required for the EAC to meet its statutory requirements under the Help America Vote Act (HAVA) of 2002 (42 U.S.C. 15301), the National Voter Registration Act (NVRA) (42 U.S.C. 1973gg-1 et seq.), and the Uniformed and Overseas Citizens Absentee Voters Act (UOCAVA) (42 U.S.C. 1973ff-1). Respondent's obligation to reply to this information collection is mandatory as required under NVRA (42 U.S.C. 1973gg-1 et seq.) and UOCAVA (42 U.S.C. 1973ff-1); respondents include the fifty states, the District of Columbia, and the U.S. Territories. This information will be made publicly available on the EAC website (www.eac.gov). According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is OMB Control No. 3265-0006 (expires 3/31/09). The time required to complete this information collection is estimated to average 88 hours per state response. This estimate includes the time for reviewing the instructions, gathering information, and completing the form. Comments regarding this burden estimate should be sent the U.S. Election Assistance Commission — 2008 Election Administration and Voting Survey, 1225 New York Avenue, Suite 1100, Washington, DC 20005.

EAC Commissioners

Chair, Gineen Bresso Beach

Vice Chair, Gracia Hillman

Commissioner, Donetta Davidson

EAC Staff

Thomas Wilkey, Executive Director

U.S. ELECTION ASSISTANCE COMMISSION

1225 New York Avenue,NW

Suite 1100

Washington, DC 20005

866-747-1471 (toll free)

HAVAinfo@eac.gov

www.eac.gov

CHAPTER 7

ABSENTEE VOTING AND VOTE BY MAIL

Introduction

Ballots are cast by mail in every State, however, the management of absentee voting and vote by mail varies throughout the nation, based on State law. There are many similarities between the two since both involve transmitting paper ballots to voters and receiving voted ballots at a central election office by a specified date. Many of the internal procedures for preparation and mailing of ballots, ballot reception, ballot tabulation and security are similar when applied to all ballots cast by mail.

The differences relate to State laws, rules and regulations that control which voters can request a ballot by mail and specific procedures that must be followed to request a ballot by mail. Rules for when ballot requests must be received, when ballots are mailed to voters, and when voted ballots must be returned to the election official—all defer according to State law.

Listed below are the various types of voting by mail:

* Permanent absentee—usually, but not always, reserved for the elderly and/or those voters with disabilities. These voters automatically receive a ballot in the mail for every election. Some State laws provide for periodic review of the "permanent" status, specifically if the voter does not cast a ballot after several elections.
* Absentee (Voter must provide a reason or excuse)—requires voters to certify that they meet certain criteria, i.e. absent from the jurisdiction on Election Day, temporarily ill or disabled, etc. Some States require that the application to request a ballot must be notarized.
* Early Voting/Absentee (Voter does not have to provide a reason or excuse)—based on State law, voters may submit a request to vote by mail. In some States the request is valid for one or more years. In other States, an application must be completed and submitted for each election.
* Vote by Mail—all votes are cast by mail. Currently, Oregon is the only vote by mail State; however, several States allow all-mail ballot voting options for ballot initiatives.

Ballot Preparation and Mailing

One of the first steps in preparing to issue ballots by mail is to determine personnel and facility and supply needs.

Facility Needs:

Adequate secure space for packaging the outgoing ballot envelopes should be reviewed prior to every election, based on the expected quantity of ballots to be processed. Depending upon the number of ballot styles and quantity of ballots, adequate shelving and a security-controlled storage area must be in place.

NOTE If inserting is performed at a mailing service, extra space may not be as critical.

Space will be required for sorting undeliverable ballots, since they should be reviewed immediately. Space will also be required for processing returned voted ballots:

* Signature Verification
* Challenged Ballots
* Envelopes
* Separating Ballots from Envelopes
* Duplication, if required

Staffing Needs:

If ballot insertion is done in-house, part-time and/or regular employees, working in teams of two, are

assigned and managed in a staged work flow area. Various teams should be set up to help control the flow of materials and expedite the overall procedures:

* Control Team
* Labeling Team
* Packet Assembly Team
* Support Team
* Sort Team

NOTE If outgoing mail ballot preparations are to be done off-site at a mailing house service, election office staff supervision is recommended.

If the election returned ballot processing is done in-house, review State law and regulations to determine if a sworn election worker board must be in place, or whether supervisors can be regular staff, whose only duty is to oversee the process. It is important to plan for peak periods which will require either more personnel, staggered shifts, or overtime.

Equipment and Supplies:

Equipment and supply needs must also be evaluated as it relates to space needs. These may include:

* Ability to run data exports/labels for mailing companies
* Software that provides CASS certification (postal barcode)
* Insertion, folding and sealing machines
* Printers
* Postage meter and envelope sealer machine
* Automatic letter openers
* Computers and bar code devices
* Storage shelves
* Mail trays
* File storage boxes
* Tamper-evident tape

Ballot Preparation and Printing

The first step in preparation for printing and distribution of ballots is to develop a timeline detailing each step in the process. Examples of dates to be included on a timeline are:

* Filing deadline
* Close of registration
* Deadline for public review of ballot design and content
* Developing the ballot order and finalizing contract negotiation with the ballot printer
* Date that ballot file is due at the printer
* Delivery date for printed ballots
* Logic and accuracy testing
* Deadline for mailing of military and overseas ballots
* Date for initial mailing of absentee ballots
* Last date that absentee ballots can be mailed
* Last day for receipt of voted absentee ballots

Once the timeline has been developed, staff assignments and deadlines can be incorporated.

Determining the number of ballots to order is often stipulated by State law or State administrative policies and procedures. If not, the ballot order can be developed by use of a spreadsheet containing the number of voters in each precinct multiplied by the percentage of ballots expected to be requested and/or reviewing the prior election turn-out by precinct.

NOTE It is important to increase the ballot order to provide for extra ballots needed to develop necessary logic and accuracy testing and to provide for provisional, spoiled and/or replacement ballots.

Before meeting with your ballot printer, make decisions regarding the following:

* Quantities and different variations (ballot styles).
* Consider possible weight limitations (printing instructions back-to-back will reduce the amount of paper and overall weight of the mail).
* Consider different colors for different ballot types or districts.
* Review any specific State requirements for ballots, i.e. numbered, detachable stub on each ballot.
* Include required statutory information per ballot type.
* For Primary Elections, remember to analyze the number of non-affiliated voters (consider buffering ballot quantities to accommodate for party changes or parties opening their Primary).

Prior to every election, election officials should also contact the local post office to review all policies and procedures relating to mailing, tracking and receiving the ballots. If you plan to use an outside mail service, you should also include a review of election office internal policies and procedures and contract requirements with the mail service vendor. Listed below are possible items to review and consider:

* Identify timelines and scheduling (may want to allow for possible delays).
* Identify staffing needs at all stages of the process (on-site supervision may be required).
* Identify staging requirements (work areas for barcoding, tray assembly, zipping/sorting, etc.).
* Consider quality control and security issues. Indicate how ballot transportation security needs are to be met (i.e. from office or vendor to mailing house or from mailing house to Post Office).
* Specify various quality control issues (tracking and audit trails).
* Establish method for addressing/labeling envelopes.
* For inserts that may be needed, check with vendor on insert capability. Examples include:
  - Secrecy envelopes
  - Return envelopes
  - Ballot (one or more)
  - Local Voters' Pamphlet, if applicable
  - Drop site information, if applicable

Remember to review outgoing and return ballot envelopes before placing new orders. New technology and postal policies/procedures can improve the management of packaging outgoing envelopes and receiving voted ballots.

The Post Office can review or help you design outgoing and return envelopes to ensure they meet the necessary postal standards for automated handling. This includes review and assistance with the proper wording and placement of endorsements on your envelopes as they apply to the Post Office. They will also provide a camera-ready copy of the front side of both outgoing and return envelopes for the printer. This will include, for the return envelope, the 11-digit barcode for your return address.

Other examples include:

* Eliminate the use of labels by printing voter names directly onto the outgoing ballot envelope.

NOTE Print these envelopes in ballot order instead of alphabetically to improve accuracy and efficiency when pulling and inserting ballots into outgoing envelopes.

* Implement bar code technology for easy updating of voter history when return ballot envelopes are received in the mail.
* Utilize the official election postal indicia on all outgoing and return ballot envelopes. Remember to review any envelope design changes with your local postal authority. It is recommended that you request their written approval on any changes.
* Discuss options for the return mailing address for voted ballots with your local post office. Options include:
  - Your office address and zip plus 4
  - Post Office assigns a special "plus 4" for the elections office only
  - Establish a specific Post Office box for returned ballot envelopes.

Ballot Mailing

IMPORTANT As soon as printed ballots are delivered, conduct routine logic and accuracy testing on all ballot styles. This logic and accuracy test MUST be completed prior to mailing or issuing any ballots to voters.

It is important to track the number of envelopes printed each day and balance that number to the number of voter records flagged in the voter file that were issued mail ballots on each day. Print a master listing of voter names issued absentee ballots as a part of your audit trail for each election. Each day that envelopes are printed, a master listing of voter names should also be printed and balanced to the number of envelopes printed, inserted, and delivered to the post office every day. This audit trail will also provide the necessary tool for your use in tracking and verifying your printed ballot inventory.

Coordinate delivery of the outgoing ballots with your local post office. They will schedule a time frame that allows for the immediate distribution of ballots.

NOTE Larger post offices sometimes require delivery to a specific dock area. If delivery is by truck, the Post Office may require the truck to be weighed before the mailing is loaded and again before off-loading the ballots.

tip

Take the return ballot envelope package (containing the return ballot and all envelopes) to the post office to confirm the return postage amount. Include this information as an insert message to the voter.

Ballot Reception

The most common delivery method of absentee ballots is by mail. Other methods include drop site locations, often including a location at your local election office. The local election office may wish to consider coordinating a time with the Post Office to pick up the mail each morning. Even if the return address is the election office, you can arrange with the Post Office to pick up the voted/returned ballots each day. This will allow for earlier ballot processing. If ballots are returned to a P.O. Box number, the election office should consider establishing a written procedure for collecting these ballot envelopes.

NOTE Remember to coordinate with the Post Office for the latest pick-up time for last minute returns on Election Night.

If you plan to use drop site locations, be sure to refer to State Law and State administrative policies and procedures. You will want to determine drop site locations based on population, geographic areas, security and available funding. Consider using city and/or county facilities, public assistance offices, senior and community centers, secure locations in areas with significant minority or traditionally disenfranchised communities as drop off locations when applicable.

When determining locations, be sure to consider where the ballot box will be placed. Items to consider include:

* security
* voter convenience
* access for the physically disabled
* parking

Remember that the ballot boxes must be locked and secure at all times. They should be located in an area that can be viewed and monitored by authorized personnel.

If you plan to use outdoor mailboxes for drive-by or walking traffic, the ballot drop site mailboxes should be accessible only by a key that is in the possession of two authorized election staff members. A predetermined collection schedule should be established. A team of two election staff should transfer the voted ballots to a locked or sealed ballot box, bag or pouch and deliver same to the election office.

Be sure to communicate the location and hours of operation for all drop sites in your jurisdiction. On Election Day, the drop site locations must be monitored throughout the day until the close of the polls or deadline for ballot receipt.

If State law allows the voter to drop off voted absentee ballots at early voting locations and/or the polling places on Election Day, be sure to include instructions and procedures for poll workers to use in returning these voted ballot envelopes to the central election office.

There must be an audit trail throughout the ballot reception process. Consider maintaining logs for processing the ballots through different steps. Maintain all statistical information for each precinct. This may include:

* number of ballots issued
* number of ballots received
* number of ballots counted
* name, team number or person
* date and time processed
* number of challenged ballots
* number of write-ins and duplicated ballots
* number of envelopes that do not contain a ballot
* number of envelopes containing more than one ballot
* number of provisional ballots counted and not counted

The audit trail begins when the first ballot envelopes are returned from voters. On a daily basis, staff at the elections office counts and logs the number of:

* ballots returned by the Post Office
* ballots received over the counter
* ballots received from drop sites, if applicable
* ballots forwarded to other counties
* ballots returned undeliverable

Initial Envelope Sort:

The ballot envelopes are then sorted into categories. Examples include:

* Signature and address match
* Challenged Ballots
  - No signature on ballot envelope
  - Address or name does not match voter record
  - Ballot has markings that could identify the voter
  - Signature does not match signature on file

Based on State law, jurisdictions establish internal procedures for managing returned ballot envelopes with no signatures. These options may include automatically re-mailing (if time permits) the unsigned and unopened envelope back to the voter in a separate outgoing envelope. Often the election staff is required to notify the voter that the ballot cannot be processed unless the envelope is signed by the close of polls on Election Day. The voter can be provided several options, including:

* Request a replacement ballot be mailed (if time permits)
* Sign the return identification ballot envelope at the elections office
* Request that the original unsigned envelope be re-mailed to the voter for a signature (if time permits)

If signature verification is required by State law, it is important to provide your staff with signature verification training; training should include a section on how physical and cognitive impairments may cause signatures to not match . Implement a three-step process for reviewing all rejected signatures—first check is done by part time and/or regular staff; second check is done by more experienced staff; and the third check is conducted by the canvass board. Consider utilizing the following criteria as an example when comparing to the signature on file:

* Capital letters match
* Letters tail off alike
* Letter spacing is the same
* Space between signature and the line is the same
* Beginning and ending of signature and the slant are consistent
* Unique letters match
* Overall appearances match

NOTE If it is determined that the signature does not match the voter registration card or digitized signature, notify the voter and take other action that is required by your State law, policy and/or regulations.

NOTE Review State law and/or regulations regarding signatures of voters who are, physically or otherwise, unable to sign their name.

Data Entry of Returned Ballot Envelopes:

For all ballots that fall into the category of "signature and address match", the envelope is recorded as "returned" and data entry is completed. The number of envelopes in this category is recorded on a data entry log on a daily basis. This number should balance to the number of envelopes stored and flagged as "ready to open and process" (see Sample Form 7.1).

SAMPLE FORM 7.1: RETURNED BALLOT ENVELOPES DATA ENTRY LOG

Ballots Returned—Summary of Data Entry

Election _____

Date	# Data Entered	Accumulative Total Entered

For purposes of balancing ballots received to ballots counted, you may want to bundle these envelopes into batches, number the batches for auditing purposes, and label the bundles (see sample data entry log strip below).

Data Entry Log Strip

Date Entered ..... Batch Number .....

Total Number Entered .....

Staff Initials .....

Replacement Ballots (if permitted by State law)

A replacement ballot is issued when a voter requests by phone, in writing or in person a second ballot because the original ballot was destroyed, spoiled, lost or not received. If required, the voter must complete and sign a replacement ballot request form. Once a request for a replacement ballot has been received, the election official must:

* Verify that the voter has not voted another ballot
* Record that the voter has been issued a replacement ballot
* Issue the replacement ballot by mail or other means

Ballot Processing

Based on State law and/or local policies and procedures, ballot envelopes are authorized to be opened. This process is done in several stages and is managed by separate teams of staff.

* The first stage is opening the ballot envelopes and verifying that the batch contains the number of envelopes as noted on the data entry log strip. If the envelopes have been stored in batches, the opening team must keep the envelopes within their batches through the opening process.

NOTE It is recommended that envelopes opened each day be processed completely and securely stored at the end of the day.

* The second stage is separating the ballot from the envelope. During this stage the ballots are pulled from envelopes and the envelopes are immediately placed into storage containers.

IMPORTANT REMINDER ★ ★ ★

Before storing ballot envelopes, recheck that all envelopes are empty.

* The third stage is the review stage (depending upon State law). During the review stage, ballots are analyzed for possible duplication, i.e. damaged ballots, identifying marks, etc.
* The last stage is tabulation. The ballots move to the scanners, remaining in their original batches—and the total number of ballots scanned is validated at the time of tabulation. All scanned ballots are stored in batched in secured and/or tamper-evident sealed containers.

Ballot Review Process

Ballot review teams determine whether ballots should be counted, rejected or duplicated. The object of ballot review is to ensure that all ballots are machine-readable and that the voter's actual vote will be recorded accurately. If the ballot has damage or defects that would cause problems in tallying, the ballot may be duplicated, if provided by State law.

Based on State law, determine whether your jurisdiction is responsible for determining voter intent and at what stage of the process this is to be done (before tabulation or after attempted tabulation). If so, establish teams of two board members of differing political party affiliation to work together to determine voter intent.

The ballot review teams should also be trained to check for questionable marks and write-in votes at the same inspection.

Questionable marks are:

* marks that cannot be read by the ballot counting equipment
* a checkmark or an "X" in the voting area
* voting area completed too lightly
* voter's choice not marked in the voting area, such as a write-in with an unmarked arrow or circle
* marks that could identify the voter
* marks indicating the voter's change of mind and/or
* comments marked in the voting area

Determining Voter Intent

If the inspection board agrees on the voter's intent, the ballot should be duplicated to reflect the voter's intent and the duplicated ballot counted. If the inspection board does not agree on the voter's intent, the ballot should be challenged and forwarded to the canvass board.

NOTE Jurisdictions should follow their State's definition of what constitutes a vote and what will be counted as a vote (Section 301(a)(6) of the Help America Vote Act).

Examples of the ballot review are noted below for reference only:

* The arrow or oval has been completed for one response and a dot or partially completed arrow or oval is marked for the other.

  Yes

  No

* The arrow or oval has not been marked, but the response is circled.

  Yes

  No

* The arrow or oval has not been marked but there is a connective line between the response and the arrow or oval to indicate the vote.

  Yes

* More than one arrow or oval has been completed, but a word or mark is used to indicate the correct vote.

* A word has been used to indicate the vote instead of completing the arrow or the oval.

  this one

Duplication boards, regardless of the vote tally system used, process ballots requiring duplication, making a duplicate ballot that is machine-readable and reflects the voter's intent. Duplicating and proofing

SAMPLE FORM 7.2: DUPLICATE BALLOT LOG

Duplicate Ballot Log

Date _____

Election _____

Batch Number	Ballot Style and/ or precinct	Assigned Duplicate Number	Reason (Be Specific) Ex: Torn—letter opener, from mail, etc. Check Mark—pencil, black ink, red ink, etc	Staff Initial	Board Initial	Date

must be done by at least two election personnel each with a different party affiliation. Each worker should initial both ballots and complete a duplicate ballot log (see Sample Form 7.2). A unique duplicate number is assigned to each ballot to be duplicated for tracking and auditing purposes.

NOTE The original ballot is retained and is uniquely numbered to be easily identified with its duplicated ballot.

Ballot Tabulation

When the review teams have verified ballots for scanning, it is recommended that a form be prepared for each batch of ballots to be counted (see Sample Form 7.3).

The form should include the originally assigned batch number and the number of ballots sent to the scanner, including any exceptions. Types of exceptions include: (1) no ballot in the envelope; (2) more than one ballot in the envelope; (3) ballot from wrong election in the envelope, etc.

By developing and maintaining an audit trail from the time that ballot envelopes are returned from the post office, through the initial sort, into the opening/separating and review process, at tabulation the audit team can verify that all ballots returned are accounted for—and have been either challenged or tabulated.

A sample ballot log transfer sheet is below.

It is recommended that ballots being counted in a centralized location on scanners be handled in batches. Each batch should be validated to the cumulative counter on the scanner. A central scanner log should be maintained detailing the batch numbers and total number of ballots scanned per batch. If the scanner uses a memory card, the memory card should be appropriately labeled and identified on the scanner log sheet. Refer to Sample Form 7.4 for an example of a scanner log sheet.

SAMPLE FORM 7.3: BALLOT LOG TRANSFER SHEET

BALLOT LOG TRANSFER SHEET

Election _____

Opening and Ballot Removal Team Report _____
(Team Initials)

Batch Number _____

Batch Date _____

Total in Batch _____

Exceptions _____

_____

_____

Total Ballots Sent to Scanner _____

Scanning Team Report _____
(Team Initials)

Number Received To Be Scanned _____

Scanner # _____

Memory Card Assigned _____

Number Scanned (Count) _____

Number of Overvotes _____

Number of Blank Votes _____

Form is filed in master log book in batch number order and balanced to Return Mail Ballots by Batch Number Log assuring that all batches have been scanned.

SAMPLE FORM 7.4: SCANNER LOG SHEET

Scanner Log Sheet

Election _____

Scanner #	Batch #	Count #	Blanks	Overvotes

Managing Absentee Ballots at the Polls on Election Day

Depending upon State law, internal procedures must be established for managing the return of absentee ballots at the polls on Election Day. These procedures must be incorporated within your poll worker training guidelines.

To assist poll workers on Election Day, prepare a visual flow chart detailing the steps to follow, based on the specific voter scenario. On the next page is an example of a flow chart for this purpose based on a sample provided by an election jurisdiction.

Storage and Security

Storage:

All ballots and empty ballot envelopes should be boxed and sealed in tamper evident containers. Store all other records—ballot return logs, duplicate logs, scanner logs, etc. according to Federal and your State's retention rules.

tip

Consider storing ballots by precinct for recount and/or auditing purposes.

All challenged and/or provisional ballots that are not eligible to be counted should be stored separately.

Security

Prepare a written security plan on the processing of absentee/vote by mail ballots. The plan should include the following details:

- Security at the printing facility
- Security for periods of ballot transportation (e.g. from print shop to location of insertion; from mailing house to Post Office and from Post Office to election office other than regular mail delivery)
- Security for ballots during processing
- Security for ballot drop sites
- Guidelines for security involving observers
- Document the security of your office work area, building and ballot storage (alarms, cameras, special keys, limited keys)
- Document security for vote tally systems, computer access security and off-site storage for system backups.

At all times, ballots **must** be maintained in a secure location in accordance with your written security plan. Adequate supervision must be provided during all processing activities.

Establish and maintain a log of who has access (keys, electronic codes, etc.) to secure areas. To prevent unauthorized access, consider installing secondary locks accessible only to authorized Elections Officials on election-specific dates.

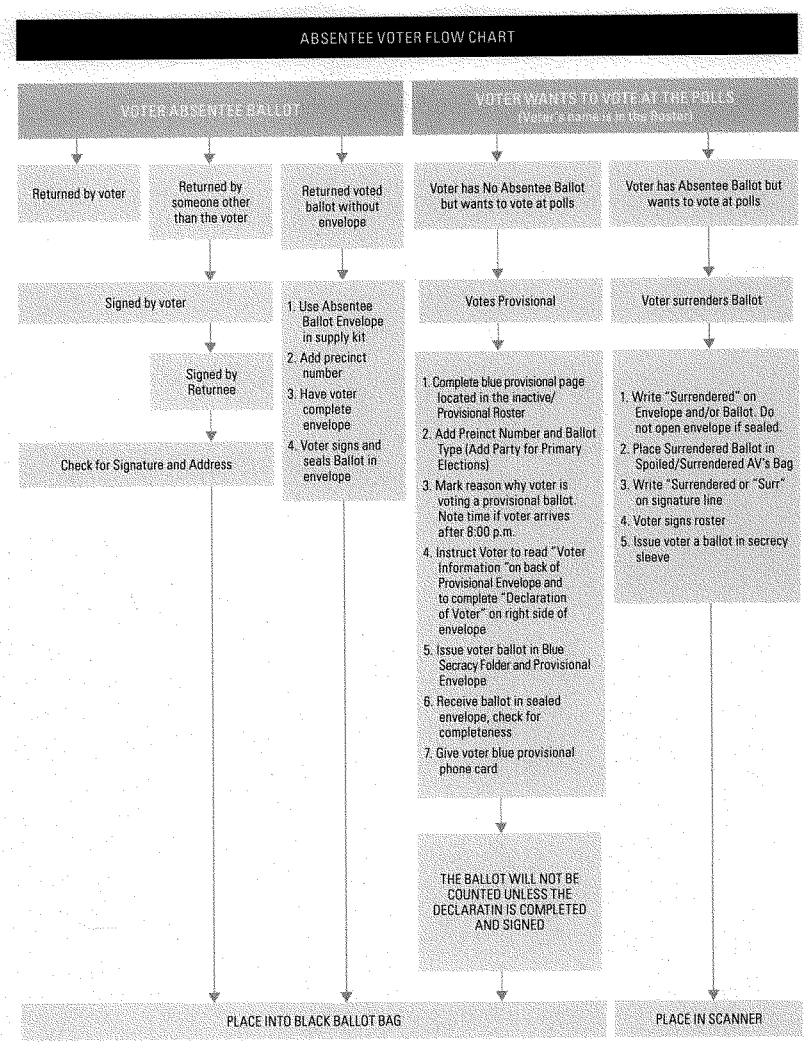
REMINDER ★ ★ ★

Use of motion detectors, video cameras, alarm systems and other technology may be appropriate supplements to locks.

