



**Before the United States Senate
Committee on Rules and Administration**

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

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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, 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 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 the

clear distinctions between “private” corporations established by individuals and municipal corporations established by governments.

Justice Stevens’ conclusion that the government may interfere with the First Amendment rights of privately founded and financed corporations is not only absent in the *Dartmouth College* decision, it is contradictory to it. Indeed, Professor Foley rightly acknowledges this public/private corporation distinction.

Second, foreign participation—whether direct or indirect—in our elections is a crime. Even the giving or receiving of foreign *advice* is a crime. Domestic subsidiaries with a majority of foreign directors are permitted to establish PACs so long as the decisions are delegated to U.S. nationals. PACs allow American employees and American executives to participate in politics no matter their employer. But, 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. Why? Because 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 nothing, would be a cynical statute unworthy of U.S. Senators.

Proposals to silence corporations with 5% foreign ownership are likely unconstitutional, as Professor Gerken acknowledges, because it is burdensome for corporations to know who owns 5% of shares at any one time. Silencing corporations with a majority of foreign shareholders is covered by existing law, and any legislation that would clarify the point must apply equally to non-profits with a majority of foreign *membership*, and to labor unions. We’re aware, after all, of what the “I” stands for in SEIU.

The Supreme Court just said in *Citizens United* that any association of Americans may speak about politics, no matter their associational form. Expect soon a majority of the D.C. Circuit, in the *SpeechNow.org* case, to permit multiple organizations to pool funds for these purposes. This would mean that right-to-life organizations may team with right to work groups and with small businesses across the land. Children's Defense Fund may team with the Teachers' unions.

This will be healthy for democracy, and there is little you can do but adapt.

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 its treasury spent on the ad. But what benefit would that provide the public? The apparent goal is simply to discourage 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 only BCRA provisions not held unconstitutional. Wouldn't it be better if the party committees had resources enough to go straight to the people with legislative issues, or resources enough to depend less on outside spending in the coming midterm elections?

Permit the national party committees a building fund. Include staff salaries, lift the party coordinated limits, and free up resources for elections. Establish an issues fund for communications that don't mention candidates. Decouple the state party committees from federal law—the Levin-fund provisions never worked well, anyway.

Many of the organizations I mention would rather give some of their resources to the political parties rather than go it alone under the *Citizens United* opinion. You should permit them do to so.

Lift these restrictions or you will face second-tier budgets that garner second-tier operatives, resulting in second-tier campaigns.

If this trend persists, you can expect the People to go elsewhere—not because they disagree with your message—but because current law makes it comparatively impossible to affiliate with entities that have either “Democrat” or “Republican” in their title, and almost effortless to engage with outside organizations.

Now Mr. Wertheimer would exacerbate your problem by tightening existing restrictions on coordination, and keeping flat the amounts the party committees can accept, even while recognizing that outside organizations will likely spend relatively more resources independently.

Senators, my overall point to you is this: If it is your position that accepting the support of your political allies somehow corrupts you, well, you’re a co-equal branch of the federal government and the Court will take you at your word. But what the Court will no longer take, correctly and for the foreseeable future, is the argument that outside groups can be silenced because they speak more effectively than you might prefer.

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

Thank you.