Voter Education

It is important that election officials take extra efforts to inform voters of the proper way to vote their ballot and all other procedures required for returning the ballot envelope to ensure that their vote is counted.

SAMPLE FORM 7.5: ABSENTEE VOTER FLOW CHART



Be sure to print clear concise instructions on the ballot with simple visual aids indicating how to fill in the oval or connect the lines to select their choices. The outside of the ballot envelope should contain a quick checklist and/or instructions to remind voters of common problems encountered, i.e. "Signature is required in order to count your ballot", postage amount required, etc.

In order to ensure that all voters have access to information about voting absentee by mail, establish a variety of communication methods.

Listed below are examples:

* Create an informational brochure with instructions on how to vote absentee by mail. If permitted, include a copy of the vote by mail ballot application form as a "tear off return mail page" on the brochure. Make these brochures available at area city hall, libraries, etc. Distribute them at "Get Out the Vote" speaking engagements, community events, registration drives, etc.

EXAMPLE Be sure to include information about all aspects of voting by mail, including how to request a replacement ballot, and how to qualify to become a "permanent" vote by mail voter, if permitted by State law.

* Post information about absentee vote by mail procedures on your jurisdiction's web site. Information on all deadlines should be posted along with dates that voters can expect the ballots to be mailed. If voted ballots must be received in your office by a certain date, be sure to include that date in **BOLD**. If possible, include a downloadable copy of the vote by mail ballot application form, if required.

tip

If permitted, consider including a link that allows voters to confirm their voter registration status and to request an early/absentee ballot from your web site. If their information needs to be updated, provide another link to a voter registration form, allowing the voter to manage their own updates at their convenience.

* Provide this information to high schools, community colleges, and universities. Partner with these learning institutions to distribute voter registration and absentee voting instructions with enrollment packets. Encourage them to communicate Election Day deadlines for voter registration and absentee voting through the use of email, pod casting, and text messaging.
* Encourage candidates to provide information to voters about how to vote absentee by mail.

tip

Provide a scripted handout to all candidates and encourage them to use it for all campaign literature to ensure consistency in all printed material.

* Distribute absentee voting procedures brochure to special interest groups: nursing homes, assisted living centers, hospitals, military installations, etc.
* Utilize brochures, flyers, and your jurisdiction's web site to inform the voter about how to ensure that the ballot will be counted. Provide answers to "frequently asked questions" such as: "Can I drop my voted absentee ballot at the polls on Election Day?"; "Will my ballot be counted if I mail it on Election Day?"; "I made a mistake while voting my ballot. How do I get a new ballot?"
* Provide your local and State media with any deadlines and requirements specific to absentee voting.
* Provide all of this information in the appropriate alternate language(s) if your jurisdiction is covered for language assistance under the Voting Rights Act.
* Materials should also be developed in formats accessible to voters with disabilities. For resources and information on how to develop brochures, flyers, websites, and other materials that are accessible visit the Access Board at **http://www.access-board.gov/** or contact them at 202.272.0080 (v) or at 202.272.0082 (TTY). You may also find the following resource useful: Accessibility of State and Local Government Websites to People with Disabilities: **http://www.ada.gov/websites2.htm.**

U.S. ELECTION ASSISTANCE COMMISSION

Quick Start

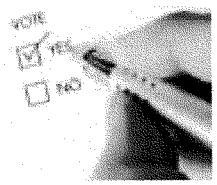
ABSENTEE VOTING AND VOTE BY MAIL

October 2007

www.eac.gov

The Quick Start Management Guide for Absentee Voting and Vote by Mail is part of a series of brochures designed to highlight and summarize the information contained in the chapters of the U.S. Election Assistance Commission's (EAC) Election Management Guidelines (EMG). The goal of the EMG is to provide a collection of election management guidelines, consolidated into one document, to assist State and local election officials effectively manage and administer elections. These guidelines are solely designed to serve as a source of information for election officials and not as requirements by which they must abide. The EAC expects the EMG to be completed in 2008. However, due to the urgent need for election management resources, EMG chapters and Quick Starts are released as they are completed.

The content of the EMG and the Quick Start Management Guides has been developed in collaboration with State and local election officials and other election professionals who have first-hand experience managing elections. The EAC is grateful for their participation and ensuring the guidelines are practical and applicable for jurisdictions regardless of their size and resources. The EMG and the Quick Starts are available online at www.eac.gov.



INTRODUCTION

- Please note that this guide is designed to cover general processes and procedures regarding absentee voting/vote by mail. Laws and procedures regarding absentee voting/vote by mail vary by state *(i.e. eligibility requirements, deadlines, processing, etc.)*

- In most states, absentee voting requires a voter to make a formal request for an absentee ballot; the election office then processes the application and mails the ballot to the voter; the voter receives and casts his or her ballot per the established procedures; and the election office then processes the returned ballot to determine its validity and, if valid, tabulates the vote into the official vote tally.

- A separate Quick Start Management Guide has been designed to discuss matters regarding absentee voting by uniformed and overseas military voters more in depth.

BALLOT PREPARATION AND MAILING

- Review all of the deadlines relating to preparation and distribution of ballots. Prepare a timeline detailing each activity in chronological order, including staff assignments and completion date.

TIP: *Highlight in* BOLD *any dates mandated by Federal or State law.* Examples include, but are not limited to:

- Last day to register to voter and/or update voter registration information.
- Date that the ballot file should be sent to the printer.
- Date that printed ballots should be delivered by the printer.
- Date that military/overseas ballots must be mailed.
- Date to mail out-of-state ballots.
- Date to mail in-state ballots.

- Determine how many ballots to print by reviewing State law and the history of voter turnout for a similar election. Develop "Plan B" for how to respond to a ballot shortage. For example:

  - Will you utilize ballot on demand printers?
  - Do you have an action plan in place with your ballot printer?

- Review outgoing and return ballot envelopes to determine ways to incorporate the use of technology to improve staff efficiencies and implement voter user-friendly techniques, while ensuring that all statutory requirements are met.

  - Consider using envelope printers to print voter data directly onto each envelope instead of using labels.

- Print envelopes in ballot order instead of alphabetical by voter name for ease of use and accuracy for pulling ballots and stuffing the envelopes.
- Incorporate the use of bar codes on the ballot envelopes for ease in receiving return envelopes and updating voter history.
- If State law requires the voter to sign the return ballot envelope, consider incorporating a tear-off flap to cover the voter's signature.
- Refer to State law to determine the need of a third secrecy envelope. Consider using a "blue lining" on the return ballot envelope. TIP: *Develop internal policies and procedures requiring that the ballots be opened in steps by different teams to ensure privacy of the voted ballot instead of using a secrecy envelope.*
- Consider paying for "business reply" postage. When undeliverable envelopes are returned, they can be opened and the unused ballot recycled.
- Review State law and local budgetary rules when evaluating whether to pay return postage for all absentee by mail ballots. TIP: *If not paying return postage, be sure to note the amount of postage required on the return ballot envelope.*
- Partner with your area post office to utilize the official election postal logo on all outgoing and incoming ballot envelopes. Coordinate the design of the envelopes, placement of the wording, etc. with the postal authorities and request their written approval.
- Consider establishing a specific P.O. Box number for returned ballot envelopes. TIP: *Establish separate P.O. Box numbers for voter*

registration applications, absentee applications, etc. to speed the sorting of incoming mail.

- Evaluate the area designated for pulling and stuffing ballots to determine space needs in order to develop an efficient work flow. Implement the policy of working in teams of two to ensure accuracy. Staff assignments should include individuals designated as ballot pullers and ballot stuffers. Be sure to implement "two person" integrity and separation of duties throughout the process.

- If using an external mailing/distribution center for ballot mailing, it is recommended that election staff be on-site at all times.

- Maintain a daily listing of all individuals who have been mailed a ballot. Follow State law regarding public/candidate access to this information.

- Track numbers of ballots issued by quantity and ballot style on a daily basis. Use this information to monitor ballot stock usage and availability.

BALLOT RECEPTION

- Consider investing in postal tracking software to track the envelopes through the postal facilities and to confirm the delivery of individual ballot envelopes to the postal carriers. This same tracking software can track the route of the return ballot envelope.

- Coordinate with the post office on how you wish to receive the returned ballots. Will you schedule a special delivery from the post office? Will you have

staff members pick up the ballots from the post office? TIP: *Always work in teams of two when receiving returned ballot envelopes. At no time should any one person be alone with the voted ballot envelopes.*

- Determine if you will provide off-site collection/ drop off receptacles for returned ballot envelopes. Establish procedures for securing and monitoring these locations.

- Develop and post general rules for individuals wishing to observe the ballot reception process. For example:

  - Ask everyone observing the process to turn off or silence their cell phones.
  - Observers must visibly wear identifying name tags/badges at all times.

- Develop training manuals and conduct training sessions for all temporary staff assigned to the ballot reception operation. Maintain record of all staff involved in ballot reception by keeping a daily sign in/out sheet. TIP: *Require that all ballot reception staff take lunch breaks at the same time, ensuring that the ballot reception area is locked down and secured during that time period.*

- Date and time stamp each return ballot envelope. Implement daily logs (computerized or by hand) to account for all returned ballot envelopes. These logs must be balanced on a daily basis to actual ballot envelopes on hand.

- Update the voter record to indicate that the ballot envelope has been returned. Confirm the voter's

name and address. If required, verify the voter's signature on the envelope. TIP: *Provide specialized staff training on signature verification. Consider implementing the "check it three times" policy for questionable signatures: first check is conducted by regular staff; second check is conducted by more experienced staff; and third check is conducted by the county canvass board. When a signature is first questioned, consider sending a letter to the voter notifying them that their signature is being questioned.*

- Separate and log any ballot envelopes that are challenged. Continue to balance all receiving logs to total ballot envelopes received on a daily basis.

BALLOT TABULATION

- Develop procedures for managing exceptions during the ballot opening process. Examples include: "No ballot in the envelope"; "Too many ballots in the envelope"; or "Ballot from a wrong election in the envelope". TIP: *Before storing ballot envelopes, recheck that all envelopes are empty.*

- Follow State law and uniform administrative guidelines when determining voter intent. Establish procedures for managing physically damaged ballots, ballots that are marked in such a fashion that they will not be read by the scanner, and write-in votes.

- Establish written procedures for manual duplication of voted ballots. Assign a number to the original ballot and that same number to the duplicate ballot. Work in teams of two to duplicate each

ballot. Maintain a log indicating the assigned number, ballot style, and reason for duplication. Require that the two person duplication team initial the ballot log for auditing purposes.

- Count the number of ballots sent to the scanner and balance with the scanner on a regular basis. Consider batching the ballots in bundles and assign batch numbers to each bundle to ensure that all ballots have been read by the scanner.

- When tabulation is completed, balance the total number of envelopes received, minus exceptions to the total number of voted ballots scanned.

STORAGE AND SECURITY CONSIDERATIONS

- Install appropriate security in areas where ballots are stored *(i.e. alarms, locks, cameras, etc.)*.

- Enforce the two-person rule anytime ballots are handled. Maintain a listing of employees who are authorized to access the ballot area. Establish an access log to include access date, employee name(s), and reason for access.

- Store the empty return envelopes and voted ballots in separate tamper-evident sealed containers.

VOTER EDUCATION

- Publish advertisements in newspapers, area neighborhood association newsletters, city/chamber/school district newsletters, church

publications, multilingual media publications, etc. reminding voters to update any change to their voter registration information *(i.e. name change, address change, party affiliation change, and signature update).* TIP: *Partner with your State Office to develop a statewide media blitz.*

- Create an informational brochure with instructions on how to vote absentee by mail. Include a copy of the vote by mail ballot application form as a "tear off return mail page" on the brochure. Make these brochures readily available in your community by distributing them at community events and diverse locations *(i.e. city hall, libraries, schools, registration drives, etc.)* TIP: *Be sure to include information about all aspects of voting by mail, including, but not limited to, how to request a replacement ballot and how to qualify to become a "permanent" vote by mail voter, if permitted by State law.*

- Post information about absentee vote by mail procedures on your jurisdiction's Web site. Information on all deadlines should be posted along with dates that voters can expect the ballots to be mailed. If voted ballots must be received in your office by a certain date, be sure to include that date in BOLD. If possible, include a downloadable copy of the vote by mail ballot application form, if required. TIP: *Consider including a link that allows the voter to confirm their voter registration status on your Web site. If their information needs to be updated, provide another link to a voter registration form, allowing the voter to manage their own updates at their convenience.*

- Provide information to high schools, community colleges, and universities. Partner with these learning institutions to distribute voter registration and absentee voting instructions with enrollment packets. Encourage them to communicate Election Day deadlines for voter registration and absentee voting through the use of e-mail, podcasting, and text messaging.

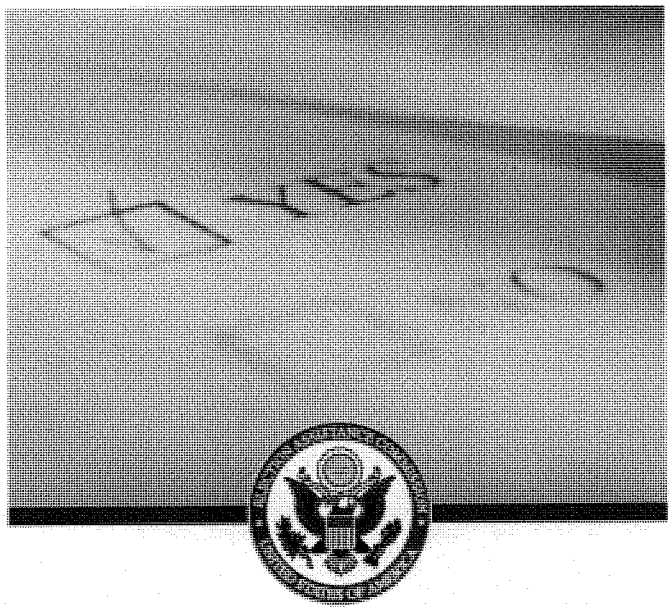
- Encourage candidates to provide information to voters about how to vote absentee by mail.
  TIP: *Provide a scripted handout to all candidates and encourage them to use it for all campaign literature to ensure consistency in all printed material.*

- Distribute absentee voting procedures to special interest groups: nursing homes, assisted living centers, hospitals, military installations, etc.

- Provide copies of the Vote by Mail Ballot Application forms to post offices, supermarkets, churches, etc.

- Utilize brochures, flyers, and your jurisdiction's Web site to inform voters how to ensure their ballot is counted. Provide answers to "frequently asked questions" such as:

  - May I drop my voted absentee ballot at the polls on Election Day?
  - Will my ballot be counted if I mail it ON Election Day?
  - I made a mistake while voting my ballot – How do I get a new ballot?



For information regarding this publication or to request additional copies, please contact:

U.S. Election Assistance Commission
1225 New York Avenue, NW, Suite 1100
Washington, DC 20005
Attn: Election Management Guidelines

Telephone (202) 566-3100 (866) 747-1471 (toll free)

Fax (202) 566-3127

E-mail Address HAVAinfo@eac.gov

Web site www.eac.gov

The EAC is an independent bipartisan commission created by the Help America Vote Act of 2002 (HAVA). It is charged with administering payments to states and developing guidance to meet HAVA requirements, implementing election administration improvements, adopting voluntary voting system guidelines, accrediting voting system test laboratories and certifying voting equipment and serving as a national clearinghouse and resource of information regarding election administration.

May 11, 2010

Dear Senator Schumer, Senator Bennett and Members of the Senate Rules Committee:

Thank you, Chairman Schumer and Ranking Member Bennett, for holding this very important hearing to discuss H.R. 1604, The Universal Right to Vote by Mail and H.R. 2501, The Absentee Ballot Track, Receive and Confirm Act and thank you for the opportunity to join in the conversation around **Voting By Mail: An Examination of State and Local Experiences**. The American Association of People with Disabilities (AAPD) is the largest national cross-disability membership organization in the United States, dedicated to ensuring economic self-sufficiency and political empowerment for more than 50 million Americans with disabilities. AAPD works in coalition with other disability organizations for the full implementation and enforcement of disability nondiscrimination laws, particularly the Help America Vote Act, the National Voter Registration Act, the Americans with Disabilities Act (ADA) of 1990 and the ADA Amendments Act of 2009, and the Rehabilitation Act of 1973.

I am Jim Dickson, Vice President of Organizing and Civic Engagement at AAPD. In a variety of capacities, I have 28 years experience organizing on non-partisan voter registration and education issues. With Sandy Newman and others I helped create Project Vote, the nation's foremost nonpartisan voter registration and education organization. I am honored to have been appointed to the United States Election Assistance Commission's board of advisors by Senators Dodd, Feinstein, and Reed and am currently serving as Chair of that board.

I have dedicated my life to the voting rights of people with and without disabilities because, as Taylor Branch put it, "Our nation is a great cathedral of votes - votes not only for Congress and for President, but also votes on the Supreme Court and on countless juries. Votes govern the boards of great corporations and tiny charities alike. Visibly and invisibly, everything runs on votes. And every vote is nothing but a piece of nonviolence. " (April 6, 2008 New York Times) I am proud to report that due to the sustained efforts of advocates, legislators, and civil servants across the nation we are closer than ever before to voting equality for people with disabilities in the United States.

In the 2008 Presidential Election, 14.7 million Americans with disabilities voted according to the Community Participation Survey of the United States Census. The raw census numbers have been analyzed by Professors Doug Kruse and Lisa Schur of Rutgers. Their report and summary with a state by state breakdown of disability voter participation is available at http://www.kintera.com/atf/cf/%7Bef7ab230-f758-4c6b-8cea-916d9108bfee%7D/Full_9pg_2008_Voter_Turnout_Rutgers.doc. The Senate Rules Committee is to be congratulated because your passage of HAVA was a major contributor to our increased voter participation. Between 2000 and 2008, the turnout amongst the able-bodied rose by 25%. In the same time period the turnout of people with disabilities rose by 34%. In other words, an additional 3.8 Americans with disabilities voted in 2008. The committee's foresight and conviction that voting must be accessible were major factors behind these stunning gains.

American Association of People with Disabilities
1629 K Street NW, Suite 950 • Washington, DC 20006
phone 202-457-0046 (V/TTY) • 800-840-8844 (V/TTY) • fax 202-457-0473 • www.aapd.com

AAPD believes that any legislation should include the concept of "single agent independence." Developed by Ted Selker of Carnegie Mellon-Silicon Valley, this principle is simply that throughout the voting process, at each point where a ballot is handled, there must be at least two agents observing and recording the interaction. Single agent independence will reduce the possibility of fraud as well as inadvertent human error.

It has become very clear that Americans, including Americans with disabilities, are looking for greater access and more convenience when it comes to voting. Since 2000, there has been a significant increase in the percentage of voters voting from home; voting early, at home or at specific sites; and an increase in the use of technology to serve voters.

In the presidential election of 2008, an unprecedented number of Americans voted at places other than their polling place, either at early voting locations or increasingly from home by absentee ballot. Two states—Oregon and Washington—now conduct all their elections by mail. It is time that the United States look at modern and innovative channels to allow voters with disabilities the same ability to vote independently and privately at home as other Americans enjoy. It is essential that any vote-by-mail legislation maintain the accessibility requirements and specifically "the opportunity to vote privately and independently" established by HAVA (§301). Technology exists that would allow privacy and independence for absentee voting.

Many voters with disabilities utilize computer technology in their daily lives as they communicate with others and conduct day-to-day transactions, just like other Americans. These voters utilize their own assistive devices with their computers to use the internet on a regular basis. At the same time, it should also be recognized that there are many Americans with disabilities who do not use computers—but do conduct normal transactions in their everyday life using the telephone. While the private sector has been utilizing telephone and internet voting for some time, the public sector still has a long way to go to provide adequate and equal access for all voters—especially for voters with disabilities. Telephone and computer voting produces a paper ballot that is printed in the security of the election office. Thus, they are secure and accessible ways to vote.

Private Sector

We all know the private sector utilizes the internet and telephone to for voting purposes. The American Arbitration Association has used telephone voting for years to resolve disputes (http://www.adr.org/sp.asp?id=29490). There are plenty of companies that conduct their shareholder elections online or using the telephone (http://www.rtco.com/corp/telephone_internet_voting.asp). Many political parties have used internet and telephone voting to elect their party leaders and candidates. In 2008, Democrats Abroad, a branch of the Democratic National Committee, conducted the first Global primary using the Internet (http://www.bluemassgroup.com/showDiary.do?diaryId=10146).

The two most-watch television shows in America this year and this week are "Dancing with the Stars" and "American Idol". Each week, millions of Americans, including those with disabilities, make their voices heard on these shows by using their telephone and the home computers to vote for their favorites.

Public Sector

Innovative voting techniques are being used around the world to serve voters at home. Many countries in Europe are ahead of the curve in offering pilot programs and innovations in elections. For example, Switzerland, Estonia and the Netherlands have all used telephone voting for their citizens in public elections (http://aceproject.org/ace-en/topics/va/201de-voting201d-and-external-voting/remote-e-voting-and-external-voting). In the U.K., in 2003 and 2007 pilots were conducted to allow for telephone voting in local elections, with a particular emphasis on access for people with disabilities and the elderly.

Furthermore, it should be noted that voting over the Internet and by telephone is not a new concept to certain areas of the federal government of the United States. The US Federal Labor Relations Authority published a news release earlier this year promoting its efforts to allow labor and other organizations to use an internet and telephone voting system to settle disputes (http://www.flra.gov/webfm_send/228).

Since 2005 in the United States, telephone voting has been used at polling places in states including Vermont, New Hampshire, Oregon and Oklahoma to fulfill HAVA's requirements to allow disabled voters to cast their ballots privately and independently.

In 2009, voters in the City and County of Honolulu voted in Neighborhood Board elections using only the channels of internet or telephone voting. These innovations saved the city two thirds the cost of the election and provided voting accessibility from the comfort of one's home.
http://www.honolulu.gov/NCO/2009electionfaq.htm

In the 2009 primary and general elections in Franklin County, Washington, a vote by mail county, innovative County Auditor Zona Lenhart, who was not pleased with the very small use of voting devices at her offices for disabled voters, decided to conduct a pilot election whereby voters with disabilities were targeted and encouraged to use their own assistive devices at home to mark their ballot over the Internet, and print it to send back. The result was that instead of a handful of voters with disabilities using her voting devices, a significant 158 voters voted from home in the 2009 general election. In a survey of those voters, 94% indicated they were pleased with the system and would use it again.
http://www.tri-cityherald.com/2009/10/09/747751/online-voting-makes-progress-in.html

For a variety of reasons including transport issues and physical stamina limitations, a significant percentage of Americans with disabilities vote absentee. Unfortunately, current absentee voting systems in the US often require voters with disabilities to sacrifice their rights to privacy and independence. The types of disabilities that affected by this concern go well beyond blindness and low-vision and included people with learning disabilities, paralysis, Parkinson's Disease, and arthritis. AAPD's position is that people with disabilities should have all of the same options in voting as other citizens without having to surrender their rights to privacy and independence in voting.

In conclusion, AAPD supports the concept of making absentee voting easier. However, we would oppose any legislation that does not maintain the high accessibility standards guaranteed by HAVA. We also believe that voting in person, at a polling place is an important civic and community activity, and we would oppose legislation that leads to an all-absentee voting system.

Sincerely,
Jim Dickson
Vice President of Organizing and Civic Engagement

FAIR · ELECTIONS · LEGAL · NETWORK

May 5, 2010

Charles Schumer, Chairman
Robert Bennett, Ranking Member
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, D.C. 20510

Re: The Universal Right to Vote by Mail Act

Dear Chairman Schumer, Ranking Member Bennett, and members of the Committee:

The Fair Elections Legal Network (FELN) is a national, nonpartisan network of experienced election lawyers involved in removing impediments to increased voter participation by traditionally under-represented constituencies. We write today in support of the Universal Right to Vote by Mail Act. We strongly support the Act because it removes an unreasonable voting impediment that exists in 21 states – requiring citizens to provide an excuse to vote absentee.

In our view, voters in the different states should be given equal opportunities in methods and abilities to cast their ballots in federal elections. Early voting by mail is becoming more and more common across the states. It provides opportunity to voters who may or may not fit within the somewhat arbitrary list of reasons required in "excuse-only" states, and yet may find it extremely challenging to vote in person on Election Day. It allows voters greater deliberation time in considering ballots. Persons with language challenges are able to receive in-person assistance rather than having to bring a second person to the polls. Early voting by mail also helps in-person voters and election officials by reducing the stresses that occur at polling locations on Election Day. It leads to a more accurate count.

The legislation also increases fairness among sectors of the electorate. In "excuse-only" states, absentee balloting is very heavily skewed toward older voters. That imbalance is less pronounced in non-excuse states, and will likely trend toward further balancing as all segments of the electorate become used to the procedures for early voting by mail.

This bill does not mandate a vote-by-mail system, and FELN supports continued in-person voting. It simply eliminates the obstacle that "excuse-only" absentee voting places between citizens and the right to exercise their franchise. As a nation, we need to continue to remove impediments to voting wherever possible. We urge its passage.

Sincerely,

Robert M Brandon
President

Brian J. Siebel
Legal Director

1825 K STREET, N.W. • SUITE 450 • WASHINGTON, D.C. • 20006
TELEPHONE 202.331.0114 • FAX 202.331.1663 • WWW.FAIRELECTIONSNETWORK.COM

Your Mission • Your Voice

www.fra.org

125 N. West Street
Alexandria, VA 22314
1-800-FRA-1924
703-683-1400
703-549-6610 (fax)

April 30, 2010

The Honorable Charles E. Schumer
Chairman, U.S. Senate Rules and Administration Committee
313 Hart Senate Office Building
Washington, DC 20505

Fax: 202-228-3027

Dear Chairman Schumer:

With regard to your upcoming committee hearing on the issue of voting by mail, the Fleet Reserve Association (FRA) strongly supports "The Absentee Ballot Track, Receive, and Confirm Act" (HR 2510) that would amend the Help America Vote Act of 2002 and direct the Election Assistance Commission (EAC) to reimburse states for the costs of establishing, for states that so choose, an absentee ballot tracking program for federal elections. This tracking system would allow voters to easily determine, either online or through an automated phone system, whether an elections office has sent out a ballot, if a completed ballot has arrived at the registrar's office and whether the ballot was actually counted. If a ballot is not counted, the voter could also learn why this occurred.

The Association also strongly supports "The Universal Right to Vote by Mail Act" (HR 1604) that prohibits a state from imposing additional conditions or requirements on the eligibility of an individual to cast a vote in federal elections by mail, except to the extent that it imposes a deadline for requesting the ballot and returning it to the appropriate state or local election official.

FRA is a leading association representing Navy, Marine Corps, and Coast Guard enlisted personnel on compensation, benefits and quality of life programs, and strongly supports improved military overseas voter participation in Federal elections and an improved military mail processing of overseas ballots.

The Association stands ready to provide assistance in advancing these legislative proposals, and the FRA point of contact is John Davis, FRA's Director of Legislative Programs, at the above numbers or (john@fra.org).

Sincerely,

JOSEPH L. BARNES
National Executive Director

JLB:tw

JOSEPH E. HOLLAND
County Clerk, Recorder and Assessor
Registrar of Voters

JIM MCCLURE
Asst. County Clerk, Recorder and Assessor

105 E. Anapamu St. 2nd Floor
Santa Barbara, CA 93101

Mailing Address
PO Box 159
Santa Barbara, CA 93102-0159

COUNTY CLERK, RECORDER AND ASSESSOR

April 30, 2010

The Honorable Charles E. Schumer
Senate Rules and Administration Committee
305 Russell Senate Office Building
Washington, D.C. 20510

Honorable Charles E. Schumer:

I am writing to express my support for HR 1604 The Universal Right to Vote by Mail Act, and HR 2510 The Absentee Ballot Track, Receive, and Confirm Act'

California has had no-excuse absentee voting since 1978. With the advent of no excuse absentee voting Californians have increasingly chosen to vote by absentee ballot in each election. Additionally, beginning in January 2002, new legislation took effect that allowed California voters to sign up to become permanent absentee voters. Today California has done away with the terminology of "absentee" voting and now simply provides voters the option to "Vote By Mail".

In the November 2008 Presidential General Election over 6 million California voters voted through the mail. Of the 7.3 million ballots issued through the mail over 84% of these ballots were completed and returned. This compares with a 76% turnout for voters who chose to vote at the polls. In the most recent May 19 Statewide Special Election almost two thirds of the votes cast were Vote By Mail ballots. Statistics consistently show that providing voters with the option to vote by mail leads to overall higher voter participation.

The recent historic November 2008 Presidential General Election saw unprecedented levels of interest and participation by voters across the country. To accommodate this high level of interest many states attempted to provide early in-person voting to allow people the opportunity to vote prior to Election Day. Unfortunately these well intentioned efforts often resulted in long lines and multi-hour wait times for people attempting to vote early. In California over 5 million voters conveniently cast their ballot through the mail **prior** to Election Day in November 2008. On Election Day another 1 million Vote By Mail voters conveniently dropped off their Vote By Mail Ballot at the polls.

In Santa Barbara County over 50% of our 200,000 registered voters choose to receive a ballot through the mail 29 days before each and every election. Having a high percentage of Vote By Mail voters allows us to more accurately order ballots for the polls and helps to reduce the overall cost of providing poll based services. These cost savings help to offset the cost of providing the option of voting by mail to County voters.

Voting by mail is more secure than voting at the polls. In California the signature on each Vote By Mail envelope is matched against the signature on the original voter registration affidavit. Only if the signature matches the original registration signature is the envelope opened and the ballot counted. This is in contrast to poll based voting where there is no checking of original registration signatures. Additionally the Vote by Mail process allows Election officials to put in place extensive security safeguards such as cameras, alarms, and ballot handling procedures that are not available in polling places.

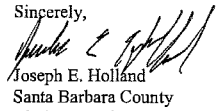
California currently employs mail ballot tracking, receipt and confirmation practices similar to those proposed in HR 2510. Providing the ability for voters to confirm, via the internet or over the phone, whether their mail ballot has been received and if their vote has been counted, has allowed the voter to achieve greater confidence that their ballot is in-house and securely part of the vote tabulation process. Additionally this ballot tracking confirmation process has been easy to implement as all of the election registration management companies have developed the software necessary to provide this service.

Voting by mail has proven to be very popular in California. For those counties that have chosen to promote this voting choice it is not unusual to see as many as 60 to 75% of the registered voters signing up for permanent Vote By Mail status. In the 2008 November General Election 53 of California's 58 counties issued vote by mail ballots to more than 40% of their registered voters.

It is my opinion that providing no excuse absentee voting, is really about expanding voter choices, in choosing the method by which they exercise their right to participate in democracy. With thirty years of no excuse absentee voting history in California, evidence shows that voters are very appreciative of the option to vote from the privacy of their own home, and that the popularity of voting through the mail continues to increase.

I respectfully request that you support HR 1604 and HR 2510 expand the right to vote by mail, without requiring an excuse, to all citizens of this country.

Sincerely,



Joseph E. Holland
Santa Barbara County
Clerk, Recorder and assessor
Registrar of Voters

1401 New York Avenue, NW
Suite 400
Washington, DC 20005-2124

Tel: 202.662.8600
Fax: 202.783.0857
www.lawyerscommittee.org

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May 4, 2010

Charles Schumer, Chairman
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Robert Bennett, Ranking Member
Senate Committee on Rules Administration
431 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Bennett:

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") wishes to share its support for the Universal Right to Vote by Mail Act (H.R. 1604) sponsored by Representative Susan Davis and Senator Ron Wyden. For four decades, the Lawyers' Committee has been at the forefront of the legal struggle to achieve equality and protect advances in voting rights for racial and ethnic minorities and other traditionally disenfranchised groups. While voter registration challenges continue to be greatest barrier to the ability to vote for most Americans, other challenges such as deceptive practices, intimidation at the polling place, unnecessary requirements to vote mail, etc. also play a large part in inhibiting voters. Thus, we believe that H.R. 1604 helps to alleviate some of these unnecessary challenges so that all Americans are better able to exercise their fundamental right to vote in the face of often difficult circumstances.

Primarily, H.R. 1604 recognizes that it is often difficult for Americans to get to and wait at polling places on Election Day. Professional and family commitments sometimes interfere with the capability of otherwise interested parties to travel. To miss an opportunity to exercise their fundamental right because of legitimate conflicts undermines our goal of increased participation in the election process. This is especially pertinent among communities of color, often victims to deceptive practices in their polling areas or disproportionately impacted by jobs from which they cannot take leave or single-parent obligations that do not allow for flexibility to travel away from home. This process also allows voters, especially those not proficient in English, to better examine the ballot and make informed choices.

While we recognize the benefits of H.R. 1604, we want to emphasize that this should only be an additional tool for voting rather than one that supersedes or supplants other methods. There should still be ample traditional polling places available in convenient locations for those who choose not to vote by mail. Poll workers should still be better trained to respond to those that have limited English proficiency or whom have general questions about registering and participating in the process. Furthermore, efforts should still be made to curtail deceptive practices that misdirect citizens as to when and where to vote.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

1401 New York Avenue, NW
Suite 400
Washington, DC 20005-2124

Tel: 202.662.8600
Fax: 202.783.0857
www.lawyerscommittee.org

The Lawyers' Committee, through its Voting Rights Project and its Election Protection program has long been invested in protecting the rights of citizens to engage in the voting process. Part of our goal is to increase access to the polls. We continue to strongly support efforts to eliminate unnecessary barriers to the ballot through voter registration reform, the elimination of deceptive practices and other barriers such as access to the polling place. H.R. 1604 ensures that citizens, especially those that find it burdensome to travel from home, have another viable option and we support such efforts so that all eligible Americans can, without hindrance, participate in the electoral process.

Sincerely,

Tanya Clay House
Director of Public Policy

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1 **TESTIMONY OF DR. MICHAEL P. MCDONALD, PREPARED MAY 3, 2010**

2

3 **CHAIRMAN CHARLES E. SCHUMER**

4 **SENATE RULES AND ADMINISTRATION COMMITTEE**

5 **305 RUSSELL SENATE OFFICE BUILDING**

6 **WASHINGTON, D.C. 20510**

7

8 **RANKING MEMBER ROBERT F. BENNETT**

9 **SENATE RULES AND ADMINISTRATION COMMITTEE**

10 **305 RUSSELL SENATE OFFICE BUILDING**

11 **WASHINGTON, D.C. 20510**

12

13 **FOR: SENATE RULES AND ADMINISTRATION COMMITTEE HEARING ON MAY 5, 2010**

14 **RE: VOTING BY MAIL: AN EXAMINATION OF STATE AND LOCAL EXPERIENCES**

15

16 Thank you for the opportunity for me to provide testimony on an issue that affects the most
17 basic way by which American citizens provide their feedback to their elected officials: voting.
18 My name is Dr. Michael P. McDonald. I am an Associate Professor of Government and
19 Politics at George Mason University and a Non-Resident Senior Fellow at the Brookings Institution. I
20 specialize in voting and elections.[1] Relevant to my testimony, I have participated in the production
21 of the United States Election Assistance Commission's 2004 and 2008 election administration
22 surveys; I have consulted for the media's national exit poll consortium since 2002; and I serve on
23 the advisory board of the Overseas Vote Foundation, whose mission is to promote voting for
24 America's military and overseas civilian voters.
25 I have been asked to provide written testimony regarding recent experiences of mail
26 balloting in the United States. I will discuss the forms of mail balloting, present trends, review the

[1] I have published several works on voting and election administration, the most widely cited is Michael P. McDonald and Samuel Popkin. 2001. "The Myth of the Vanishing Voter." *American Political Science Review* 95(4): 963-74.

27 effect of mail balloting on turnout and the composition of the American electorate, and discuss
28 related election administration issues.

29 **WHAT IS A MAIL BALLOT?**

30 America's experience with mail balloting dates back at least to the Civil War. Soldiers were
31 permitted by some states to vote by mailing a marked ballot to their friends or family to be
32 delivered to their home polling place on Election Day.[2] Some Civil War soldiers were permitted to
33 vote on Election Day at a special polling place within their units. At the turn of the twentieth
34 century many states adopted this method of remote Election Day absentee voting for military
35 personnel and civilians away from their homes.[3] In 1913, North Dakota became the first state to
36 allow mail balloting for traveling citizens, and Wisconsin soon followed, adding provisions for sick
37 and disabled voters.[4] In 1936, Michigan perhaps became the forerunner to "no excuse" mail
38 balloting by permitting mail ballots for "any person necessarily absent while engaged in the pursuit
39 of lawful business, *or recreation*."[5]

40 The federal government has enacted several laws to promote mail balloting by military
41 personnel and overseas citizens.[6] The National Voter Registration Act of 1993 and the Help America
42 Vote Act of 2002 also contain directly or indirectly provisions that pertain to mail ballot voters,
43 such as identification requirements and steps to purge registrants from the voter registration rolls.

44 Today, there are several methods by which eligible persons can cast a ballot other than at
45 their home precinct on Election Day. These various methods are important to understand in order
46 to correctly interpret the available statistics on mail balloting.

47 There are essentially three types of mail balloting:[7] the first is a traditional absentee ballot
48 that requires a voter to provide a valid reason to receive a mail ballot and the second is a no-excuse

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[2] See: Lee, Duncan Campbell. 1916. "Absent Voting." *Journal of the Society of Comparative Legislation* 16(2): 333-45.

[3] Civilians were often allowed to vote on Election Day at any county courthouse within their state. See: Ray, P. Orman. 1918a. "Absent-voting Laws, 1917." *The American Political Science Review* 12(2): 251-61; Ray, P. Orman. 1918b. "Military Absent-Voting Laws." *The American Political Science Review* 12(3): 461-69.

[4] See: Ray 1918a, *supra* note 2

[5] Election Laws of Michigan, Revision of 1936, Ch. X. Art. 3134, original emphasis, as quoted in Steinbicker, Paul G. 1938. "Absentee Voting in the United States." *The American Political Science Review* 32(5): 898-907.

[6] These laws include the Serviceman Voting Act of 1944, The Federal Voting Assistance Act of 1955, Overseas Citizens Voting Rights Act of 1975, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, and the Military and Overseas Voters Empowerment Act (MOVE) of 2009.

[7] These definitions are largely consistent with other work, though ambiguity at the margins is an issue that those who administer, collect, and study these data wrestle with. See, Nathan Camenska, Jan E. Leighley, Jonathan Nagler, and Daniel P. Tokaji. "Report on the 1972-2008 Early and Absentee Voting Dataset." Pew Charitable Trusts Make Voting Work Report available at http://www.pewcenteronthestates.org/report_detail.aspx?id=58252, accessed May 1, 2010; Paul Gronke, "The Early Voting Information Center." http://www.earlyvoting.net/, accessed May 1, 2010; and The United

49 absentee ballot that, as the name implies, is available to all eligible voters. Depending on state law,
50 eligible voters may obtain their mail ballots by requesting an absentee ballot or they may be
51 allowed to sign up to permanently receive a mail ballot. The third type of mail balloting is an all-
52 mail ballot election where all voters are required to cast their ballots by mail. In 1977, Monterrey
53 County held the first jurisdiction-wide all-mail ballot election.[8] In 1998, Oregon adopted, by voter
54 initiative, statewide all-mail ballot elections. Other jurisdictions may run all-mail ballot elections for
55 all their voters, for certain voters in precincts that are difficult to provide a polling place for, or may
56 choose to run all-mail ballot elections for only certain types of elections. Complicating the collection
57 of statistics, these jurisdictions that conduct all-mail ballot elections may define absentee ballots
58 only as those mail ballots sent to an address other than a voter's home address on file with their
59 voter registration.

60 Variation exists as to the date a mail ballot is received so that it may be validly counted.
61 Some states require that a valid ballot be returned by Election Day, while others may require that a
62 mail ballot be post-marked by a certain date, usually Election Day.

63 In recent years, mail balloting has become intertwined with a related method of casting
64 ballots known as early voting. Eligible voters seeking to cast an absentee ballot are, to my
65 knowledge, always permitted to request and cast their absentee ballot in-person at their central
66 election administration office. Increasingly, jurisdictions have operated additional special polling
67 places to accommodate these voters. Early voting is most commonly associated with no-excuse
68 absentee voting at these special polling places. However, recently jurisdictions that require an
69 absentee excuse have opened additional polling places, muddying the definition of an early vote.
70 Jurisdictions may not distinguish these in-person early votes from mail ballots in the statistics that
71 they report.

72 In-person early voting may reduce the number of provisional ballots. Persons who do not
73 have required identification can return at a later date to attempt to vote again. A voter registration
74 problem can be resolved on site. These special early voting polling locations further serve as a
75 voter's home precinct, which effectively circumvents some states' rules which reject provisional
76 ballots not cast in voters' home precincts.

77 Some jurisdictions permit persons who receive a mail ballot to drop off their mail ballot at
78 their home polling place on Election Day. In 2008, slightly more than one million Californians

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States Election Assistance Commission 2004, 2006, and 2008 Election Day Survey reports available at: http://www.eac.gov/program-areas/research/eavs/election-day-survey-results, accessed May 1, 2010.

[8] See: David B. Magleby. 1987. "Participation in Mail Ballot Elections Participation in Mail Ballot Elections." *The Western Political Quarterly* 40(1): 79-91.

79 returned their mail ballots in this manner.[9] Jurisdictions may not distinguish these ballots dropped
80 off in-person with those that were returned by mail in the statistics that they report.

81 As I discuss below, a significant number of absentee ballots are rejected because a voter
82 failed to follow proper ballot return instructions, such a signing the outside of the special ballot
83 return envelope. Election administrators encourage in-person return of mail ballots since it permits
84 poll workers to verify that the voter correctly completed the necessary information on the mail
85 ballot return envelope. In-person early voting also mitigates mail ballot transmission errors that
86 may lead to invalidation of mail ballots.

87 In some states that require voters to register in advance of an election, the registration
88 deadline may overlap the period of absentee voting. When this happens, it is possible for eligible
89 persons to register and vote at the same time, what is termed Same Day Registration. In some
90 states, such as North Carolina, eligible persons are permitted to register and vote at early voting
91 polling locations during the entire early voting period, even after the normal voter registration
92 deadline. However, North Carolina does not permit Same Day Registration on Election Day, what is
93 also known as Election Day Registration, as do some other states.

94 The United State's highly decentralized system of election administration has fostered
95 considerable variation in early voting and mail ballot laws among the states. As Congress considers
96 legislation to address mail balloting, I encourage thoughtful consideration as to how such
97 legislation may affect the tapestry of current state law and procedures.

98 **TRENDS IN EARLY VOTING**

99 It may be difficult to distinguish between mail ballots and early votes, as many states do not
100 report separate statistics for these voting methods. I will use the term "early voting" to describe any
101 vote cast prior to Election Day, and I will provide specific statistics on mail ballots where available.
102 Note, too, that I will count mail ballots returned to a polling place on Election Day as early votes
103 because few jurisdictions distinguish these ballots from other early votes.

104 The available statistics indicate a clear increasing trend in the use of early voting by
105 American voters. Historical studies in 1936 and 1960 found that early voting increased from 2
106 percent to 5 percent of all ballots counted in these elections, respectively (these are likely over-
107 estimates).[10] Recent aggregate statistics indicate that early voting increased from at least 8 percent

[9] Personal correspondence with Joe Holland, Santa Barbara Clerk and County Reporter, December 24, 2008.
[10] See: Paul G. Steinbicker. 1938. "Absentee Voting in the United States." *The American Political Science Review* 32(5): 898-907 and Andrews, William G. 1966. "American Voting Participation." *The Western Political Quarterly* 19(4): 639-52. These estimates likely overstate absentee voting. They are constructed by

108 in 1992, 8 percent in 1994, 11 percent in 1996, 12 percent in 1998, 16 percent in 2000, 16 percent
109 in 2002, 23 percent in 2004, to 31 percent or at least 40.6 million voters in 2008.[11]
110 Another information source for early voting is the United States Census Bureau's monthly
111 Current Population Survey. In a November of a federal election year, the Census Bureau asks
112 respondents a limited number of voting and registration questions.[12] Since 1972, with the
113 exception from 1982-1990, those who report voting were asked when they voted, on Election Day
114 or before.[13] From 1972 to 1992, the percentage of self-reported early voters gradually increased
115 from 4 percent to 7 percent. From 1992 to 2008, the rate of increase accelerated, such that by 2008,
116 30 percent of all voters.[14] In 2008, Current Population Survey respondents were also asked if they
117 voted in-person or by mail. Of the 8 percent of voters who self-reported voting by mail, only 6
118 percent of these reported voting on Election Day (or in other words, less than 1 percent of all voters
119 voted by mail on Election Day). This survey data, which is susceptible to typical survey
120 methodology errors, is largely consistent with the observed aggregate data.
121 The inescapable conclusion from these statistics is that the number of persons who vote an
122 early ballot is rising, both in absolute numbers and as a percentage of the overall electorate.
123 Naturally, the question follows, why?
124 More voters have the choice to vote early under their states' laws. According to a
125 comprehensive list of early voting laws compiled for a Pew Make Voting Work Project,[15] the
126 number of states that allow no-excuse absentee voting increased from 2 in 1972 to 27 in 2008. The
127 number of states that allow no-excuse early voting increased from 5 in 1972 to 31 in 2008.
128 Additionally, during this period Oregon adopted all-mail ballot elections in 1998. Most local

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extrapolating absentee statistics in a few states that maintained records of absentee voting, which were likely states most interested in providing access to early voting, to the entire country.

[11] I consult for Mitofsky International and Edison Media Research, the media's exit polling firms. To accurately project election results on Election Day, exit pollsters need to estimate turnout and the proportion of votes that may be cast early. Towards this end, the exit polling firms have worked with the Associated Press to collect aggregate statistics on early voting from states' election administrators. Since 2004, I have collected these early voting data from state election administrators. I work with the Associated Press Election Research and Quality Control Unit to cross-check and verify the statistics we separately collect. The 2008 statistics are available at: Michael P. McDonald. "(Nearly) Final 2008 Early Voting Statistics." http://elections.gmu.edu/Early_Voting_2008_Final.html, accessed May 1, 2010.

[12] For reports and data, see http://www.census.gov/hhes/www/socdemo/voting/index.html, accessed May 1, 2010.

[13] Note this question wording may not accurately measure those who return their mail ballot on Election Day.

[14] These data further suggest a slight drop off in early voting rates in a midterm election compared to the previous presidential election, and then increasing in the next presidential election: two steps forward, one step back.

[15] See: Camenska et al., *supra* note 6.

129 Washington jurisdictions also have adopted all-mail ballot elections, as have many local
130 jurisdictions in other states for their hard-to-service precincts.

131 Changing laws provide opportunities for early voting, but these new policies cannot explain
132 the increasing popularity of early voting since voters in all jurisdictions – except those that conduct
133 all-mail ballot elections – retain the right to decide how they will vote. In 2008, the percentage of
134 voters casting an early vote exceeded 50 percent of all ballots cast for the first time in states such as
135 Florida, Georgia, New Mexico, and North Carolina. The substantial increase from 2004 in these
136 states was experienced almost entirely among persons casting an in-person early vote. California
137 and Colorado also experienced notable increases in early voting from 2004 to 2008, but the
138 increase in these states appears to be attributable primarily to mail ballots, particularly among
139 voters who take advantage of these states' laws to sign up to always vote by mail. [16] For those states
140 that have not adopted some form of early voting, either no-excuse absentee voting or in-person
141 early voting, the Current Population Survey reports only a slight increase in excuse-required
142 absentee voting, from 4 percent in 1980 to 6 percent in 2004.

143 To summarize, in-person early voting is predominantly favored in the East and mail
144 balloting is predominantly favored in the West. In some respects, this dichotomy makes sense since
145 mail balloting may be a more convenient and practical method of early voting in sparsely-populated
146 regions in the Western states. Many voters appear to prefer these methods of voting, and are doing
147 so in increasing numbers as they become more familiar with their states' policies.

148 Further insight on the methods and challenges of early voting are provided by the United
149 States Election Assistance Commission's 2004, 2006, and 2008 Election Day Surveys.[17] The Election
150 Day Surveys attempt to collect election administration statistics from all local jurisdictions, which
151 may help guide policymaking. Participation by local jurisdictions in the Election Day Survey is
152 voluntary for some of these data relating to early voting. Jurisdictions must report statistics
153 pertaining to the Uniformed and Overseas Citizens Absentee Voting Act of 1986 and the National
154 Voter Registration Act of 1993. A few jurisdictions fail to report these mandatory statistics, perhaps
155 because their jurisdiction lacks the capacity to do so. Localities may also choose to interpret
156 definitions in different manners from one another, even within the same state. As a consequence,
157 Election Day Survey statistics are incomplete and in some cases may be misleading. I will discuss
158 the 2008 survey for brevity's sake. The number of reporting jurisdictions has been increasing, so

[16] 40 percent of Florida's 2008 ballots were cast by mail, and the state permits voters to be placed on a permanent transmission list. Still, the increase in early voting over 2004 was predominantly among in-person early votes.
[17] See: the Unites States Election Assistance Commission, *supra* note 6.

159 the 2008 survey provides the best snapshot of the current state of United States election
160 administration as it pertains to early voting.
161 The 2008 Election Day Survey reports that 26.0 million domestic absentee mail ballots were
162 transmitted to voters. Of these, 9.6 million were transmitted to persons who had signed up to
163 always receive a mail ballot; six states account for nearly all of these ballots.[18] Of these transmitted
164 ballots, 22.6 million were counted and at least 0.4 million were rejected. (These numbers do not
165 sum due to missing responses for some categories of ballots; and these statistics exclude Oregon
166 and Washington, see below for an explanation). The apparent 3.0 million "lost" unreturned
167 transmitted mail ballots occur predominantly among the six states that provide most of the
168 permanent mail ballot transmissions: California alone had over 1 million unreturned mail ballots.
169 These unreturned domestic mail ballots may thus be related to the challenges of maintaining
170 accurate voter registration addresses or voters uninterested in participating in an election who fail
171 to return their ballot.
172 Jurisdictions that conduct all-mail ballot elections may not consider their mail ballots sent
173 to all voters as absentee ballots. For example, Oregon only reported 25,505 absentee ballots
174 returned, even though the Secretary of State reported that 1.8 million ballots were cast among the
175 2.1 million registered voters in this all-mail ballot state.[19] These Oregon all-mail ballots are not
176 included in the statistics reported in the preceding paragraph. Most Washington local jurisdictions
177 conduct all-mail ballot elections, but these local jurisdictions apparently define all-mail ballots as
178 absentee ballots in their response to the 2008 Election Day Survey. Washington reported
179 transmitting no absentee ballots to the 3.6 million registered voters in the state. The state reported
180 counting all of the 2.7 million absentee mail ballots that were returned.[20] Because these statistics
181 are not consistent with those from other states, I exclude Washington from the statistics reported in
182 the preceding paragraph. These reporting issues underscore a difficulty in collecting and analyzing
183 election administration data. Seemingly-simple definitions are sometimes difficult to define in
184 practice, given the variation in state election laws.
185 The 2008 Election Day Survey also reports various reasons why the at least 407,806
186 absentee mail ballots were rejected. Unfortunately, many local jurisdictions did not report these
187 reasons, so the statistics that follow are only suggestive of the reasons why mail ballots are rejected.

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[18] These ballots were primarily transmitted by six states: Arizona (908,902 ballots), California (5,890,996), Colorado (1,459,090), Florida (1,087,083), Montana (107,372) and New York (102,993).
[19] See: http://www.sos.state.or.us/elections/, accessed March 6, 2009. (Archived at: http://elections.gmu.edu/Registration_2008G.html)
[20] See: http://www.sos.wa.gov/elections/Default.aspx, accessed March 6, 2009. (Archived at: http://elections.gmu.edu/Registration_2008G.html)

188 The most frequent reason cited for rejecting a ballot is that the ballot was returned after a deadline
189 (75,073 ballots). The second most frequent reason is that the voter failed to sign the envelope
190 (45,693) or the signature did not match a signature on-file (26,408). Other, less frequent, reasons
191 include a missing witness or election officials' signature (where required by state law), ballots
192 returned in unofficial envelopes, missing ballots, unsealed envelopes, multiple ballots in envelopes,
193 missing address (where required by state law), deceased voters (where ballots transmitted after a
194 death are excluded), no ballot application on record, and the voter was a first-time voter who did
195 not provide proper identification. A special category merits explanation, those mail ballots rejected
196 because a person also voted in-person (26,620). Election administrators investigate these instances
197 of potential fraud, but conclude that they are almost always well-meaning persons who were
198 concerned that their ballot was lost in the mail. Further, election administration safeguards ensure
199 these absentee mail ballots are rejected in favor of the ballot cast in-person.

200 These statistics for domestic absentee ballots do not include the at least 17,379,871 persons
201 who cast an in-person early vote, as reported by local jurisdictions to the United States Election
202 Assistance Commission for the 2008 Election Day Survey.

203 Further, these statistics for domestic absentee ballots do not include the at least 989,207
204 mail ballots transmitted to Uniformed and Overseas Citizens Voters.[21] Of these, at least 345,772
205 were one-time requests and 231,324 were automatic requests for two-election cycles. The mail
206 ballot return rate for these voters is lower than that for domestic voters, with 682,341 returned
207 ballots. Of these, 637,216 were validly counted ballots. My comments on these ballots are brief, as
208 Congress has recently addressed voting issues for these voters in the bipartisan Military and
209 Overseas Voters Empowerment Act of 2009.

210 **DOES EARLY VOTING AFFECT TURNOUT?**

211 Providing early voting may logically appear to increase turnout rates. Early voting may
212 lower voting costs, by providing a means for a person to vote who is unable to vote on Election Day
213 and by providing voters with an opportunity to carefully review information about the candidates
214 on a ballot. Further, voter mobilization studies find that a reminder to vote increases voting
215 propensities: what greater reminder is there than having a ballot in hand?[22] However, a method
216 such as mail balloting may impose additional costs and reduce other benefits. A voter may be
217 required to vote in two stages: once to request a mail ballot and a second time to return a received

[21] See: http://www.eac.gov/program-areas/research/doc/2008-uocava-report_final/attachment_download/file, accessed May 1, 2010.
[22] See: e.g., Alan S. Gerber and Donald P. Green, "The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment," *American Political Science Review* 94(3): 653–63.

218 ballot. There may be benefits realized by voting in-person on Election Day, such as sense of
219 belonging to a community or receiving an "I Voted" sticker. Theoretically, then, the voting calculus
220 may not be straightforward. A new available choice may have net greater costs than existing
221 choices, and may thus not change individuals' behavior.

222 To date, a number of scholarly studies have investigated if early voting does indeed increase
223 voter turnout. The authors of perhaps the most comprehensive and recent of these studies find that
224 no-excuse absentee balloting increases long-run turnout rates by an average of 3 percentage points
225 and that no-excuse in-person early voting increases long-run turnout rates by an equal average of 3
226 percentage points.[23] Some other scholars generally support the notion that early voting has a
227 modest positive effect on turnout. The earliest study found all-mail ballot elections generally
228 increased turnout in local elections.[24] Three groups of scholars find Oregon's all-mail ballot system
229 increased turnout for all elections and two of these find a greater effect for traditionally low-
230 turnout elections (state and local general elections and all primaries).[25] A scholar studying the 1992
231 election found that a positive turnout effect is only realized if the political parties mobilize their
232 supporters to take advantage of early voting.[26] A group of scholars analyzing the American National
233 Election Study survey found modest positive turnout effects for students and disabled voters.[27] One
234 pair of scholars found a modest turnout increase for no-excuse absentee balloting in state
235 legislative elections,[28] and other pair found an increase in one Tennessee County.[29] Other scholars
236 find that positive turnout effects in presidential elections are short-lived,[30] are non-existent in
237 national elections,[31] or did not materialize in one Tennessee County (a separate study).[32]

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[23] See: Jan E. Leighley and Jonathan Nagler "The Turnout Effects of Non-Precinct Place Voting Reforms." Pew Charitable Trusts Make Voting Work Report available at http://www.pewcenteronthestates.org/report_detail.aspx?id=58252, accessed May 1, 2010.
[24] See: Magleby, *supra* note 8.
[25] See: Jeffrey A. Karp and Susan A. Banducci. 2000. "Going Postal: How All-Mail Elections Influence Turnout." *Political Behavior* 22(3): 223-29; Adam J. Berinsky, Nancy Burns, and Michael W. Traugott 2001 "Who Votes by Mail? A Dynamic Model of the Individual-level Consequences of Vote-by-Mail Systems." *Public Opinion Quarterly* 65(2): 178-97; Priscilla L. Southwell and Justin Burchett. 2000. "The Effect of All-mail Elections on Voter Turnout." *American Politics Research* 28(1): 72-79.
[26] See: Eric J. Oliver, 1996. "The Effects of Eligibility Restrictions and Party Activity on Absentee Voting and Overall Turnout." *American Journal of Political Science* 40(2): 498-513.
[27] Jeffrey A. Karp and Susan A. Banducci. 2001. "Absentee Voting, Mobilization, and Participation." *American Politics Research* 29(2): 183-195.
[28] Peter L. Francia and Paul S. Herrnson. 2004. "The Synergistic Effect of Campaign Effort and Election Reform on Voter Turnout in State Legislative Elections." *State Politics and Policy Quarterly* 4(1):74-93.
[29] See: William Lyons and John M. Scheb. 1999. "Early Voting and the Timing of the Vote: Unanticipated Consequences of Electoral Reform." *State and Local Government Review* 31(2):147-52.
[30] Joseph D. Giammo and Brian J. Brox. (forthcoming). "Reducing the Costs of Participation: Are States Getting a Return on Early Voting." *Political Research Quarterly.*
[31] See: Mary Fitzgerald. 2005. "Greater Convenience But Not Greater Turnout: The Impact of Alternative Voting Methods on Electoral Participation in the United States." *American Politics Research* 33(6): 842-67;

238 In my expert judgment and in consideration of the preponderance of these scholarly
239 studies, adopting more permissive early voting laws, including no-excuse absentee balloting, most
240 likely would have a modest, positive effect on turnout rates among the few states that do not
241 currently permit it. I caution that election administration is more complicated than turning on or off
242 a switch. Election administrators must implement a policy and voters must become familiar with it.
243 Turnout is also dependent on many factors, perhaps the most important being the competitiveness
244 of the election. Thus, it may be that turnout increases will not be apparent until several elections
245 can be observed.

246 A related question is who would be stimulated to vote. A fairly consistent finding among
247 these studies is that early voters are different from in-person Election Day voters. The 2008 Current
248 Population Survey shows that early voters were markedly older: 36 percent of early voters were
249 over age 60 compared with 24 percent of Election Day voters. However, on other demographic
250 profiles such as race and education, the Current Population Survey shows Election Day voters and
251 early voters are virtually identical.[33] This comports with a survey of voters in the 2003 California
252 recall election,[34] a study of Oregon's all-mail ballot elections,[35] and the only comprehensive long-
253 run national study.[36] In contrast, others find that early voting primarily mobilizes persons already
254 predisposed to vote, and did not mobilize disadvantaged persons.[37] The location of in-person early
255 voting polling locations may be a factor.[38] Finally, authors of two studies – unlike the rest – found
256 early voting increased turnout among younger voters, such as college students.[39] These two studies

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Paul Gronke, Eva Galanes-Rosenbaum and Peter A. Miller. 2007. "Early Voting and Turnout." *PS: Political Science & Politics* 40(4): 639-45.

[32] See: Grant W. Neeley, and Lilliard E. Richardson Jr. 2001. "Who is Early Voting? An Individual Level Examination." *Social Science Journal* 38:381-92.

[33] In 2004, 82 percent of early voters were non-Hispanic White compared with 79 percent of Election Day voters. President Obama's candidacy had an apparent mobilizing effect for minorities. In 2008, 76 percent of early voters were non-Hispanic White compared with 77 percent of Election Day voters. In 2008, 60 percent of early voters had at least some college education compared with 54 percent for Election Day voters. These statistics are compiled by myself in preparation for this testimony.

[34] See: Matt A Barreto, Matthew J Streb, Mara Marks, Fernando Guerra. 2006. "Do Absentee Voters Differ from Polling Place Voters? New Evidence from California." *Public Opinion Quarterly* 70(2): 224-34.

[35] See: Karp, *supra* note 21; Priscilla L. Southwell and Justin Burchett. 1997. "Survey of Vote-by-Mail Senate Election in the State of Oregon." *PS: Political Science and Politics* 30(1): 53-7; Priscilla L. Southwell and Justin Burchett. 2000. "Does Changing the Rules Change the Players? The Effect of All-Mail Elections on the Composition of the Electorate." *Social Science Quarterly* 81(4): 837-45.

[36] See: Leighley, *supra* note 20. These scholars find that no-excuse absentee voting only has an age effect on the composition of the electorate, and that in-person early voting has no compositional effect.

[37] See: Magleby, supra note 8; Berinsky, *supra* note 21; Oliver, *supra* note 22; Karp, *supra* note 24; Neely, *supra* note 30; Robert M. Stein. 1998. "Early Voting." *Public Opinion Quarterly* 62(1):57-69.

[38] James G. Gimpel, Joshua J. Dyck, and Daron R. Shaw. 2006. "Location, Knowledge and Time Pressures in the Spatial Structure of Convenience Voting." *Electoral Studies* 25(1): 35-58.

[39] See: Lyons, *supra* note 28; Karp, *supra* note 27.

257 may seem to conflict with other studies, however, they may be in harmony if early voting activates
258 the youngest and oldest voters, but does not energize middle-aged voters.

259 I caution against drawing definitive conclusions from these studies about the effect of early
260 voting on the composition of the electorate. Early voters and Election Day voters appear to be
261 different from one another on some demographic characteristics, notably age. However, these
262 differences cannot address the long-run effect of who might be encouraged to vote by adopting
263 more permissive early voting laws. High propensity voters may alter their behavior by shifting from
264 Election Day voting to early voting, thereby masking the new voters who are brought into the
265 electorate through early voting. More study is needed. Indeed, the composition of the early voting
266 component of the electorate has likely changed since the publication of nearly all the existing
267 studies, as more voters have taken advantage of the early voting option.

268 **RELATED ISSUES**

269 I would like to address the possibility of election fraud or coercion enabled by early voting,
270 particularly mail-balloting. Consistent with a report by the United States Election Assistance
271 Commission, I believe the evidence of election fraud and coercion generally in our electoral system
272 is anecdotal and tends to be colored by ideology.[40] In contemporary elections, the handful of
273 instances of organized election fraud or coercion has occurred primarily in local elections where
274 such activity can have the greatest impact because the electorate is small. If mail balloting enabled
275 more election fraud or coercion, we should observe an increase in such activity as the number of
276 early voters increases and as more local jurisdictions move to all-mail ballot elections. We might
277 further expect to observe such a trend given the greater attention to detecting election fraud and
278 coercion and technological advances in database management that enable better detection. Yet,
279 there is no study to my knowledge that finds such a trend.

280 There are costs associated with the administration of elections. Recently, Hawaii held a
281 special statewide all-mail ballot election to fill a United States House of Representatives vacancy.
282 The state did so, citing cost-savings as the motivating reason. Election administrators tend to view
283 all-mail elections as less costly than in-precinct elections, where polling places must be established,
284 equipped, and staffed. However, running elections through a hybrid system of early voting and
285 Election Day voting may be more expensive since election administrators must expend resources to
286 provide both voting methods. A related cost issue for jurisdictions that conduct all-mail ballot
287 elections or allow voters to sign up to automatically receive a mail ballot are costs of mailing ballots

[40] See: "Election Crimes: An Initial Review and Recommendations for Future Study." http://www.eac.gov/program-areas/research/doc/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file, accessed May 2, 2010.

288 to registered voters who have since moved from their address or to persons who have no intention
289 of voting in an election.

290 There are, perhaps, other unintended effects of early voting on campaigns. In the presence
291 of early voting, campaigns must be active during the entire period of early voting. This may stress
292 the resources of state and local campaigns that do not have the same resources as, say, a
293 presidential campaign.[41] As the election nears, the electorate will be winnowed down to those who
294 have not already voted,[42] which I believe renders ineffective the infamous "October surprise" dirty
295 attack the weekend prior to Election Day.

296 **RECOMMENDATIONS**

297 If the federal government were to exercise its authority in Article I, Section 4 of the United
298 States constitution to regulate early voting in federal elections, I recommend the following:
299

300 - Consider allowing all federal voters to request to receive permanently a mail ballot.
301 - Require otherwise valid absentee ballots postmarked on Election Day to be counted as valid
302 ballots. This would address the most frequent reason for rejecting absentee ballots.
303 - Do not impede current state policies regarding in-person early voting, as this is a popular
304 form of early voting. Further, in-person early voting is a more reliable method of voting
305 since it does not involve many of the reasons why mail ballots may be rejected.
306 - Require local jurisdictions to provide statistics on all forms of early voting in order to
307 determine if local jurisdictions are implementing federal laws.
308 - Consider how adopting no-excuse mail balloting for federal elections may induce an
309 unfunded mandate on local election officials, some of whom are resource poor.

[41] This issue is raised, but not studied, by Lyons, *supra* note 28.
[42] See: Gimpel, *supra* note 37.

April 27, 2010

The Honorable Charles E. Schumer
Chair, Senate Rules and Administration Committee
305 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Robert F. Bennett
Ranking Member, Senate Rules and Administration Committee
305 Russell Senate Office Building
Washington, D.C. 20510

RE: H.R. 2510

Dear Chairman Schumer and Ranking Member Bennett:

The National Association of Counties (NACo), the only national organization that represents county governments in the United States, would like to lend its support to the "Absentee Ballot Track, Receive, and Confirm Act" (H.R. 2510). The bill will amend the Help America Vote Act of 2002 to provide reimbursement to states for the costs incurred in establishing a *voluntary* program to track and confirm the receipt of absentee ballots in elections for federal office.

County and state governments are responsible for the proper conduct of elections. Unfortunately, federal legislative efforts are often undertaken that would impose specific voting requirements and procedures that improperly invade the province of local election officials. This legislation, however, provides funding for states that establish, *if the state so chooses,* an absentee ballot tracking system. While many jurisdictions currently provide an online ballot tracking system, this legislation, and the funding it would provide, would serve to increase the availability of this service to more voters across the country. NACo is also appreciative that the legislation provides for the optional use of a toll-free telephone number for those localities without an Internet site.

We thank you for your leadership in this matter and look forward to working with you on this and other voting-related legislation.

Sincerely yours,

Larry E. Naake

Larry E. Naake
Executive Director

25 Massachusetts Avenue, NW / Suite 500 / Washington, DC 20001 / 202.393.6226 / fax 202.393.2630 / www.naco.org

NATIONAL ASSOCIATION OF POSTAL SUPERVISORS
National Headquarters
1727 KING STREET, SUITE 400
ALEXANDRIA, VA 22314-2753
(703) 836-9660

May 4, 2010

The Honorable Charles Schumer
Chairman
Committee on Rules and Administration
United States Senate
Washington, D.C. 20510

The Honorable Robert Bennett
Ranking Member
Committee on Rules and Administration
United States Senate
Washington, D.C. 20510

Re: Endorsement of the Universal Right to Vote by Mail Act in connection with May 5, 2010 Hearing on Voting by Mail

Dear Chairman Schumer and Senator Bennett:

Thank you for scheduling the May 5 hearing on Voting by Mail and its underlying examination of state and local experiences. I write on behalf of the National Association of Postal Supervisors to endorse the need for legislation that guarantees the right of every eligible American voter to vote by mail in a federal election. I request the inclusion of this correspondence in the official record of the Committee's May 5 hearing on Voting by Mail.

The National Association of Postal Supervisors endorses legislation introduced in the Senate today by Senator Ron Wyden and pending legislation in the House of Representatives introduced by Rep. Susan Davis (D-CA) that would allow citizens to request permission to vote by mail in federal elections without requiring a reason for the request. The Universal Right to Vote by Mail Act amends the Help America Vote Act of 2002 to prohibit a state from imposing additional conditions or requirements on the eligibility of an individual to cast a vote in federal elections by mail, except to the extent that it imposes a deadline for requesting the ballot and returning it to the appropriate state or local election official. The House bill (H.R. 1604) was approved by the Committee on House Administration on July 16, 2009 and awaits a floor vote in the House of Representatives.

We strongly believe that state election practices and the uniformity of the rights of all American voters would be advanced by such legislation. In addition to providing Americans a convenient, secure and inexpensive way to participate in federal elections, the expansion of mail-in voting would provide additional, much-needed revenue to the Postal Service. These dual benefits provide a win-win situation for the nation and for all Americans.

As you know, mail-in voting is a method of distributing ballots for an election that has proven to be convenient and safe. Most commonly, mail-in voting when used in connection with absentee balloting supplements the use of traditional polling places. The ballot is requested, then voted and returned to the election office to be counted. Twenty-eight states currently provide this alternative to voters, and that number is growing. Americans are attracted to the flexibility, convenience and safety of voting by mail.

In 2008, more voters than ever participated in the democratic process by casting absentee ballots. One in four Americans cast their ballots by marking their ballot at home and returning it through the mail. This growing trend can be attributed to the fact that voters in 28 states currently may exercise "no excuse" absentee voting, which allows citizens to vote by mail without requiring a reason for the request.

The rules governing the conduct of elections throughout the United States are largely created by each state. Unless preempted by federal law, each state has its own rules regarding mail or absentee voting. All states allow for some voters, typically the disabled and infirm, to vote with an absentee ballot. Currently, twenty-three states still require a voter to provide an excuse to election authorities before they may receive a mail or absentee ballot, some even requiring notarized affidavits of absence to first be filed by the voter. While these states still retain obstacles that stand in the way of voting by mail, the trend is clearly towards greater freedom of choice and easier access to mail voting.

As noted, twenty-eight states currently allow any voter to choose a mail-in absentee ballot. States can go even further by maintaining a list of voters who choose to always vote by mail and then automatically sending them a mail-in ballot every election. Florida's statute provides an excellent example of a simple absentee voting law that allows access for all voters. Millions of ballots have been cast in "no excuse" states with no greater problems than those in states that require excuses. Oregon, a state that has cast its votes entirely by mail since 1998, has prosecuted just nine cases of mail ballot fraud involving sixteen ballots out of 76,393,979 ballots cast or 0.00000012% of all ballots cast over the past eleven years.

Twenty-one states, the District of Columbia, and all the territories still require voters to provide a qualifying excuse in order to vote absentee by mail. Requirements to justify a qualifying excuse differ among state laws, but many are burdensome. Congress should enact legislation that removes the unnecessary requirements that have created such barriers for voters. Such legislation should level the playing field and give all voters the option to vote by absentee ballot in federal elections whether by choice or need. The legislation should not require anyone to vote by mail but merely provide the option of voting absentee without having to respond to intrusive and unnecessary questions that make it more difficult for voters to participate in federal elections.

It is time that the Congress passes legislation that guarantees the right of any eligible voter to vote by mail in a federal election. The federal government has a significant interest in making sure every eligible voter who wants to cast a ballot in a federal election has that opportunity. Under the Constitution, Congress has the authority to regulate elections. As it has in the past, Congress should act now to strengthen our democracy when significant disparities in voting opportunities for voters among different states exist. By giving all voters the same ability to vote by mail, regardless of state residency, Congress will have taken a critical step toward encouraging the full participation of all citizens in federal elections. Congress should recognize the benefits of an election practice established by over half of our nation's states and ensure a uniformity of rights for all voters.

Mr. Chairman, thank you for your consideration of these comments and for your long-standing leadership in strengthening the democratic process to give American voters the choices they deserve.

Sincerely,

Ted Keating
President

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

The National Conference of State Legislatures has been tracking the "Universal Right to Vote by Mail Act of 2009" (HR 1604) sponsored by Rep. Susan Davis (D-CA). HR 1604 would require all states to provide no excuse absentee ballots by 2012. The bill states that if an individual in a state is eligible to cast a vote in an election for federal office the state may not impose any additional conditions or requirements on the eligibility of the individual to cast the vote such election by mail, except to the extent that the state imposes a deadline for requesting a ballot and related voting materials from the appropriate state or local election official. The proposed legislation also requires signature verification for absentee ballots.

NCSL conducted a survey of states that do not currently maintain a no-excuse absentee voting by mail system. The results, presented here, vary widely reflecting the unique solutions each state has created to reflect its own constituency. Legislators were eager to elaborate on how each state-established system addressed the state specific challenges. The following states would be preempted by HR 1604.

Responses to Proposed Legislation: "Universal Right to Vote By Mail Act"

State	Response
Alabama	Looked into this legislation, in 2008 no bills passed. County clerks, judges, Secretary of State and the legislature all have ideas as to how this should be done and are continuing to discuss what would be best for Alabama High cost of implementation is also a problem. In 2009, one bill was introduced and failed. This bill would have allowed any qualified elector to apply for absentee without stating a reason.
Connecticut	In 2008, this issue was offered as an amendment to another piece of legislation and it was tabled as both sides wanted to discuss it. In 2009, eleven bills were introduced relating to vote by mail, early voting, absentee voting, and no-excuse absentee voting. All failed.
Delaware	In 2008, several bills introduced in the House to reduce the burden on the voter via absentee ballots, but defeated in the Senate. Delaware Legislature is not supportive. In 2009, no legislation was introduced.
Illinois	IL has early voting which allows you to vote between 4 wks and the Friday before the election. After two years of this (early voting), the voters really like this process. The clerks in IL aren't clamoring for no-excuse absentee. NB - this is a democratic legislature. There is a concern about fraud and coercion - if there is fraud, it is through absentee voting according to the Cooke County clerk's office. 2-3 yrs. ago IL tried to pass a bill allowing over -65 yr. olds no excuse absentee and that narrow bill didn't even pass the IL House. It is

Denver Office: Tel: 303-364-7700 | Fax: 303-364-7800 | 7700 East First Place | Denver, CO 80230
Washington Office: Tel: 202-624-5400 | Fax: 202-737-1069 | 444 North Capitol Street, N.W., Suite 515 | Washington, D.C. 20001

NCSL

	generally believed that early in-person voting meets the needs of IL's voters and assuages fraud concerns. In 2009, five bills regarding early voting were introduced. Four are pending. A bill eliminating in person absentee voting failed.
Kentucky	The Kentucky General Assembly has looked at "no excuse" absentee voting. However, the proposal was never enacted into law. Most of the opponents of no-excuse absentee voting have expressed concerns over the enhanced opportunities for casting multiple votes. Vote fraud is a continuing problem in certain parts of Kentucky. The proposed federal law would indeed preempt Kentucky's oversight of its own election system. KY has early voting. In 2009, six bills were introduced in Kentucky regarding early voting and absentee voting. All six failed.
Louisiana	LA has early voting which is viewed as sufficient. Has not considered relevant legislation recently on this issue. There is a concern about fraud given the state's colorful past, but anyone can vote no excuse in person early voting during the seven election days prior to the actual day of. In 2009, no bills were introduced on this issue.
Massachusetts	Constitution would need to be amended. Difficult to do; however in 2008 a bill was placed before the Joint House/Senate session in 2006-2007, but the debate over same-sex marriage derailed it which means proponents will had to start all over again in 2009. In 2009, nine bills were introduced regarding absentee no-excuse voting. All nine are currently pending.
Michigan	Use of optical scan machines has decreased the number of spoiled ballots. What spoiled ballots MI does have; however come from absentee ballots. Mailed in ballots do not give voters the second chance that they otherwise have when they actually go to the polls (voting machines let voters do this if ballot is miscast). Absentee ballots cause machine breakdowns because of the folds in the ballots. No evidence to document that no excuse absentee results in higher voter turnout. See Ford Carter and Ford Baker election reform reports. MI now requires photo ID at the polls. Voting by mail is seen as a way to avoid this requirement. There is evidence of fraud - In the city of Benton Harbor, an entire election was overturned by the court due to widespread voter fraud in absentee voting. There is no system in MI to assure absentee ballots are received and counted. MI legislature prefers and is looking to implement early in-person voting through bi-partisan legislation. In 2009, five bills were introduced and all are pending further action.
Minnesota	Has been looking at bills which incorporate no excuse absentee voting for 14 years. In 2007 legislative session, it was passed as part of a larger omnibus appropriations bill, but the Gov. vetoed the no excuse absentee portion on fraud and coercion grounds. Also the Gov. stated in his veto message that a fundamental aspect of fair elections is that they be conducted in the open and no excuse absentee mail in voting undermines that concept. There is early voting in MN. In 2009, twelve carry over bills addressing this issue; no action has yet been taken.
Mississippi	In 2008, a political argument involving fraud and gerrymandering has prevented any serious debate on the issue. In 2009, thirteen bills were introduced and each failed.
Missouri	Missouri law requires reasons for absentee voting. No early voting either. In 2009, ten bills were introduced allowing absentee or early voting. All of these bills failed.
New Hampshire	Best voting turnout in the country – why change it? Vote by mail – very unpopular idea in NH. Recently expanded the situations under which people may ask for absentee ballots (military, students, out of the precinct or disabled). NH looks at voting as a community experience. Face to face social interaction is invaluable. Also working to create a holiday for voting. Also, they resist early voting because information may be revealed just before the election – and those who vote by mail would be voting at a disadvantage (less informed). In 2009, two bills were introduced. Both failed.
New York	There is interest in streamlining the absentee ballot statute. NY's absentee ballot provisions are constitutionally mandated. Art. II of the NY Constitution requires that a person be physically ill or disabled or out of the county. It would take at least 2 yrs. to change the NY constitution. There is no interest in NY to amend. Instead, there is a bill in the drafting stages to remove the statutory burdens to absentee voting. In 2009, twenty-four bills were introduced. All are currently pending.

North Carolina	Passed legislation that established registration and one-stop voting sites. This allows NC voters to register and vote up to 3 days before election day at one stop voting sites and is in lieu of no excuse absentee. By requiring the voter to show up in person to register (and vote) the issue of fraud is addressed. Most telling is that in the elections of Oct. and Nov., 2007, voter participation increased. In 2009, one bill was introduced to improve absentee voting, especially with regards to military and overseas voters. This legislation is pending.
Pennsylvania	In 2008, there were no bills/votes on this issue. Opponents of the concept see it as an end-run around vote by mail (such as Oregon) and there is a strong feeling that one should show up at the polls to vote. Article VII Section 14 of the Constitution of the Commonwealth of Pennsylvania very specifically authorizes the use of an absentee ballot under certain circumstances. In 2009, six bills in this area are pending.
South Carolina	Currently requires excuses and pre-approval for absentee voting. Has passed a no excuse by mail absentee voting bill in the Senate for two sessions – held up in the house. The house generally does not support any early voting. In 2009, there are fifteen carry-over bills pending.
Tennessee	There is a bill proposed, HB 17 and SB 12 to do no excuse absentee, but it won't pass for several reasons. It's too expensive, TN already has no excuse early voting where the voter can show up between 20th and 5th day before election day to vote. 1.1 million voters voted early in the last election. The undercurrent in TN is that there is the potential for fraud, it is too expensive and there is an unwanted (by them) burden placed on clerks to count all of the mail-in ballots. In 2009, seven bills regarding absentee voting are pending.
Texas	There is no excuse absentee in TX because there is extended in person early voting (anywhere from 8 to 14 days prior to the election). Larger counties even have mobile early voting units. Clerks and election officials prefer early voting to no excuse absentee, as do the voters. 45% of the total democratic primary ballots were submitted during early voting. Evaluation of voter fraud by the state revealed that mail-in ballots are the major area of concern. There is super-precinct voting on election day as well. In 2009, six bills regarding absentee voting have failed. Two bills regarding early voting and no excuse absentee voting are pending.
Virginia	In the past Virginia has resisted efforts to liberalize absentee voting due to concerns about voter fraud and the additional costs that would be incurred by local Voter Registrars to support expanded absentee voting. VA does have early voting and experienced record turn out at the polls in 2008. In 2009, thirteen bills were introduced and failed. One bill which elarifies that the deadlines for having ballots ready for absentee voting passed.
West Virginia	Absentee voting by mail requires an excuse. Early voting (in person) 30 days before the election at county courthouse. Has increased voter turnout – small state, not many absentee voting, concerned about privacy. Cost would be difficult for state. Currently, 20% vote early in person. In 2009, four bills were introduced and failed. One bill which authorizes county commissions to designate early voting locations outside of the courthouse passed.

For more information, please contact Susan Parnas Frederick (202-624-3566, susan.frederick@ncsl.org) or Emily Taylor (202-624-3586, emily.taylor@ncsl.org) of the NCSL DC staff.

May 5, 2010

Charles Schumer, Chairman
Robert Bennett, Ranking Member
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Bennett:

On behalf of the hundreds of thousands of members of People For the American Way, thank you for holding today's hearing on voting by mail. As part of the hearing record, we wish to share our strong support of the Universal Right to Vote by Mail Act sponsored by Representative Susan Davis and Senator Ron Wyden. This much needed legislation is about fairness, giving all voters the option to vote by mail, for any reason, in federal elections. Every effort should be made to remedy current flaws in the system in order to increase voters' faith and participation in our democratic process.

In at least half of our states and territories, voters are only eligible for mail-in (or absentee) ballots if they have certain excuses, such as being elderly, ill, out of town on Election Day, or engaged in military service, while voters in other states can vote by mail at will. The Davis-Wyden bill recognizes that many other circumstances frequently prevent voters from making it to the polls on Election Day, including work, family commitments, or other responsibilities. Accordingly, this bill allows every citizen to vote by mail when they are unable to make it to the polls and are otherwise ineligible for an absentee ballot.

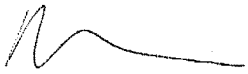
In this way, the Davis-Wyden bill is an additional tool to better assist all Americans in exercising their right to vote regardless of their circumstance and/or the obstacles they may face. The Davis-Wyden bill is not a replacement for voting at the polls, nor does it place additional requirements on the states. It does, however, remedy inconsistencies across the country. The opportunities and/or barriers to participation in federal elections should not depend on where you live.

By providing the option to vote by mail, the Davis-Wyden bill is particularly notable in its encouragement for, and honoring of, the time-honored ritual that brings American voters together in a common act of civic participation. The Davis-Wyden bill does not force voters to vote by mail – it simply gives voters the option to participate on their own timeline. Making this option available has overwhelming support among the American people. Studies show that support for voting by mail is consistent across nearly every demographic – including age, income level, race, education, employment status, geographic location, and party affiliation. In fact, states that give voters the universal right to vote by mail experience up to 30% growth in the use of mail-in ballots.

2000 M Street, NW ♦ Suite 400 ♦ Washington, DC 20036
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

The Davis-Wyden bill is timely because it reflects the needs and preferences of those who prefer to vote by mail. Not only does this encourage participation, but it also eases the strain on poll workers and shortens the long lines at polling places. We commend the bill's sponsors for introducing such a well-conceived bill that stays above partisan politics and attempts to engage as many people as possible in the electoral process. We urge all Members to support efforts to pass the Davis-Wyden bill and make civic engagement in our elections easier, fair, and accessible for all people.

Sincerely,



Michael B. Keegan
President

Marge Baker
Executive Vice President for Policy and Program

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

RUTH Y. GOLDWAY
CHAIRMAN

April 27, 2010

The Honorable Charles E. Schumer
Chairman, Senate Rules and Administration Committee
305 Russell Senate Office Building
Washington, DC 20510

Chairman Schumer:

I am writing in my individual capacity to support H.R. 1604, the Universal Right to Vote by Mail Act. It is my understanding that Senator Ron Wyden (D-OR) will be introducing a Senate companion bill.

In my testimony before the House Committee on Administration on October 16, 2007, I pointed out that the U.S. Postal Service provides a reliable and trusted means of voting for many Americans. Further, the Postal Service is actively working with State and local election officials to make the Vote by Mail process simpler and more accountable.

Absentee ballots account for an increasing percentage of votes cast nationally, but there is great disparity in rates of participation between states which provide for no-excuse or universal absentee voting and those which require particular justification for each election. As I said in my testimony:

"Offering citizens the option of voting by mail provides significant advantages, including the potential to increase voter turnout for national, state and local elections. Voters would not need to take time off from work, find transportation, locate the right polling place, get baby-sitters or rush through critical yet sometimes complicated ballot initiatives. (...) Voters appreciate the opportunity to read a ballot slowly in the privacy of their homes, and to drop it in the mail, exercising their voting franchise thoughtfully and carefully."

In my home state of California which offers no-excuse or universal absentee voting, more than half the votes in statewide elections are cast by mail, a percentage that has been steadily growing over time. In the June 2008 California primary and the November 2008 California general elections, for example, 58.71 percent and 41.64 percent of all votes respectively were Votes by Mail. In the May 2009 statewide special election, the percentage of Vote By Mail Voters had climbed 62.19%.

Legislation extending universal access to absentee voting in national elections beyond the 29 states where it is already in effect would increase participation, interest and greater confidence in the electoral process.

Having served for twelve years on the Postal Regulatory Commission, I am familiar with the efficiency and reliability of the mail service provided by the Postal Service. I strongly support giving citizens the option to cast mail-in ballots as a secure and efficiency alternative to in-person voting.

Sincerely,

Ruth Y. Goldway

Ruth Y. Goldway
Chairman

Legislative Building
PO Box 40220
Olympia, WA 98504-0220
Tel 360.902.4151
Fax 360.586.5629
www.secstate.wa.gov

May 5, 2010

Statement by Washington Secretary of State Sam Reed
Senate Committee on Rules and Administration

It is my distinct pleasure to join Secretary Brown in her remarks about how well vote-by-mail is working in the Pacific Northwest. It is a huge hit with our voters, increases participation, reduces costs, and provides time-pressed voters more than two weeks to consider their ballot in the comfort and privacy of their own homes.

I commend to your attention the package introduced by Senators Wyden, Merkley and Cantwell. They, along with Senator Murray, can describe how well this reform has been received. Our election officials sing the praises of this system of voting, and are appreciative of the methodical, incremental way we adopted and implemented vote-by-mail.

Citizens in the Northwest have been voting this way for some time, and there are no kinks or downsides that have caused us concern. Oregon voters adopted the system by initiative in 1998, by a remarkable 70 percent of the vote. Washington state voters likewise led the way for this reform in the Evergreen State, by choosing vote-by-mail when this option was made available.

More than 35 years ago, our Legislature in Olympia authorized all eligible voters to request a no-excuse-needed absentee ballot and in 1993 said voters could sign up for permanent mail-vote status, meaning they automatically receive a ballot every election. Also in 1993, counties were authorized to conduct nonpartisan elections entirely by mail. By 2004, over 68 percent of our voters cast General Election ballots by mail, and so in 2005, our lawmakers passed a local-control measure that said counties could decide to switch entirely to vote-by-mail. Within two years, virtually all of our 39 counties made the switch, with county officials from both parties concurring with their voters that it was the preferred method. Today, only Pierce County (Tacoma) has a relative handful of polling places left, and less than 2 percent of the state's vote is cast by this method. Per-voter cost to run those pollsites was nearly $25 in the 2009 primary and $4.27 in the general, much higher than the vote-by-mail average.

There are many clear benefits to vote-by-mail, in my view. No. 1 is that I believe we have a better informed electorate when they have more than two weeks to consider their actual ballot, with all of the election materials, Voters' Pamphlet, campaign literature and so forth spread on their dining room table. Having one single Election Day may not work for some families. They may have to work or have a sudden family emergency to deal with. People might not know where their polling places are and they

might be too busy with their hectic schedule to go across town to vote. Vote-by-mail fits the lifestyle and how we want to vote in the 21st Century. People can find time that is relatively calm, such as late at night or on the weekend, and fill out that ballot. We want to remove artificial barriers to voting.

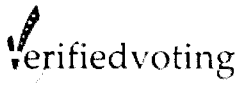
We provide a generous number of days to vote. Ballots are available in-person at the county election office 20 days before the election and are mailed out 18 days before the Election Day deadline for returning the ballot. (Oregon counts those actually received by Election Day; we count those postmarked by Election Day.) Military and overseas voters get more time.

Voter turnout has increased, costs have been contained, and fraud and abuse have not been a problem.

Having spent most of my adult life in state and county election administration, and serving as both president and executive board member of the National Association of Secretaries of State, I commend this system, and this legislation, to your consideration.

Sincerely,

SAM REED
Secretary of State



May 4, 2010

The Honorable Charles Schumer
Chairman, Committee on Rules and Administration
The Honorable Robert Bennett
Ranking Member, Committee on Rules and Administration
United States Senate
Washington, D.C. 20510

Re: HR 2510, the Absentee Ballot Track, Receive, and Confirm Act

Dear Chairman Schumer and Ranking Member Bennett,

We write to you to voice support for HR2510, the Absentee Ballot Track, Receive, and Confirm Act. Verified Voting is national nonpartisan organization devoted to promoting voting systems that are accessible, reliable, transparent, and publicly verifiable.

HR 2510 is common-sense legislation that would authorize funding for the Election Assistance Commission to reimburse States for the cost of establishing a program to allow a voter to use either a an Internet site (or a toll-free telephone line) to learn if local election officials have sent, received, and counted his or her absentee ballot.

As the use of absentee balloting grows, effective tracking of the delivery and processing of such ballots becomes increasingly important to the security of and public confidence in elections. HR 2510 is timely and much-needed legislation. We urge its prompt passage by the Committee and the full Senate.

Respectfully,

Pamela Smith
President, Verified Voting

NOMINATION OF WILLIAM J. BOARMAN TO BE THE PUBLIC PRINTER

WEDNESDAY, MAY 25, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The Committee met, pursuant to notice, at 10:06 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Warner, and Bennett.

Staff present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Staff Director; Veronica Gillespie, Elections Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Justin Perkins, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Abbie Platt, Republican Professional Staff; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Okay. Good morning, and I want to thank my colleagues here—I apologize for being late—and thank our witness here today. I want to thank my colleague on this Committee, Senator Warner; he is going to Chair the remainder of the hearing, and I appreciate him doing that, because I had a previous commitment, but we wanted to move this on. And, of course, I want to thank Senator Bennett always.

The hearing will come to order. I would like to welcome everybody, including our Ranking Member, Senator Bennett, and Senator Warner, and especially our nominee, William "Bill" Boarman. The Government Printing Office was created by the Printing Act in 1860 for the production and distribution of information products and services for all three branches of the Federal Government. GPO opened its doors on March 4, 1861. That is the same day President Lincoln became the 16th President of the United States. In fact, next year is the GPO's 150th anniversary.

Today the Public Printer employs 2,400 staff, manages annual revenue of $1 billion. From the earliest days of the Nation, congressional leaders recognized the need for printed documents to assist both chambers in Congress in communicating with the American public. James Madison cited in his notes of the Federal Convention of 1787 the delegates' concern over the Government's responsibility to inform the citizenry when he wrote, "It should not be in the option of the legislature to conceal their proceedings." This is the GPO's primary mission: "Keeping America informed."

GPO produces the Nation's most important Government information products, such as the Congressional Record and Federal Register. Both are produced at the GPO's main plant in Washington.

However, nearly 60 percent of the printing the GPO manages for the Federal Government is procured through private sector vendors throughout the country. On a daily basis, the agency maintains between 600 and 1,000 print-related projects through a longstanding partnership with America's printing industry.

Congress is dependent upon the ability of the GPO to provide printed and electronic versions of our legislative documents and the Congressional Record in a timely manner. With the ever increasing workload of Congress and our demanding schedules, the agency needs to continue to provide the necessary resources to meet our legislative demands so that we can carry out our duties as mandated by the Constitution and governed by the rules of both Houses of Congress.

The Public Printer faces diverse and pressing challenges in the upcoming years, which I will not list here, but we know what they are. And now, if confirmed, Mr. Boarman would be the 26th Public Printer. He is a practical printer by trade. He began his career by serving a 4-year union apprenticeship at the McArdle Printing Company in Washington, D.C. Following completion of his apprenticeship, he worked in a number of local establishments. In 1974, he went to work for the GPO. In 1977, he took a leave of absence from the GPO after being elected a full-time union official. He has continued a professional relationship with the GPO that spanned more than 30 years.

Over the years, he has testified on GPO matters on a number of occasions before our Committee and before the Joint Committee on Printing. Since 1989, he served as president of the Printing, Publishing, and Media Workers Sector of the CWA, Communications Workers of America, and president of the International Allied Printing Trades Association.

Mr. Boarman has served as Chairman of the Board of Trustees of the CWA/ITU-negotiated pension plan, CWA Pension Plan Canada, and Executive Board of the Council of Institutional Investors. So we are fortunate to have a nominee of Mr. Boarman's caliber and experience for this important post, and I look forward to your testimony, sir.

I call on Bob Bennett.

OPENING STATEMENT OF SENATOR BENNETT

Senator BENNETT. Thank you very much, Mr. Chairman. My connection with the GPO goes back to the time when I chaired the Leg. Branch Subcommittee of the Appropriations Committee and went down to the GPO and spent time with the Public Printer, went through the plant, got an understanding of how big an operation this really is. And since that introduction of the GPO, I have seen it change. I have seen it grow. The number of its employees has gone dramatically as its productivity has gone up dramatically, which is a pattern that we see throughout American business generally.

So, Mr. Boarman, we welcome you here, recognize that you will be taking on a very significant management challenge, and I simply want to take the opportunity to thank all of those who have gone before you, not just the Public Printers but all of the GPO employees who have worked so tirelessly on behalf of the Congress

and the executive branch. This is an agency, as the Chairman indicated, that serves more than one branch of Government, even though the funding does come through the Congress.

So it is very important that we continue the innovation, the change, the pattern of keeping up with the times that has been established in the last decade, and I look forward to hearing what plans you have to do that, and I am happy to welcome you to the Committee.

Mr. BOARMAN. Thank you, sir.

Senator BENNETT. Thank you, Mr. Chairman.

Senator WARNER [presiding]. Thank you, Senator Bennett.

We have been joined by my colleague and friend, Senator Cardin from Maryland, and I know he is here for the purpose of introduction. I will simply add one point. Mr. Boarman, if confirmed, taking on this position is of particular interest to both Senator Cardin and me since so many GPO employees live in both of our States. I know you reside on the other side of the river, but this is an organization that has a great deal of effect right here in the national capital area, and I am very pleased that my friend and colleague, Senator Cardin, is here for the purpose of introduction.

Senator Cardin.

STATEMENT OF HON. BENJAMIN L. CARDIN, A UNITED STATES SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Senator Warner, thank you very much. Senator Bennett, thank you for your attention to these issues. I am not going to repeat everything that Senator Schumer has said, but I do want to welcome my constituent, Bill Boarman, to this Committee and strongly recommend his approval, his confirmation.

Bill Boarman has been a lifelong resident of Maryland. He currently resides in Severna Park. And from the beginning of his career as a pre-apprentice at the McArdle Printing Company in Washington, D.C., in 1966, Mr. Boarman has devoted his life to the printing industry and protecting the workers within the printing industry. As has been pointed out, he has worked his way up to the senior vice president of CWA, and he has emerged as an icon, quite frankly, in the printing industry. He is so well qualified for this position. He is an expert. He is well respected by the workers at the Government Printing Office, and, Senator Warner, as you pointed out, many of those workers live in Maryland and live in Virginia, and we have heard nothing but praise as to the selection of Mr. Boarman to lead this agency.

Beginning in 1974, Mr. Boarman spent some of his early years as a career journeyman printer in the United States Government Printing Office, so he has the experience. He worked his way up, as I said, in the unions. He has been involved in every aspect and has been called upon by us as an expert in this area. We rely upon Mr. Boarman's views.

He has been an informal adviser to the leadership at the Government Printing Office. He has been called upon many times to help out, and now we have the opportunity to have him as our director. He is so well qualified. He has the leadership that is needed to bring us into the issues that Senator Bennett has raised dealing with new technologies and the new needs within the printing field.

So I am proud to recommend him, and I am proud that he is a fellow Marylander.

Senator WARNER. Thank you, Senator Cardin. Of course, you are welcome to stay, but I know time constraints may mean that you have got to move on.

I know as well that Senator Mikulski was hoping to be here. Scheduling prohibited her, but she has got a statement of introduction as well.

[The prepared statement of Senator Mikulski inserted into the record]

Senator WARNER. At some point along the way, we may be joined by our friend Steny Hoyer from the other side of the body. And if he comes in, we will interrupt your testimony, Mr. Boarman, to let him make his opening comments.

So, with that, I would ask the nominee to stand and raise his right hand? Do you swear that the testimony you are to provide is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BOARMAN. I do.

Senator WARNER. Please be seated. Now, Mr. Boarman, if you would like to go ahead and make an opening statement. I know you have got friends and colleagues around you. If you want to make any introductions to the Committee, please feel free to do so. Then we are anxious to hear your statement.

TESTIMONY OF WILLIAM J. BOARMAN, OF MARYLAND, TO BE THE PUBLIC PRINTER

Mr. BOARMAN. Thank you, Mr. Chairman, and thank you, Senator Bennett, for holding this hearing today. I fully appreciate how busy each of you are with the important work of the Senate, and I am honored by your presence here today for my hearing.

I want to thank Senator Cardin for his wonderful introduction. I hope that Congressman Hoyer will be able to make it. Both of these gentlemen have a record of standing up for the citizens of Maryland, and I am proud that they wanted to be here for me today. It is an honor.

Mr. Chairman, I would like to introduce a few very special people that are here with me today. First, my daughter, Lauren, who is sitting right behind me. Lauren is my only daughter and looks after me with the love and support that only a daughter can offer.

I would like to mention my son, Christopher—I think he is watching this right now. He could not be here because he is teaching a spring course at Berkeley where he is finishing his Ph.D. in medical anthropology.

Also, I am honored to introduce my colleague and friend for the last 22 years, Larry Cohen, the president of the Communication Workers of America. He is sitting right behind me, and he also is my boss.

And, finally, a young man whose grandfather happens to be my very good friend, and his name is Chase Lawson. He is sitting over here. Chase is a junior at Mount St. Joe's in Baltimore, and he is very interested in government and politics, and I invited him here today so that he could get a first-class civics lesson on the advice-

and-consent role of the U.S. Senate as prescribed by the Constitution. So welcome, Chase.

Let me begin by saying I am deeply honored by the President's nomination to be the Public Printer of the United States. For a practical printer by trade, there is no higher post in the Nation than as head of the GPO, with its distinguished tradition of supplying the printing and information needs of the Federal Government for almost 150 years.

I have been a printer for more than 40 years. I learned my trade in the private sector and worked in several large commercial printing plants and in two large daily newspapers. As was stated, I was appointed to the GPO in the 1970s as a printer and left the GPO for a full-time job with my union. Now, since 1989, I have served as president of the Printing, Publishing, and Media Workers Sector of CWA.

But while at the GPO, I worked to achieve practical agreements with management that opened the door to technological change and saved jobs. And during my career with CWA, I have worked toward the same objective, establishing a proven track record of cooperation and achievement in labor-management relations in the printing and publishing industry.

I have also served in a number of executive capacities for a variety of boards and councils and have served for the last 21 years as chairman of the board of the CWA/ITU-negotiated pension plan, and as president of the Union Printers Home Corporation, which is a retirement community our union runs in Colorado Springs, Colorado.

Now, from executive decision making to fund management and controlling costs to making payroll, I have had a broad range of management experience that I hope you will agree has equipped me to lead the GPO, if I am confirmed.

The GPO today is a substantially different agency compared with the one that I left many years ago. It employs fewer employees but is significantly more technologically advanced. However, one thing has not changed: The GPO continues to employ an extraordinarily talented group of men and women who every day carry out their responsibilities with unmatched expertise and dedication. If there is any one asset that best characterizes the GPO, it is the superb quality of the people who work there.

I think the GPO has made progress in recent years in improving functions it carries out. If confirmed, I look forward to continuing with that progress and to ensure that what the GPO strives to accomplish in the coming years will contribute measurably to the distinguished record of service it has compiled over the past 150 years.

Finally, on a personal note, I have had the high honor and privilege to have been consulted by and testified before some of the true giants of the Senate in days gone by. In just this Committee, I have had close personal relationships with former Chairman: Claiborne Pell, Charles McC Mathias, Mark Hatfield, Wendell Ford, and John Warner. Each of these men have sought my counsel and judgment on matters that relate to the GPO. Likewise, I have worked with almost every Public Printer since the Nixon administration to stand beside them on matters that had grave importance to the

agency as it changed and evolved from administration to administration and Congress to Congress.

I believe it was these unique relationships and experience that the White House focused on when they asked me to serve the President and accept the nomination as the 26th Public Printer of the United States. I truly believe that all of this background and 35 years' involvement with the GPO will serve me well if I am confirmed by the Senate as the next Public Printer. I am ready and willing to serve if I can get your support.

Thank you, Mr. Chairman, and I would be happy to answer any questions that you and Senator Bennett may have of me at this time.

[The prepared statement of Mr. Boarman was submitted for the record]

Senator WARNER. Well, thank you, Mr. Boarman. Thank you for your testimony, and I look forward to getting to questions in a moment.

Let me just add for the benefit of Chase, you know, you are also getting something rather unusual in today's hearing. Not only are you going to get to see your friend Mr. Boarman testify and the Majority Leader of the House of Representatives come all the way over to the Senate to make an introduction, but you are also getting something particularly unusual in a hearing of this nature. As a new Senator, I usually sit way, way down there on the end, and it is a special time that I get to actually sit up here in the big chair. So there will be people in this room making sure that I do not mess up as well.

But recognizing before we get to my questions that we have been joined by Representative Hoyer, the Majority Leader of the House to make an introduction as well, I will call on my good friend Steny Hoyer.

STATEMENT OF HON. STENY HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. HOYER. Thank you very much, Mr. Chairman, and I am pleased to see you in the exalted seat of the chairmanship. I know it is tough, having been a Governor and running the place, to come and sit at the end of the line. So this is a change.

I want to say I am particularly pleased to be here with Senator Bob Bennett. I think Senator Bennett is one of the outstanding Members of the Congress. He is a Senator who has served with the public's interest uppermost in his mind, with a view towards making democracy work, not simply having confrontation but sitting down at the table and trying to make democracy work.

Senator Bennett, I want to say I am one Democrat who is going to be very sorry to see you leave the Senate. I think it is a loss for Utah. I think it is a loss for the Nation. You represented, I think, and continue to represent the kind of Member of the Senate and the House that the American public wants to see. It is unfortunate that a very narrow band of people in both of our parties think that what we need is confrontation, not collaboration. The country will be lesser for your loss, and I want to thank you for your service.

Senator BENNETT. Thank you very much, and I would remind you it is Mr. Boarman's hearing and not mine.

[Laughter.]

Senator BENNETT. Thank you.

Mr. HOYER. Well, and I will not vote on confirming you or not confirming you, so I will know my proper role.

Mr. Chairman, I am here to—and I will submit a statement for the record—just briefly to say that I have known Bill Boarman for a very long period of time. He and his wife are good friends, so I am not objective on his nomination. But as you have seen from previous testimony—I presume Senator Cardin was here and Senator Mikulski as well, probably—we have all known him very well, not only his expertise that the Public Printer will have to deal with, but also his judgment, his wise counsel has been, as he said, for many of us throughout my tenure in the Congress of the United States, which now I am in my 30th year, has been extraordinarily well received and important. And I think the administration has made an excellent choice for the Public Printer. I think he will work well with the people who work at GPO. I think he understands the necessity to look to make a solid business model work for the GPO. I know he has talked about that in his statement.

So I will not belabor the point other than to say that I am strongly in support of his nomination. I think he will serve our country well and serve the Government Printing Office well and serve the Congress well. And I urge his confirmation, and thank you for this opportunity to appear.

[The prepared statement of Mr. Hoyer was submitted for the record]

Senator WARNER. Thank you, Leader Hoyer.

Mr. HOYER. Also, I will vote to confirm Senator Bennett.

[Laughter.]

Senator WARNER. I am glad you said that after the convention instead of before.

Mr. Boarman, again, thank you for your testimony. And, Representative Hoyer, thank you for your statement. Obviously, from your background you are a printer's printer, a great background, varied and the kind of experience across the board in terms of all the aspects of the challenge that the President has selected you for.

I have got a couple of questions, though, before we get to Senator Bennett. I am sure this body will confirm you, but, you know, printing is going through as much transformation as any industry that is around.

I wanted to start my questioning, though, with—you know, traditionally, the GPO has had a unique role in terms of the relationship kind of as a public-private entity with, my understanding, nearly 60 percent of the GPO printing activities are actually procured through private contracts, and I think on a daily basis that may mean between 600 and 1,000 print projects a day are managed in this ongoing relationship.

With the changing nature of the business, how do you see that business relationship between the GPO and the various private sector printers around who the agency employs? Do you see that changing? Do you see it continuing? What is your sense of the business model going forward?

Mr. BOARMAN. Well, thank you, Senator. The GPO relies heavily on the private sector in order to do the work of the Government. The main printing plant is set up primarily to do the overnight, quick-turnaround work that the Congress and the President demand. It is really not set up for the kind of work that we procure through our procurement program. So we are heavily dependent on the private sector to support that program. I think we contract somewhere over $500 million worth of work through the GPO procurement program. And we hope to get more, because the law requires all agencies to use the Government Printing Office.

Unfortunately, there was a dust-up about 10 years ago about separation of powers. Since GPO is a legislative branch agency, some Assistant Attorney General wrote a memo suggesting that they did not have to use GPO. As a result, GPO has lost some of its business, even though the law is very clear, Title 44, that they must procure their work through the Government Printing Office.

But I think, you know, my approach to this would be rather than arguing about whether it is a separation of powers issue—because I think that is ridiculous, but obviously a judge would have to decide that—let these agencies give GPO a chance to procure the work for them, bring more business in.

I believe that the procurement program at GPO is the best price execution that money can buy and that we can get the job done quicker, better, and at the lowest cost for the taxpayers if we are given the chance. And I think that the agencies that use us would stand up here today and say the same thing, that that is exactly right.

So as Public Printer, what I would do is to try to go out and interact with the agencies that are not using us to try to bring more work into GPO because I think it is the right way to do it. The procurement program is overseen by the IG. To my knowledge there has never been any fraud or investigation there. And it is best price execution, and it creates jobs in the private sector when we have contracted out, and it basically goes to small mom-and-pop shops who get this work. There are big printers in there, like Donnelly and others, who get that work, but many of the people in our program are just small printers who depend on this work.

So I just think the relationship will continue. I think it will grow, and I look forward to working with the private sector on this to help it grow.

Senator WARNER. One of the questions, I think one of the unique aspects you are going to bring to this job is you have kind of seen it from every angle. You have worked at the GPO; you have obviously been involved in the labor movement; you have seen it from the workforce standpoint; you have obviously advanced your career into the management sector as well. You know, but with the challenges as more and more documents are viewed in electronic form, when we see increasing pricing pressure across the printing industry and across Government as a whole, I would like you to speak for a moment about how you are going to balance the needs of workforce versus technology versus the price constraints that the Government is under and how perhaps your background might suit you for that challenge.

Mr. BOARMAN. Well, I have been advised by the current political leadership and the professional leadership at GPO that next year GPO will actually be in a deficit position. So it is not a great place to start from, but it is what it is.

You know, I come from a background of, unfortunately, inheriting organizations that seem to have deficit problems, and I have had success in dealing with those. My president, Larry Cohen, and I inherited a huge deficit when he took over CWA. I think it was somewhere in the neighborhood of about $18 million. And we did it the old-fashioned way. We did not use gimmicky and auditors' gimmicks. You know, we made the hard choices that had to be made in order to get our budget in line, and today it is in line.

Likewise, with the nursing home that I run, when I took it over, it had a $1.5 million-a-year deficit. Today it is operating in the black, has $2 million in the bank, and, you know, probably makes about $600,000 a year. Again, we had to make hard choices.

For GPO, fortunately they have two streams of income. One is the appropriations. Now, most likely that is going to be flat. I think the Public Printer asked for $167 million, but I think it is more likely to be in the area of $140, $147 million.

So the other stream is customers, bringing new business in, and we now have this program, the SID, security and intelligent documents, where we print the passports but we also do something called smart cards, and we are doing it for a number of Government agencies. It has a chip in it, and it is absolutely secure, Government-to-Government relationship. So we need to build that business to try to offset some of the losses that are going to come as a result of less printing, less ink on paper, and more digitization. And I believe we can do that.

I met with the directors and I have been briefed by all of the top-level folks at GPO, and I have to tell you that I was very, very impressed with the SID program. And I think it is something that Congress should support. I think they should encourage the security agencies of our Nation to take a look at GPO, give us a chance to do these ID cards for all these different agencies, because I think we can show that the security with us Government to Government is a much better way to go.

So there is a lot of opportunity there. I am going to start out, I think, with a deficit, but I am used to that, and I have got some ideas to deal with it, and I look forward to the challenge.

Senator WARNER. I have got a couple more questions, but if I ever hope to get close back to this short of being here for 20 years, I will not go into Senator Bennett's time. Senator Bennett?

Senator BENNETT. Thank you very much, Mr. Chairman.

Mr. Boarman, I will give you an opportunity to deal with the issue that has come up very recently, your campaign contribution to Mr. Halter. Here is the chance for you to describe how that came about and how you realized you needed to send us the letter that you did, and we are grateful to have received it, whether there was any union efforts, CWA efforts, and you have involvement in that in any way that the Committee needs to know about. Can you go through that whole situation for us and lay it out?

Mr. BOARMAN. Well, I can tell you what I know. I was asked if I would consider giving a contribution to the lieutenant governor

who was running for the Senate, a $250 contribution, and I agreed to do that, and I actually did it online. Someone sent me an e-mail from the campaign, and I went on, and in about 5 minutes' time, I plugged in with my bank card and made the $250 contribution. It completely passed through my mind because it happened so quick, and I did not really have a receipt that I remember. It was not in my checkbook. I heard about it—someone mentioned it in an article yesterday that I had made a $250 contribution, and I went, "What is this about?" And then I had to go back and think about it.

So I went to the Federal Election Commission site to see when I made it, because I could not remember, and it was March 17th of 2010 I made the contribution, and I immediately wrote the Committee a letter, since I had unknowingly omitted that from the statement, the questionnaire that I sent up here, on which I had listed other contributions that I have made.

That is all I can tell you. I was not involved in any bundling that I have been accused of. I had nothing to do with any of that. I made a $250 contribution.

Senator BENNETT. As you think about it, have there been other contributions you have been asked to do, presumably by the union, that you said, okay, well, I will take care of that, and you go online and do that? Or is this a single experience?

Mr. BOARMAN. I do not think so, Senator, because most of us contribute through our union COPE program, and they take out an amount of money from our check every 2 weeks, and it goes into our political action committee. That is——

Senator BENNETT. So your contributions have been to the PAC.

Mr. BOARMAN. Yes, yes. I cannot ever remember doing this any other time.

Senator BENNETT. Okay, thank you. I appreciate getting that——

Mr. BOARMAN. That is all I can tell you.

Senator BENNETT. Okay. You have indicated that you get over $500 million from the private sector, and, yes, it is Donnelly at one end and then the mom-and-pop operation at the other. I think in all probability the mom-and-pop operations that you refer to do not pay union prevailing wages. Are you going to require that they pay union prevailing wages in order to deal with the GPO? Or will you take their bid without digging into their own internal compensation plan?

Mr. BOARMAN. I have no plans to change the current system. I think it would be unlawful to impose union conditions for printing. I do not know that there is any law that requires you could do that, and the program works perfectly. I believe that the union printers could compete in this arena if they chose to do that. And I do not think there would be any need to do that. So the answer is no, I do not have any plans to change what we are doing. We do it too well. It is just it has been in place for so long, and I think in order for me to be successful to attract the work that I talked to Senator Warner about from other agencies, I cannot mess around with a program that works. I mean, I am convinced, from meeting with the printing procurement people, that they know what they are doing. They know how to reach out to the customers. They know how to address their needs. They know how to take care of the

issues. If there is a billing issue, there is a special person that deals with that to make sure that, you know, they are not overbilled and, if we do overbill them, that we refund them.

I have no plans to change what I consider one of the finest procurement programs in the Government.

Senator BENNETT. All right. In that vein, then, let us talk about the structure. It is currently structured into distinct business unit, such as security and intelligence documents where the passports and other secure credentials are produced, and then plant operations, publications, information sales, print procurement and so on, and each of these business units has its own P&L, and accounting on a monthly basis to spend it through expenses, contributions, and so on.

This allows a degree of transparency in each unit so that you know exactly what is being earned and what is being spent in each one. And there is some concern that if they all got lumped together, some of the transparency might disappear.

Do you have any feeling about how you will deal with these four separate units?

Mr. BOARMAN. Well, I do not have any plans to change the way the transparency is flowing. I think that is the best way to do it. I think I told you in our meeting that we had the other day that one of the things that concerned me was that the CFO was so far down the chain in the scheme of things at GPO. In all the organizations that I have headed, the CFO has been right beside me and someone I count on to tell me the truth about, you know, how much do we have, what is the cash flow, you know, what is outstanding, what is coming in, what is the auditor saying.

I think that relationship between the chief executive officer and the CFO is very important. So that is something that I would look at to hopefully bring the CFO closer to me so that I could keep my handle on the dollars, especially as it appears we are going to be entering a deficit situation.

But, no, I think the transparency that you talked about is fine. I think the way they have separated the businesses is—it gives them a chance, especially the SID program. They were part of operations at one point, and I think doing pretty well. But now that they are separate and there is more security, I think the opportunity for SID to grow and to attract more businesses from maybe NSA or from other agencies that do security work—we do some Homeland Security products—it is much better set aside. As I understand it, all the people in the SID area have the necessary security clearances. We have the necessary guards to keep the place safe from people getting in and getting their hands on passports, which could be a disaster.

So if we can protect the passports for the State Department, I believe we could do the same thing for every agency of Government. So I think those separate business units are working well, and I would continue that.

Senator BENNETT. Thank you.

Mr. BOARMAN. Thank you, sir.

Senator BENNETT. Thank you, Mr. Chairman.

Senator WARNER. Let me follow up on the line that Senator Bennett has raised. One of the things that I saw in your background,

Mr. Boarman, that impressed me was the fact that you have been involved with operations, as you mentioned earlier, where you would come in and there was a deficit circumstance and you, from a good business perspective, brought it back up into a more positive balance. Clearly, with the changing nature of printing and with the notion that, should you move forward in this position—and I hope you will—the GPO will be in a deficit position to start with. I want to simply give you a chance to reemphasize again that coming into that deficit circumstance, recognizing that you have got a series of private contracts out there, recognizing that you have got Government enterprises that have other choices, if you are going to increase GPO's market share, you are going to have to be price competitive to do that, and that means if there are good working relationships with your private sector partners, regardless of the makeup of their workforce, you are not going to do anything to cut back on GPO's competitiveness in the marketplace. I would like you to expound on that a bit.

Mr. BOARMAN. No, absolutely not. I think the relationship with the printing industry and the contractors—there are a couple different groups that represent these folks that work with us—is a good one, and I look forward to meeting with these folks after confirmation and creating that bond even stronger and let them know that we count on them for what they do. We cannot do it alone. We have to have these private contractors. And it is just good Government to send as much as we can to the private sector.

I read some statistics somewhere in a publication that GPO had cut back on procurement, but I checked into that with the professionals at GPO, and they tell me that the amount of work that was contracted out last year is the same percentage that it had been in previous years.

Now, if someone counted the SID stuff, which does not go out, it has to be the passport work and the smart cards, which is done in-house, if they included that in part of it, I think you could skew the numbers. But the printing that we normally contract out will continue, and we hope to build on that by getting more agencies to come with us and using the GPO.

Again, give us a chance, let us prove that we can do the best price execution. You can always go back to the printer that you had if we do not do the job we think we can do. I am absolutely convinced that we are going to save the taxpayers money because we can do it cheaper.

Senator WARNER. In terms of workforce, let me ask you a question there. Again, we see in the newspaper business it is going through a dramatic transition. The printing business is going through a dramatic transition. The whole notion of ink on page and printing books or the traditional periodical is being transformed as we move to more electronic media.

How both within—and I imagine in terms of your contracting you can find that new expertise, but within the GPO itself, how do you make sure that your workforce stays current? How do you make sure that, both from a technology standpoint and from a workforce development standpoint, you are truly training the public printers of the 21st century and not of the 20th century?

Mr. BOARMAN. Well, that is going to be a challenge because I have been advised by the human capital people in the briefings that I have had that we have an aging workforce, and that it is going to become a critical issue over the next few years. And some of these people have extraordinary skills that, if we let them go out the door without transferring that to someone else, we could have a catastrophe.

You know, when the Congress of the United States decides to stay in late at night and legislate, it is not an immaculate conception that creates the Congressional Record that comes to the Hill every day along with the bills and hearings. It is the people that I talked about in my opening statement who know exactly what they have to do every night and every day when they come in there, and they know they have to come in, whether it is snowing or whatever, to get the Record out. If Congress is in, we are in.

Now, I think that we can be very competitive in terms of attracting the kind of people that we need to the GPO. I think the rates of pay and I think the benefits and the security of working at the GPO is a very attractive package for young people who are pursuing a career in printing and publishing, whether they are in a technical college or whether they are at RIT or they are working in the private sector as a printer, like I did.

I think we need to develop a program to go out and recruit these people to replace the people that we know we are going to lose over the next 4 or 5 years. I think that what I would do right away is have human capital provide me with a critical list of the people that are going to retire, and then I think I would sit down with the line supervisors that know these individuals and say—to tell me which one of these have skills that we need to find out and have them work with someone so that when they leave we do not lose that information, we do not lose that institutional memory that they have.

So that is what I have been thinking about, how to deal with this, because whenever you lose people like we are going to lose, it is going to be a difficult situation for GPO. But I am confident that they will work with us and that we can recruit the people to replace them.

Senator WARNER. I have got one more question, but I will go ahead and—well, you know, one of the—the Federal Depository Library Program has the requirement of safeguarding the public's right to know about what is going on in the Government, and, you know, the Obama administration has made transparency a hallmark of its administration.

Now, sometimes translating that transparency into reality has been a challenge, and some depository librarians feel that GPO is not meeting the needs of its users or adjusting to the increasing demands for digital access to Government information.

You know, what can the GPO do to work with the librarians to ensure that the Federal Depository Library Program will really meet its goal of keeping Americans informed in this ever more transparent world?

Mr. BOARMAN. Well, I think the underlying problem can be spelled out in one sentence. About 95 percent or more of all Federal documents are born digital today and will never end up in the De-

pository Library Program. And everything that we do that we put ink on paper can be created digitally as well.

The law, which originally, I think, dates to the early 1800s, was probably the first open Government law passed by the Congress, because it provided for this wonderful program of the Federal Depository Library Program where every library gets so many copies. The Senators can designate a regional library who get even more. But today I think their walls are bulging with the books, and they have no place to put them.

But the current law, which was passed in 1962 and has not been revisited, has to be looked at so that we can modernize it to deal with the fact that so many documents are born digitally. We cannot do that by ourselves. The Congress of the United States—it would have to be—I would assume it would have to be the House Administration and Senate Rules Committee would have to come up with some changes to the law to deal with that issue.

Now, I want to caution you. I do not think we ought to throw the baby out with the bath water. I think this program is one of the greatest programs that our country has. The Congress funds this thing, about $40 million each year, to make sure that people are informed about what their Government does, and I certainly do not want to tinker with that. But I do think there are some things that we can do to make it easier on the libraries.

If I am confirmed, I will get together with the library community and try to hear them through, what they think would best work in this area. And then I think I would come to the Congress with some suggestions on how we can deal with it without messing around with the underlying tenets of this law that provides for this information.

So that is another challenge, but I think the libraries and the GPO will work well together. They are a great stakeholder for us, and I look forward to working with them about this issue.

Senator WARNER. Well, I think if Senator Bennett does not have any other questions, that was my last question. I appreciate, Mr. Boarman, your testimony here today, and I think you will be a great Public Printer. Obviously, I think you bring a great and varied background, and I do think, you know, one of the challenges is going to be—since the GPO will be in a deficit circumstance, we are going to need that business approach to make sure that we can get the best value possible for the taxpayer, and clearly in an area that is going through dramatic transformation driven by technology and by the public's need to know. So I personally look forward to supporting your appointment, and I believe you have got a big job in front of you.

So on behalf of the Rules Committee, I would like to thank the nominee, Mr. Boarman, for his testimony. The record will remain open for 5 business days for additional comments. The Committee plans to consider this nomination in a timely manner so that the Senate can confirm Mr. Boarman as the next Public Printer.

Since there is no further business before the Committee, the Committee is adjourned subject to the call of the Chair.

[Whereupon, at 10:53 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

William J. Boarman

Prepared Statement Before the
Committee on Rules and Administration
U.S. Senate

On

The Nomination to Serve As Public Printer

Tuesday, May 25, 2010
10:00AM

301 Russell Senate Office Building

Mr. Chairman and Members of the Committee on Rules and Administration, thank you for inviting me here this morning.

I'm deeply honored by the President's nomination to be Public Printer. For a practical printer by trade, there's no higher post in the Nation than as head of the Government Printing Office, with its distinguished tradition of supplying the printing and information needs of the Federal Government for nearly 150 years.

I'm a native Marylander with family roots in that State extending back to colonial times. I've been a printer for more than 40 years. I began my career in 1966 at the McArdle Printing Company in Washington, D.C., where I served my printer apprenticeship. I mastered all facets of the printing trade and received high grades and frequent promotions for my work, finishing as a journeyman printer in 1971. While at McArdle I joined the International Typographical Union, one of the oldest and most respected labor organizations in the Nation.

In 1974, I accepted an appointment as a journeyman printer to the Government Printing Office, the largest printing plant in the world at the time. I worked in four of the major printing production sections of the GPO and became very familiar with all aspects of production requirements of GPO's customers, including Congress and Federal agencies. While at GPO – an agency where collective bargaining between employees and management has been provided for by law since 1924 – I rose through the union ranks and was elected chief shop steward for the composing craft unit, which then had more than 1,650 employees.

At that time, GPO's composing area was undergoing a major technological change with the introduction of computerized photocomposition. In negotiations with management, I worked to protect, train, and secure future work for all employees who were affected by this change. This included ensuring that minorities who worked in lower paid support jobs were not left behind. I helped work out an agreement for one of these groups, monotype castermen, that allowed more than 80% of them to be trained and become full journeymen. As a result of the agreement we reached with management, not one of these workers lost their job due to the technology transition.

I left GPO in 1977 to work full-time for the ITU, which later merged with the Communications Workers of America. The lessons I learned at GPO – how to achieve practical agreements with management that open the door to technological change while protecting and advancing opportunities for employees – were lessons I carried into my new position. During my career with CWA, I have used them repeatedly and successfully to establish a proven track record of cooperation and achievement in labor-management relations in the printing and publishing industry.

As a member of the CWA's leadership team, I've gained significant management experience. The CWA today represents more than 600,000 workers nationwide. Since 1989, I have served as President of the Printing, Publishing, and Media Workers Sector of the CWA. I am also today the Senior Vice President of the CWA, and as a member of

the CWA board I participate in executive decision-making affecting the work and shaping personnel policies for more than 600 CWA employees around the country.

Along with my CWA executive responsibilities, I serve as chairman of the Board of Trustees of the CWA/ITU Negotiated Pension Plan, a multi-employer defined benefit pension plan with assets of $1 billion, and I have more than 25 years of experience as a pension plan trustee. I also serve as Chairman of the Board for the CWA Pension Plan Canada, which has assets of more than $150 million. As co-chairman of the North American Taft-Hartley Study Tour between 1996 and 2001, I traveled around the world to study international investment opportunities for these funds.

I helped shape the AFL-CIO Capital Steward Program in connection with the creation of the Center for Working Capital, and was a member of the Executive Board of the Council of Institutional Investors, an organization whose members have more than $2 trillion in assets under management, serving three terms as Council co-chair. I was also a founding member of the "Capital That Matters: Managing Labor's Capital" Conference held at the Harvard Law School in 2003. I've returned to the Harvard campus each year as an invited participant to further the discussion to develop a teaching curriculum regarding the role of institutional stockholders in corporate governance matters.

One of my additional responsibilities is the presidency of the Union Printers Home Corporation, a retirement community in Colorado Springs, CO, with more than 200 employees. When I inherited that position in 1989, the Home was losing about $1.5 million per year and was facing a possible closing. With the advice of the expert management consultants I brought in, within three years the deficit was wiped out and today the Home has a surplus of about $2 million in the bank. I also serve as President of the International Allied Printing Trades Association, which has local councils in 39 States and the District of Columbia. From executive decision-making to fund management and controlling costs to making payroll, I have a broad range of management experience that I believe has equipped me to lead the GPO, if I am confirmed.

Equally important has been my continued involvement with the GPO throughout my career. Over the past 30 years, in addition to working on behalf of the employees represented by the CWA, I've also worked with and remained on good terms with several Public Printers. I've testified many times before this Committee, the Joint Committee on Printing, and the House Administration Committee in support of the important role the GPO plays, and occasionally in defense of the GPO against unwise and potentially costly efforts to dismantle its mission. Through those years I became friends with several leaders of this Committee, including Chairman Claiborne Pell, Chairman Charles McC. Mathias, Jr., Chairman Mark Hatfield, Chairman John Warner, and Chairman Wendell Ford. I have great respect and personal admiration for these distinguished Senators and for the many others who have served this Committee and the important work it does. I look forward to working under your guidance and direction, should I be confirmed as Public Printer.

The GPO today is a substantially different agency compared with the one I left many years ago. It employs fewer personnel but is significantly more technologically advanced, and it is responsible for a range of products and activities that could only have been dreamed of 30 years ago: online databases of Federal documents with state-of-the-art search and retrieval capabilities, passports and smart cards with electronic chips carrying biometric data, print products on sustainable paper using vegetable oil-based inks, a management infrastructure supported by the latest IT enterprise architecture, and more.

These changes have been explained to me in briefings from GPO that I've had since my nomination, and I'm grateful to Public Printer Bob Tapella for this courtesy. From my own observation, however, it's obvious that one thing hasn't changed: the GPO continues to employ an extraordinarily talented group of men and women who every day carry out their responsibilities with unmatched expertise and dedication. If there is any one asset that best characterizes the GPO, it's the superb quality of the people who work there.

In my past testimony, I've used the analogy of the three-legged stool to characterize the GPO and the unique and essential services it performs for the Nation:

- GPO performs in-plant production of legislative printing to support the Congress as well as certain products of the executive branch, such as the Federal Register and secure documents like passports and smart cards. This provides a Government-to-Government solution that enables secure, quick turnaround production under direct congressional and Government control.

- GPO procures the vast majority of the work it's required to do – upwards of 75% – by procurement from private sector printers across the country, relying on a highly successful public/private partnership that is a model of service provision. The competition for Government printing contracts by thousands of printers ensures taxpayer savings while generating job opportunities nationwide, especially in the small business sector.

- GPO provides public access to the official publications of the Government, helping to fulfill a constitutional requirement to keep the Nation informed. GPO carries out this task in a number of ways, most prominently in partnership with nearly 1,200 libraries across the country which house depository collections of Government documents for the free use of the public, and via a Web site containing a vast and still growing amount of official information from all three branches of the Government.

These three functions operate in close connection with one another. For GPO to fulfill its mission properly, none of these functions could operate effectively by itself, nor could any two of the functions operate effectively without the third. I think the GPO has made progress in recent years in improving how these functions are carried out. If confirmed, I look forward to continuing with that progress, and to ensuring that what the GPO strives

to accomplish in the coming years will contribute measurably to the distinguished record of service it has compiled over the past 150 years.

Mr. Chairman and Members of the Committee, this concludes my prepared statement and I would be happy to answer any questions you may have.

Statement by Senator Mikulski
William Boarman Nomination Hearing, Public Printer
Senate Committee on Rules and Administration

I am submitting a statement today in support of the nomination of William Boarman, a lifelong Marylander, to serve as Public Printer and lead the Government Printing Office (GPO). I'd like to thank Senator Schumer and Senator Bennett for being so prompt in scheduling his hearing.

Although Public Printer is not a position that may be familiar to many Americans, the GPO's mission is critical to having an informed and enlightened public in our democracy. If confirmed as Public Printer, Mr. Boarman will be responsible for producing legislative and official documents of the Government and making those products available to the public, in libraries and online. The Public Printer serves as the Chief Executive Officer of the GPO and is responsible for overseeing the work of 2,300 federal employees - 1,500 of them who are Maryland residents.

GPO is also critical to our nation's small businesses as it procures nearly $500 million work of work every year from private sector printers across the country. I want to specifically recognize the way GPO has contributed to Maryland's economy, having awarded approximately $21.5 million in printing contracts to 32 Maryland firms last year.

William Boarman is uniquely qualified to run the Government Printing Office. A practical printer by trade, Mr. Boarman has worked in the printing and publishing industry for four decades, including an appointment to the GPO from 1974 to 1977. He has a strong understanding of how the GPO works. Over the last 30 years, he has testified on GPO matters several times before this committee and the Joint Committee on Printing, as an unpaid adviser to several Public Printers.

Mr. Boarman also has a proven track record of cooperation and achievement in labor-management relations. Since 1989, he has served as the President of the Printing, Publishing and Media Workers Sector of the Communications Workers of America (CWA). He currently serves as Senior Vice President of the CWA and President of the International Allied Printing Trades Association, which has local councils in 30 states and Washington, DC.

In addition to his stellar professional qualifications, Mr. Boarman has been committed to public service and giving back to his community. He served two four-year terms as a gubernatorial appointee as public member of the State Commission on Judicial Disabilities, which oversees the conduct of all state-appointed judges in Maryland.

I am proud to support this excellent nominee and I urge my colleagues to move swiftly on moving this nomination through the committee process and then to Senate floor for a vote in a timely manner.

TESTIMONY OF

THE HONORABLE ROBERT A. BRADY
A REPRESENTATIVE FROM PENNSYLVANIA

BEFORE THE SENATE
COMMITTEE ON RULES AND ADMINISTRATION
ON THE NOMINATION OF

WILLIAM J. BOARMAN, OF MARYLAND,
TO BE PUBLIC PRINTER

MAY 25, 2010

Mr. Chairman, I strongly support the President's nomination of William J. Boarman, of Maryland, to be Public Printer. I can frankly think of no one better suited to take over the GPO right now.

As chairman of the House Administration Committee and vice-chairman of the Joint Committee on Printing, it has been my pleasure to work with Bill Boarman for several years on many GPO-related matters. My staff and I have long considered him a tremendous resource for all questions about GPO, and it's clear why: Bill Boarman has worked in and around GPO for decades, giving him an institutional memory and personal experience that will serve him well in the top job.

Bill can remember when GPO employed more than 8,000 workers as the largest industrial employer in the District of Columbia. In the years since, Bill has seen the many changes that bring us to today's GPO, which employs 2,400 men and women committed to accomplishing the GPO's mission. His acceptance of the nomination demonstrates his continuing committed to GPO and his testimony revealed how his experience gives him a clear vision for where to lead GPO from here.

Although Congress years ago by law gave GPO a virtual monopoly over federal-government printing, in practice GPO does not wield monopoly power and certainly cannot behave like a monopolist. GPO must please its agency customers without whom there would be no work and the American people, without whom there could be no GPO. Agencies increasingly have options, including the option not to print many documents at all. Bill understands that GPO must keep costs down, keep customers happy by serving them in a timely way delivering the goods and services they need.

In his testimony, Bill mentioned his strong support for GPO's procurement program. Most Americans are likely unaware that GPO buys more than 70% of its printing from the private sector. Pennsylvania, which I have the honor to represent, happens to be home to many private-sector printers, many of them small, who bid on individual printing jobs through the GPO. The printing industry benefits, the GPO benefits, and the taxpayers benefit from competition among thousands of printers. Bill reiterated his commitment to the program and a determination to strengthening it wherever possible.

I am also pleased to hear of Bill's commitment to the Federal Depository Library Program designed in 1962 to serve a very different world. Bill expressed his eagerness to work with the FDLP's constituency and the Congress, including my committee, to transform the program into one that works for the patrons, librarians, and taxpayers of the 21st century.

Finally, I support Bill Boarman's nomination because of his longstanding interest in the men and women of GPO, who are essential. More than a dozen labor unions represent GPO employees in various trades and crafts. Bill's association with the labor movement will give him a wonderful perspective on how GPO management and labor might forge a genuine lasting partnership for the benefit of GPO, its customers, and taxpayers.

Mr. Chairman, the President has made an excellent choice in Bill Boarman to be our next Public Printer. I look forward to working with him and respectfully urge the Senate to confirm the nomination without delay.

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MAY-28-10 11:34AM FROM- T-557 P.002/005 F-793

1615 New Hampshire Ave NW
First Floor
Washington, DC 20009-2520
USA

Telephone 202 628 8410
Fax 202 628 8419

Washington Office

ALAAmericanLibrary Association

May 27, 2010

Honorable Charles Schumer
Chair, Joint Committee on Printing
313 Hart Office Bldg.
U.S. Senate
Washington, DC 20510
Sent via fax: (202) 228-3027

Honorable Robert Brady
Vice-Chair, Joint Committee on Printing
206 Cannon House Office Bldg.
U.S. House of Representatives
Washington, DC 20510
Sent via fax: (202) 225-0088

Dear Chairman Schumer and Vice Chairman Brady:

The American Library Association (ALA) has long cared about the public's ability to access government documents. We were gratified that the committee held a hearing to speak with the nominee for Public Printer, William Boarman, and hope that you will include this letter in the hearing record.

For over 140 years, the U.S. Government Printing Office (GPO), through the Federal Depository Library Program (FDLP), has made government information available at no cost to the public.

Over time, technologies have changed and it is the responsibility of the Public Printer to ensure that GPO and the FDLP are updated. A matter of great importance to the ALA's over 62,000 members is the digitization of government documents. The FDLP is a collection of over 2.2 million documents that once digitized will vastly improve public access to these historical and cultural resources of our nation.

These resources cover virtually every facet of US history, government policy, and administration. Digitizing these materials will allow members of the public the ability to understand their culture and history in new, meaningful ways and encourage greater civic engagement.

GPO recently launched the Federal Digital System (FDSys), a centralized location for no-fee public access to federal government information. It is important that FDSys have the ability to systematically ingest both digitally born and digitized historic collections. In today's work environment, it is common to create digital documents that may never be formally printed. If these documents are not ingested into FDSys, there would not be true transparency of the government.

The Public Printer plays a vital role in ensuring that the American public is able to access government documents. In order to guarantee open access to these documents, it is essential that

the Public Printer be supportive of moving the GPO into the 21st century and ensuring that all Americans will be able to access all formats of government documents.

Attached is a resolution that was passed in January 2010 by the American Library Association's governing council promoting digitization and calling upon the Congress to support these efforts.

Sincerely yours,

Emily Sheketoff

Emily Sheketoff
Executive Director
ALA Washington Office

2009-2010 ALA CD# 20.2
2010 ALA Midwinter Meeting

RESOLUTION TO SUPPORT DIGITAL INFORMATION INITIATIVES AT THE U.S. GOVERNMENT PRINTING OFFICE

WHEREAS, The Federal Depository Library Program (FDLP) was designed to provide no-fee permanent public access to government information through a cooperative network of depository libraries; and

WHEREAS, The U.S. Government Printing Office (GPO) recently launched the Federal Digital System (FDSys), a centralized location for no-fee public access to federal government information; and

WHEREAS, FDSys must systematically ingest both digitally born and digitized historic collections; and

WHEREAS, FDSys should allow for the systematic gathering of in-scope documents that may not have otherwise been included in the FDLP; and

WHEREAS, Ingesting both born-digital and digitized historic collections into FDSys will result in an increased need for cataloging to improve access to government information; and

WHEREAS, The GPO requires additional funding for its Cataloging and Indexing and the Federal Depository Library Programs in order to meet this expanded responsibility; and

WHEREAS, Further developments and enhancements of FDSys are vital to the FDLP's ability to provide no-fee public access to government information; and

WHEREAS, The full implementation of FDSys is vital to the public's right to access information from the legislative, executive, and judicial branches of government; now, therefore, be it

RESOLVED, That the American Library Association (ALA):

1. Works to ensure that the government fulfills its obligations to create, authenticate, collect, disseminate, and preserve government information.

2. Thanks GPO for the work that has been done in FDSys development and urges that GPO demonstrate its capacity to ingest both access and preservation copies of digitally born and digitized historic collections into FDSys.

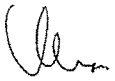
3. Urges GPO to establish partnerships to conduct demonstration projects for systematic gathering and accessing digitally born content.

4. Urges GPO to establish partnerships to conduct demonstration projects for creating and accessing digitized historic collections.

5. Urges Congress to reaffirm no-fee public access to, dissemination of, and preservation of authentic government information by providing sufficient and sustained funding to the GPO to support Cataloging and Indexing, and the Federal Depository Library Program for systematic gathering of digitally born and digitized historic collections.

6. Urges Congress to provide sufficient and sustained funding to the GPO to support FDSys

Adopted by the Council of the American Library Association
Wednesday, January 19, 2010
In Boston, Massachusetts



Keith Michael Fiels
ALA Executive Director and
Secretary of the ALA Council

Senator Charles Schumer, Chairman
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC20510

May 24, 2010

Dear Chairman Schumer:

Enclosed is a copy of my statement for the record on behalf of the nine hundred blue-collar workers who are employees at the U.S. Government Printing Office and that are represented by the International Brotherhood of Teamsters. We respectfully request that this statement be made a part of the written record on the nomination of William J. Boarman to be the next Public Printer of the United States.

Fraternally Submitted,

George E. Lord
Vice President

TESTIMONY OF GEORGE E. LORD
VICE PRESIDENT, LOCAL 285M
GRAPHIC COMMUNICATIONS CONFERENCE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
BEFORE THE
COMMITTEE ON SENATE RULES AND ADMINISTRATION
ON NOMINATION OF
WILLIAM J. BOARMAN
TO THE OFFICE OF
PUBLIC PRINTER OF THE UNITED STATES

May 25, 2010

My name is George E. Lord, Vice President of Local 285M, Graphic Communications Conference of the International Brotherhood of Teamsters and have held the position of Chairman of the Joint Council of Unions/GPO since January 1982 which is an organization that unites for collective bargaining purposes ten labor organizations representing all of blue-collar employees, both skilled and semi-skilled occupations who work for the Public Printer. Union labor has played a decisive role at GPO almost from its inception. In the nineteenth century, GPO sought out the most skilled printers it could find and to get them hired union workers and paid union wages. The Keiss Act, 44 USC 305, enacted in 1924, was one of the earliest examples of Federal labor legislation. It recognized GPO's reliance on highly skilled trades persons by providing for wage conferences between representatives of workers and the Public Printer to fix their compensation.

We are proud that many of our members have devoted most, if not all, of their working lives to GPO. We are also proud of the crucial role we perform in printing and distributing information collected and produced by the Federal Government not only to the millions of citizens we all serve but to the members and employees of the Legislative, Executive and Judicial Branches that together constitute the government of the United States.

It is the Government Printing Office's mission to provide printing and publishing services to the rest of the Federal Government and disseminate information to the People of the United States. In the past, the GPO did this by running one of the most effective and efficient procurement operations in the Government and by maintaining an up to date printing plant which must be in place to provide the Congress with overnight, accurate printing services it requires.

Short-term bragging rights, not concerns for the public fisc, have played a critical part in the failures of recent Public Printers to bring the Office into the twenty-first century. We, the employees do not question their motives but we certainly have and will continue to question their methods and judgement. We believe their judgements have resulted in the squandering of scarce Federal dollars that should have been used to plan for a more thought out transition into the digital age. The current Administration has created the largest increase in the overhead costs in the history of this Agency over-burdening every revenue-generating operation to the point they are forced to ignore their own short-term and long-term needs. Also, their methods have created a sea-change in the attitudes and confidence of each and every employee that this Administration never considered

the employees its most valued asset. The lack of good employee relations has created the need for employees to seek other avenues to get their issues resolved such as: EEO complaints and/or submitting grievances through the collective bargaining agreement.

The President of the United States has nominated William J. Boarman to be the next Public Printer to head up the U.S. Government Printing Office. We, the employees, salute President Obama's choice to head this Agency not only because he most definitely meets the requirements of 44 USC but brings to the office a wide-range of experience within the printing industry and his first-hand knowledge of the collective bargaining process. He has represented employees for over thirty years in both the private and public sectors within the printing industry. He brings with him the full knowledge of the very laws and regulations that all Public Printers have been required to follow. The nominee also brings to this Agency many years of experience in the art of finding solutions to the problems between employees and their employers. Also, the many years of managing the finances of employee pensions will be of great value while managing through GPO's financial systems and processes. If confirmed by the United States Senate, he will be at a great advantage point on his first day as Public Printer that no other nominee experienced on their first day in most recent times.

Finally, one only has to imagine, the pride and self-satisfaction that each and every employee is experiencing to see one of their own rise to the office of Public Printer of the United States. We can see firsthand the results of hard work, dedication and as an employee we can achieve if we just follow his example. We are filled with hope of a new beginning that demonstrate the employee's hopes and dreams of success along with the Agency's successes can be one of the same. All of the ingredients to this recipe for success are at hand with this nominee and we, the members of Graphic Communications Conference of the International Brotherhood of Teamsters, strongly recommend that this Committee vote to confirm.

American Association of Law Libraries

MAXIMIZING THE POWER OF THE LAW LIBRARY COMMUNITY SINCE 1906

To: The Honorable Charles E. Schumer, Chairman of the Senate Committee on Rules & Administration, and The Honorable Robert F. Bennett, Ranking Member of the Senate Committee on Rules & Administration

From: Catherine Lemann, President of the American Association of Law Libraries

Re: Statement for the May 25, 2010 Hearing on the "Nomination of William J. Boarman, of Maryland, to be the Public Printer"

Date: May 20, 2010

Attached please find a letter in support of the nomination of William J. Boarman to be the Public Printer. We ask that you please include the letter in the record of the hearing scheduled for May 25, 2010.

Thank you very much.

Catherine Lemann
President
American Association of Law Libraries
105 W. Adams Street, Suite 3300
Chicago, IL 60603
Phone: 907-264-0583
Email: clemann@courts.state.ak.us

American Association of Law Libraries
MAXIMIZING THE POWER OF THE LAW LIBRARY COMMUNITY SINCE 1906

May 20, 2010

The Honorable Charles E. Schumer
Chairman, Committee on Rules & Administration
United States Senate

The Honorable Robert F. Bennett
Ranking Member, Committee on Rules & Administration
United States Senate

Dear Chairman Schumer and Ranking Member Bennett:

I am pleased to write to you today, on behalf of the American Association of Law Libraries (AALL), in strong support of President Obama's nomination of William J. Boarman for Public Printer of the United States. AALL is a nonprofit educational organization with 5000 members nationwide. Our members serve the information needs of the legal community and the public at more than 1900 academic, firm, state, court and county law libraries nationwide. AALL's mission is to promote and enhance the value of law libraries, to foster law librarianship and to provide leadership and advocacy in the field of legal information and information policy.

AALL has been a strong champion of the U.S. Government Printing Office (GPO) and its mission in *Keeping America Informed*. GPO fulfills this crucial and unique role in partnership with more than 1200 federal depository libraries by providing permanent public access to the documents of our democracy. Through the Federal Depository Library Program (FDLP), the American public has no-fee access to historic collections of government publications at their local depository library, as well as to current digital content made available through GPO Access and the new beta Federal Digital System (FDsys). Representatives of our Association have, in the past, testified before this Committee on a range of GPO issues, including the importance and value of the FDLP as it transitions from a print to a more electronic program. We believe strongly that the FDLP and depository libraries will continue to be crucial access and service points for the public in the 21st Century.

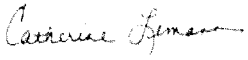
Mr. Boarman is highly qualified to serve as the 26th Public Printer of the United States, and we are especially pleased that he is so strongly committed to the FDLP and its future. Mr. Boarman brings to this important position more than 40 years experience in the printing industry, including working as a printer at the GPO from 1974-1977, when he took a leave of absence to serve as an elected representative of his Union. Coupled with his professional experience since then, currently as President of the Printing, Publishing & Media Workers Sector of the

Communications Workers of America (CWA) and as Senior Vice President of CWA, Mr. Boarman is well positioned to manage effectively all GPO programs and services. He has keen knowledge of the latest technologies to improve printing processes and the delivery of information in electronic forms. He also has the necessary skills to communicate well with GPO's many stakeholders, including Congress, federal agencies, the courts and the depository library community.

Equally important, from our perspective, is Mr. Boarman's experience in working collaboratively with this Committee and the Joint Committee on Printing. He has an expert knowledge of Title 44, including GPO's printing authorities and the Chapter 19 provisions related to the FDLP. He has testified before this Committee on many occasions, demonstrating his deep knowledge of the workings of the GPO and his support for improving public access to government information. He has long committed himself to the importance of transparency and accountability in government, which are both key components of President Obama's important open government initiatives. As Mr. Boarman stated during a hearing before this Committee on July 16, 1998, "I have often said that I believe a true democracy only exists when its citizens are well informed."

We agree. We believe that Mr. Boarman will provide a strong leadership role for the GPO, both in federal agency printing procurement and ensuring permanent public access to government information in all formats. We are confident he will also bring a positive new spirit and visibility to the agency and to all its stakeholders, including federal depository libraries. We urge you to support his nomination as the next Public Printer of the United States and to facilitate speedy confirmation by the full Senate. When confirmed, we will look forward to working with Mr. Boarman to maintain and strengthen GPO's role in federal information dissemination and access programs.

Sincerely,



Catherine Lemann
President
American Association of Law Libraries

THE BUFFALO NEWS

Daniel J. Farberman
Vice President Human Resources

May 19, 2010

Chief Clerk, Lynden Armstrong
The United States Senate
Committee on Rules and Administration
305 Russell Office Building
Washington, DC 20510

Re: Nomination of William J. Boarman

Dear Sirs:

I wanted to take this opportunity to express my full and complete support of the President's nomination of William J. Boarman to the position of Public Printer of The United States and request that this letter be included in the hearing record.

Mr. Boarman has had a long and accomplished career in the printing and publishing industry from his beginnings as an apprentice practical printer followed by his appointment to the U.S. Government Printing Office to serving since 1989 as President of the Printing & Publishing Sector of the Communications Workers of America.

Mr. Boarman has a proven track record of accomplishments in the management for large and complex organizations along with his skills and extensive experience in collective bargaining and fostering positive and cooperative labor management relations.

I have had the privilege to serve with Mr. Boarman on the board of trustees of the CWA/ITU Negotiated Pension Plan (NPP) a multi employer Taft-Hartley pension plan with assets of $1 billion, where he serves as chairman of the board of trustees. I have observed Mr. Boarman manage through the often complex and important matters before this trustee board with managerial skills that will be, I have no doubt a great asset to him in his role of Public Printer.

It is without reservation, that I urge the committee to confirm Mr. Boarman's nomination to the position of Public Printer as I know he will serve with professionalism and distinction.

Sincerely,

Daniel J. Farberman
Vice President

One News Plaza, P.O. Box 100, Buffalo, NY 14240
716-849-5570 • Fax: 716-849-4519 • dfarberman@buffnews.com

Testimony of

James P. Hoffa
General President
International Brotherhood of Teamsters
25 Louisiana Avenue, NW
Washington, DC 20001
(202) 624-6800

On

The Nomination of William J. Boarman to the Position of Public Printer

Before the

U.S. Senate Committee on Rules and Administration

May 25, 2010

For Submission to the Official Hearing Record

On behalf of the International Brotherhood of Teamsters and our membership of 1.4 million, I am pleased to express our strong support for the nomination of William J. Boarman to the position of U.S. Public Printer. Mr. Boarman's experience in the printing and publishing industry, familiarity with the U.S. Government Printing Office (GPO), and proven track record of cooperation and achievement in labor-management relations make him an excellent choice for this role. He will, if confirmed, be a strong leader for the workers employed under the Public Printer.

Mr. Boarman's career in the printing industry spans 40 years. A practical printer by trade, Mr. Boarman served a four year union apprenticeship at the McArdle Printing Company in Washington, DC. Following the completion of his apprenticeship he worked in a number of local printing establishments before accepting an appointment as a Journeyman Printer to the GPO. Mr. Boarman has served as an unpaid consultant to several Public Printers and has testified before various congressional committees regarding GPO programs.

Mr. Boarman has been active in his union since the start of his career. At age 30, he was elected President of his home local and ultimately President of the International Allied Printing Trades Association, which has Local Councils in 39 states and the District of Columbia. In addition, he now serves as a Vice President

of the Communications Workers of America and President of the union's Printing, Publishing & Media Workers Sector.

The Teamsters Union represents more than 60,000 workers in all craft and skill areas in the printing and publishing industry. Every day our members play an integral role in bringing vital information to the public. At the GPO, Teamster members are charged with keeping the American people informed about the work of the federal government. It is with the responsibility of this task squarely in mind that we offer our unqualified support.

We urge you to confirm Mr. Boarman as the 26th Public Printer of the United States.

Ted Rilea
Vice President | Labor Relations | Human Resources

May 21, 2010

United States Senate Committee
On Rules and Administration
Washington, DC 20510

Subject: Nomination of William J. Boarman of Maryland, to be the Public Printer
Hearing Date: May 25, 2010 @ 10:00 AM

Dear Senators:

I am writing this letter in support of President Obama nomination of William J. Boarman for the position of Public Printer of the United States of America. I urge all of you to register your support when his nomination comes before the Senate.

I have worked with Bill for more then 35 years. I was a president and business agent of a local union in Minneapolis, MN. (Minneapolis and St. Paul Mailer Union #4) in the late 60's. As the president of the local union I would attend the International Conventions that's where I first met Bill. In 1974 I was offered a position in management at the Minneapolis Star and Tribune Company as its production and labor relations manager. As the company's labor relations manager I stayed in touch with Bill as he move over the years to other key positions within the union ranks.

In 1984, I accepted a position at the Philadelphia Inquirer and Dailey News as its V.P. of Labor Relation. In this position Bill and I over the years negotiated several labor agreements dealing with automation, technology and other workplace changes. I found Bill to be very creative, understanding and a good listener. He cares deeply about all his members and represents them well.

Currently Bill and I sit as trustees of the Communication Workers of America and International Typographical Union Negotiated Pension Plan. Bill is currently Chairman of the plan. As a trustee Bill takes his position seriously and is always prepared. He has worked hard at understanding his role and has learned a lot about how pension plans work. He works well with everyone (attorneys, vendors, actuary's, etc.). Bill can be firm when he needs to be but he is always a gentleman. He will ask tough questions before making his decision. He is always mindful of his responsibility and what is in the best interest of the Pension Plan overall.

350 North Orleans Street | Chicago, Illinois 60654-1771
T: 312.321.2317 | trilea@suntimes.com

Bill is a real leader. He has vast experience in the printing business and as a result has seen and had to deal with a lot of changes over the years. He has the respect of everyone on both sides of the table. He is honest, hardworking, a class act and I believe he would do a great job as the Public Printer of the United States. I ask again that you support his nomination. Thank You.

~~I would please request that this letter be included in the hearing record.~~

Yours truly,

Ted Rilea
Vice President
Labor Relation
Human Resources

Cc: William J. Boarman
Andrew M. Sherman

Questions for the Record for William J. Boarman, Public Printer, Nominee

GPO Mission and Strategy

Question: Nearly 60 percent of the printing the GPO manages for the Federal Government is procured through private sector vendors across the country. On a daily basis, the agency maintains between 600 and 1,000 print-related projects a day through a long-standing partnership with America's printing industry. Do you plan on maintaining this business model that relies on the private sector as a partner?

Answer: If confirmed, I plan on maintaining this business model, which relies on the private sector as a partner. GPO's relationship with the private sector is essential to its operation, since it does not have the capacity to perform the volume of work that is procured, currently about $500 million annually. The robust open competition in the procurement program achieves significant savings for taxpayers, and there are opportunities for expanding this program that should be pursued.

Question: How do you see the escalating demand for information to be compiled, published, and distributed in electronic formats affecting the mission and operational plans for the GPO during your tenure?

Answer: GPO's technology systems need to continue to be responsive to the demands of Congress, Federal agencies, and the public, for digital formats and applications that facilitate and expand the use of Government information products and services, especially in view of the commitment by the President and Congress to open, transparent Government. The challenge facing GPO is to have a highly skilled workforce and well-equipped infrastructure to manage the expanding range of conventional and digital information products the Government and the public need. New operational plans must be developed to specifically address new and emerging technological trends, as well as the skill sets, training programs, and equipment requirements that GPO will need to address those trends.

Nominee's Background:

Question: For FY 2009, the Government Printing Office earned $934 million in revenues. Given the complexities of managing an agency of this size in an industry that is being increasingly changed by evolving technology, how has your background prepared you to lead the GPO?

Answer: I am a practical printer by trade and have spent my career working with employees and management throughout the industry – including GPO – in dealing with technological change. As President of the Printing, Publishing, and Media Workers Sector of the CWA and as CWA's Senior Vice President, I have had significant experience in the management of the CWA. I have been privileged to serve as the chairman of the $1 billion CWA/ITU Negotiated Pension Plan for

more than 20 years, as board member and co-chair of the Council of Institutional Investors for three terms, and as chief executive of the Union Printers Home Corporation—all of which enabled me to develop critical managerial and financial skills. I have maintained a lifelong interest in GPO, testifying before Congress many times over the past 30 years on the management and operations of the agency, supporting it vigorously against unwise proposals to dismantle its programs, and backing its use of technology to increase worker productivity, achieve savings, and better serve the Government and the public. If confirmed, this is the background I will bring to the leadership of the GPO.

Question: You have a very strong labor union connection. How will you manage the transition from labor to management? How do you view your new responsibilities?

Answer: As a leader at CWA, I gained extensive managerial experience, and my career-long interest in and support for GPO have equipped me to make that transition. If confirmed as Public Printer, I fully understand the statutory obligation of that office to "take charge and manage" the GPO, to ensure that it performs its mission to provide for the information needs of the Congress, Federal agencies, and the public both effectively and efficiently. Nothing in that mission is inconsistent with the principles of fairness and equity that should guide the actions of both labor and management in any context.

Workforce Development/Recruitment:

Question: Because GPO operations continue to support the printing needs of the Federal Government as well as enhance the Government's ability to disseminate information through electronic media, GPO will need to develop a workforce with the capabilities of supporting these operations into the future. What steps should GPO take to identify the critical occupations and competencies required to fulfill these missions? How would you ensure that GPO recruits and trains individuals with these capabilities?

Answer: To identify the critical occupations and competencies needed to fulfill these mission requirements, GPO should continue to monitor the evolution of electronic media and how it can be adapted to GPO's operational processes. This should be carried out by consulting with industry experts, stakeholders, and employees to clearly define the role of electronic media in the industry, the impact on GPO operations, and customer expectations. The knowledge gained from the consultation should be used to develop a strategic plan that identifies GPO's response to ongoing and emerging trends and the required skill sets. GPO should then conduct a workforce assessment to determine how the GPO measures up against those skill sets. With that knowledge, training programs can be developed to retrain existing staff and recruitment plans can be developed for prospective hires. To ensure staff commitment, this strategic goal would be tied to performance plans.

It is my understanding that GPO has an aging workforce. This is going to become a critical issue in the next few years. The workforce assessment plan can be used as the basis for the

development of succession planning and the subsequent use of recruitment and, if necessary, retention programs.

Depository Library Program:

Question: The Federal Depository Library Program safeguarded the public's right to know about their Government. What is your view of the role GPO plays in providing public access to Government information? Are there opportunities for improvement?

Answer: I believe that the Federal Depository Library Program, which traces its beginnings to the early 19th century, is the original "Open Government" program. The depository library program was envisioned as a way to "keep America informed" by distributing the official publications of the Government to participating libraries throughout the country where they would be available for free use by the public. That mission continues today in GPO's partnership with more than 1,200 libraries nationwide, and through its online information dissemination programs – GPO Access and FDsys – whose objective is to provide permanent public access to authentic online Government information.

The rapid development of new technologies has resulted in a sea change in the way the public locates, accesses, and uses Government information. GPO has been a major contributor to that change with the introduction of a centralized online dissemination program enacted by the GPO Access Act in 1993, and the development and implementation today of FDsys. If confirmed, a top priority would be to improve the program by completing the development of FDsys, which the library community has been patiently waiting for. I believe that the mission of GPO and the depository library program to "keep America informed" is more important than ever before due to the challenges of the digital age. I look forward, if confirmed, to working with GPO, various stakeholders, and the depository library community to assess any opportunities for improvements to ensure continued access.

Question: "Printing" no longer means ink on pages and "books" are no longer pages between a hard cover. What demands or requests are the Federal Depository Libraries making on GPO as a result of these changes in publishing technology and how do you see GPO responding to those needs?

Answer: The availability of electronic information technologies can help the library community address many, though not necessarily all, of the challenges it is facing. The completion of FDsys is definitely needed. GPO also needs to maintain a robust ability to "harvest" agency publications made available on the Web to ensure they remain permanently available to the public. In addition, the prospect of digitizing historical print materials would be a highly useful resource. However, the program also must be responsive to the needs of depository library users who continue to require access to an official print version, particularly in light of the challenges of permanence (including assured backup systems), digital authentication, and preservation that have yet to be fully resolved.

GPO needs to work with the library community through the Public Printer's depository council, the library associations, and other stakeholders to examine how the Federal depository library program can be transformed into a system that recognizes the unique needs of its member institutions, empowers them to work effectively with the patrons they serve, and relieves them of the burdens of one-size-fits-all requirements, while preserving the overall goal of the program to "keep America informed."

Question: Some Depository Librarians feel that GPO is not meeting the needs of their users or adjusting to the increasing demands for digital access to Government information. What can GPO do to work with these Librarians and ensure that the Federal Depository Library Program will continue to keep America informed?

Answer: It is my understanding that depository libraries vary greatly in how they build their depository collections, and they make format decisions to best meet the needs of their users. I think GPO should be able to provide for the needs of all depository libraries and their users, from those who require the latest forms of digital access to those serving members of the public who may not know how to use a computer.

I have great respect for the knowledge and dedication of depository librarians in helping the public find and use the Government information they need. It is important that GPO provide collections and services to meet a wide variety of user and depository library needs. In order to remain robust in the 21st century, GPO and the Federal depository library community must continue to work together, in partnership and collaboration, to keep America informed by ensuring permanent public access to official and authentic Government information.

Financial Outlook:

Question: Over the past several fiscal years, GPO's operations have been generally successful with positive financial returns. However, the annual positive returns have been declining and FY 2009 showed a loss after adjustments. From your past experiences and interaction with GPO, what factors do you believe have contributed to this trend? As the Public Printer, how would you ensure that these financial returns continue into the future during a period of fiscal austerity? Do you see any areas of growth or new business for the agency?

Answer: It is my understanding that GPO has been impacted by fluctuations in revenue and increased expenses. This change in revenue is primarily due to changes in printing by the customer base, including passports. At the same time, GPO's expenses have increased. To generate positive financial returns during a period of financial austerity, GPO needs to carefully examine its finances and map the budget and projected expenses against the agency's key priorities. This process may involve re-evaluating activities that no longer make business sense during a period of fiscal restraint. In this respect GPO is no different from other Federal agencies – and most American businesses – in this tough economic climate. At the same time

there are opportunities that GPO should pursue to grow its business in the secure credential area and in print procurement.

Question: Given the state of the economy, the Appropriations Committees are warning agencies to expect FY 2011 appropriations to be reduced or held to last year's totals. What can GPO do to help customer agencies reduce the costs of their printing and publishing programs?

Answer: One of GPO's greatest strengths is its print procurement program and the savings it achieves on Government printing. GPO already procures approximately $500 million in printing annually for Federal agencies. Federal budget data, however, indicate that there continues to be some printing produced by the Federal Government that does not come through GPO. I think that if GPO markets its capability to the agencies effectively – by providing the best quality customer service and demonstrating the savings that can be achieved – we can provide a real service to these agencies by helping them reduce their costs in these tough fiscal times.

GPO can also assist customer agencies by strengthening its well-known role as a printing and information services consultant. GPO experts have knowledge of and accessibility to emerging cost-efficient technologies. Closer collaboration between GPO and agency printing and information officers can result in the development of cost-effective solutions for the information product and service needs of Federal agencies governmentwide.

Building /Plant Infrastructure:

Question: In the past, GPO management has raised concerns that its facility is too large, inefficient, and expensive to operate. However, it appears that GPO lacks the legislative authority to lease its current facility and use the proceeds towards a new facility. In light of these circumstances, what ideas or plans do you have to address these issues and improve the efficiency of GPO's operations?

Answer: Because GPO is so closely a part of congressional operations, I think it is important that it be located near the Congress. Last year the GAO released a study of GPO's building plan recommending that a range of options be evaluated from a cost/benefit standpoint. If confirmed, I look forward to understanding in further detail the current authority GPO has in regards to its facilities and whether any changes would allow GPO to enhance its services and cost-effectiveness.

Senate Committee on Rules and Administration
Nomination of William J. Boarman to be the Public Printer
Questions for the Record from Senator Cochran

Question: In your prepared remarks and statement, you share your personal background and background on the GPO. As chief executive officer, the Public Printer sets the strategy and vision for the GPO. Could you please lay out your vision for the agency?

Answer: If confirmed, ensuring GPO's financial soundness will be my first and immediate priority. I will also make it a priority to ensure the continued adoption of print and information technologies that increase the efficiency of GPO's plant operations, and to grow GPO's print procurement operation as a best price solution for Federal agencies. I believe it is essential to strengthen GPO's position in the secure Federal credentials market.

GPO has a longstanding record of supporting open and transparent Government through its Superintendent of Documents programs, especially the Federal depository library program. To carry out our partnership with depository libraries effectively in the 21st century, it is essential to complete the implementation of FDsys, in order to provide the public with permanent, authentic access to Government information in a digital environment. In addition, if confirmed, I would also want to work with the library community to look at how the Federal depository library program can be transformed into a system that recognizes the unique needs of its member institutions, empowers them to work effectively with the patrons they serve, and relieves them of the burdens of one-size-fits-all requirements, while protecting the overall goal of the program to "keep America informed."

GPO must aggressively engage in workforce assessment and planning to ensure a workforce that meets the demands of a continually changing information environment, and make effective use of training, recruitment, and retention polices to guard against the loss of essential skills and improve the performance of our mission.

Finally, GPO has compiled a record of practicing environmental sustainability that should be continued. GPO's program of preparing for business continuity to support Congress and agencies in an emergency should also be carried on. Additionally, the GAO has recommended the need to fully consider the costs and benefits of a range of building options for the GPO, and if confirmed, I look forward to understanding these recommendations in more detail.

If I am confirmed, my objective will be to carry out these priorities in consultation with all of GPO's stakeholders, including our oversight and appropriations committees, GPO's customers in Congress and Federal agencies, the printing industry, the library and information user communities, employee representatives, and other groups.

Question: How will you achieve this vision in an era of fiscal restraint?

Answer: In carrying out its mission, GPO has to manage its finances in a way that makes business sense. In an economic downturn, it has to tighten its belt like other organizations. GPO needs to carefully examine its finances and map its budget and projected expenses against key priorities. This process will involve close scrutiny of current spending patterns and re-evaluation of areas that do not present a sustainable business case. It also needs to make prudent acquisitions in technology that provide a demonstrable return on investment so that worker productivity continues to increase. At the same time, GPO should focus on growing its business where there is opportunity, such as security and intelligent documents and print procurement. Just as for any other business operating in a downturn, the emphasis at GPO will be on working smarter and more efficiently while striving to reduce costs.

Question: Please explain which of the activities performed by the GPO are inherently governmental? In your view, is there any fundamental reason for government to use the private sector for printing or are there specific areas that should be reserved for government?

Answer: GPO produces congressional printing and certain key executive branch regulatory documents at its main plant, where this work is under close control and can be produced in response to quickly changing requirements. GPO also produces passports and secure Federal credentials in-plant, where its government-to-government relationship with the State Department and other agencies provides the secure production environment these products require.

Otherwise, the vast majority of work requisitioned from GPO is procured through GPO's longstanding partnership with thousands of private sector printers nationwide. Approximately 60% of all printing produced by GPO is procured; excluding passports and secure credentials—which have never been considered commercially procurable—approximately 75% of all printing sent to GPO is procured. GPO's relationship with the private sector is essential to its operation, since it does not have the capacity to perform the amount of work that is procured, currently about $500 million annually. The robust open competition in the procurement program achieves significant savings for the taxpayers, and there are opportunities for expanding this program that should be pursued.

Question: In your view, what is the appropriate percentage of agency printing that should be performed by GPO? Will you agree to continue to support a robust private sector printing industry?

Answer: For many years, this percentage—excluding passports and security documents—has been 70-75%. I think that the percentage of private sector printing could potentially increase as GPO demonstrates the savings that Federal agencies can achieve in their printing and publishing

programs by increasing their use of GPO. GPO historically has had a solid partnership with the private sector printing industry that I whole-heartedly support and will work to enhance, if confirmed.

Question: The printing industry, and GPO, has been undergoing a long-term transformation that has resulted in a decrease in size as it has shifted to electronic media. How do you plan to manage GPO through this continuing transformation, and how will you balance this with your life-long focus to protect workers?

Answer: While at GPO in the 1970's—and ever since—I worked to achieve agreements with management that both protected and provided opportunities for workers while opening the door to technological change. Through the years, GPO has managed technology transition by providing for training and retraining opportunities, and has preferred to use attrition instead of occupational dislocation measures such as RIF's, which can be costly and unnecessarily disruptive, to make adjustments in its workforce levels. I think this has been a successful strategy at GPO, and if confirmed, I would hope to continue this practice.

Question: Since over 80% of GPO's budget is derived from revolving fund activities, what happens if money falls short and GPO cannot meet budget constraints? Are there implications on the workforce?

Answer: GPO's revolving fund was devised so that GPO would operate like a business. In carrying out its mission, GPO has to manage its finances in a way that makes business sense. GPO's expert staff is its most important resource. GPO must also be able to generate the income necessary to make essential investments in technology to increase worker productivity. There are a various steps that GPO can take if necessary to adjust staffing and technology investments in response to changing business conditions. If confirmed, I would want to use strategic planning to predict and manage developments that would impact staffing and technology investment levels. I would also want to pursue opportunities to grow GPO's security and intelligent documents and print procurement programs.

William J. Boarman
Senator Alexander - Questions for the Record

Question: As chief executive officer, the Public Printer sets the strategy and vision for the GPO. Could you please lay out your top three or four goals to achieve your vision for the agency?

Answer: If confirmed, ensuring GPO's financial soundness will be my first and immediate priority. I will also make it a priority to ensure the continued adoption of print and information technologies that increase the efficiency of GPO's plant operations, and to grow GPO's print procurement operation as a best price solution for Federal agencies. I believe it is essential to strengthen GPO's position in the secure Federal credentials market.

GPO has a longstanding record of supporting open and transparent Government through its Superintendent of Documents programs, especially the Federal depository library program. To carry out our partnership with depository libraries effectively in the 21st century, it is essential to complete the implementation of FDsys, which provides the public with permanent, authentic access to Government information in a digital environment. If confirmed, I would also want to work with the library community to look at how the Federal depository library program can be transformed into a system that recognizes the unique needs of its member institutions, empowers them to work effectively with the patrons they serve, and relieves them of the burdens of one-size-fits-all requirements, while protecting the overall goal of the program to "keep America informed."

GPO must aggressively engage in workforce assessment and planning to ensure a workforce that meets the demands of a continually changing information environment, and make effective use of training, recruitment, and retention polices to guard against the loss of essential skills and improve the performance of our mission.

GPO has compiled a record of practicing environmental sustainability that should be continued. Likewise, GPO's program of preparing for business continuity to support Congress and agencies in an emergency should also be carried on. Additionally, the GAO has recommended the need to fully consider the costs and benefits of a range of building options for the GPO, and if confirmed I look forward to understanding these recommendations in more detail.

If I am confirmed, my objective will be to carry out these priorities in consultation with all of GPO's stakeholders, including our oversight and appropriations committees, GPO's customers in Congress and Federal agencies, the printing industry, the library and information user communities, employee representatives, and other groups.

Question: How will you achieve this vision in an era of fiscal restraint?

Answer: In carrying out its mission, GPO has to manage its finances in a way that makes business sense. In an economic downturn, it has to tighten its belt like other organizations. GPO needs to carefully examine its finances and map its budget and projected expenses against key priorities. This process will involve close scrutiny of current spending patterns and re-evaluation of areas that do not present a sustainable business case. It also needs to make prudent acquisitions in technology that provide a demonstrable return on investment so that worker productivity continues to increase. At the same time, GPO should focus on growing its business where there is opportunity, such as security and intelligent documents and print procurement. Just as for any other business operating in a downturn, the emphasis at GPO will be on working smarter and more efficiently while striving to reduce costs.

Question: Today GPO procures over $500 million in printing from private sector small printing firms.

a. Will you require Union Prevailing wages to be paid for all GPO outsourced work? How would such a decision impact costs to the taxpayer?

b. Do you intend to continue support of this level of private sector procurement at GPO? Why or why not?

Answer: GPO's print procurement authority under the law does not allow the Public Printer to impose or require any kind of wage levels. GPO's print procurement program works extremely well, procuring available press and other production capacity in the private sector on a highly competitive basis, and it does so extremely economically and with great benefit to the taxpayers. I believe union printers can compete in this program if they chose to do so. GPO does not and cannot impose wage levels for private sector printers who participate in this program, and I have no plans, if confirmed, to change a system that works so well.

I fully support GPO's longstanding partnership with the private sector printing industry. In this economic climate I believe there is real potential for expanding GPO's procurement program as a best price solution to Federal agencies seeking savings in their printing and publishing programs.

Question: Are there processes at GPO that are outdated and need to be modernized? Are there proactive changes in the workforce and production methods that, if introduced now, could help prevent having to institute a Reduction in Force (RIF) at GPO?

Answer: It is my understanding that technology applications in digital printing, print-on-demand, workflow management, security printing, composition system replacement, and related systems are either planned or under evaluation at the GPO. In addition, major technology projects such as GPO's FDsys and its program of replacing legacy computer systems, are

underway. My intent, if confirmed, would be to continue these activities and to select technology improvements that meet GPO's business needs, offer a proven return on investment, and ensure the performance of GPO's mission, within the available funding. GPO's incorporation of technology improvements has historically boosted productivity significantly, making occupational dislocations such as RIF's unnecessary.

BUSINESS MEETING

TUESDAY, JULY 20, 2010

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, D.C.

The Committee met, pursuant to notice, at 2:30 p.m., in Room S–216, The Capitol, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Inouye, Dodd, Feinstein, Durbin, Nelson, Murray, Pryor, Udall, Warner, and Bennett.

Staff present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Staff Director; Veronica Gillespie, Elections Counsel; Josh Brekenfeld, Professional Staff; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Abbie Platt, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

Chairman SCHUMER. The Committee will come to order. A quorum of ten members is present. Unless there is a request for a roll call vote, this will be a voice vote.

Do I hear a motion that the nomination of William J. Boarman of Maryland to be Public Printer be reported to the Senate with the recommendation that it be approved?

Senator BENNETT. I so move.

Chairman SCHUMER. Is there a second?

Senator WARNER. Seconded.

Chairman SCHUMER. All in favor, say aye?

[A chorus of ayes.]

Chairman SCHUMER. Oppose, nay?

[No response.]

Chairman SCHUMER. The ayes have it. The nomination is ordered and reported to the Senate with the recommendation that it be approved.

The meeting is adjourned, and thank you all for coming and for your patience.

[Whereupon, at 2:31 p.m., the Committee was adjourned.]

○