Opening Statement

of

JAN BARAN

Before

Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises

Committee on Financial Services

U.S. House of Representatives

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Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to this hearing on the Supreme Court decision in *Citizens United v. Federal Election Commission.* While I was a co-author of amicus briefs filed with the Court in that case, my testimony today is my own and is not on behalf of that amicus, any client of my firm or anyone else.

Let me address the five questions posed by the Subcommittee to all of the panelists today.

1. Should Congress take legislative action in light of the Citizens United decision?

It is appropriate for Congress to examine the Court's decision and evaluate what if any further legislation is permitted and needed. Any proposed legislation, however, will have to comport with the Court's decision and its other rulings in this area. In that regard, the legislation may not improperly impede the exercise of fundamental rights including those of free speech, association and the petitioning of government.

2. How, if at all, should Congress limit new corporate political activity that could arise as a result of Citizens United, especially in the context of corporate governance?

The short answer is that Congress may not "limit" corporate (or union) independent expenditures. *Citizens United* held that independent political speech by corporations may not be prohibited or limited. Therefore, any legislation that limits, is intended to discourage or in effect serves as an unreasonable, unjustified impediment to the exercise of independent political expression will contravene the Court's holding. The Court did uphold existing laws that require the filing of disclosure reports with the Federal Election Commission and the placement of notices on public advertising

confirming the identity of the speaker. Such laws are permitted but may not be excessively burdensome or subject the speaker to threats, harassment or reprisals.

With respect to corporate governance, the question will be whether proposals requiring shareholder approval and additional reporting to the government are based on a valid government interest or designed to impede or deter the exercise of constitutionally protected political speech. Any new rule on corporate political expenditures will be compared to how other corporate expenditures are treated under the law and why there is a difference. Let's assume a law requires separate shareholder approval of any expenditure by the corporation for political purposes in excess of $10,000. There is no similar requirement to approve other expenses such as a company's decision to embark on a capital expense for a new plant costing millions of dollars be subject to similar approval. Isn't the latter expense potentially of greater material consequence to stockholders than a $10,000 political ad? Will stockholders hereafter have to approve the creation of a PAC by a corporation? No vote by stockholders or even the board has ever been required.

Discriminatory requirements combined with public as well as legislative statements by proponents revealing an intent to "limit" or deter political spending would lead to the inescapable conclusion that required stockholder approval was designed primarily if not solely to deter the exercise of a constitutional right. That is not permitted.

3. What are your thoughts and comments on various legislative proposals?

As with all campaign finance related legislation Congress should legislate mindful of the important constitutional values present within political speech and activity. But in addition, Congress will have to evaluate practicalities. Specifically, how will a proposal actually work?

For example, there have been suggestions that so-called "foreign" corporations should be subject to prohibitions on political expenditures. This issue was not resolved in *Citizens United.* Current law prohibits contributions or expenditures by foreign nationals. Some have proposed defining a "foreign corporation" as a company with more than 20% foreign ownership. Presumably the objective is to prevent the "influence" of foreign money on our elections. Assuming that is a valid reason to ban speech, how will a company be able to determine that more than 20% of its stock is owned by foreigners? What if stock is owned by mutual funds or ETFs. Such ownership is common and often a significant percentage of publicly owned stock. Will a fund's foreign ownership have to be determined and will that be attributed to the company whose stock it owns in calculating the company's 20%?

Moreover, how does foreign stock ownership square with any proposal requiring the vote of stockholders to authorize a corporate political expenditure? Will foreign stockholders be permitted to approve corporate expenditure or will such stockholders be prohibited from voting on such matters since we don't want foreigners to influence our elections and electoral speech?

In addition, if 20% stock ownership constitutes a perceived threat of foreign money in our elections, what about revenues to a corporation? If a U.S. corporation generates more than 20% of its revenues in foreign sales does it become a "foreign" company subject to restrictions? If not, what is the difference between foreign stock ownership and foreign income? Isn't it all foreign money?

Similar questions arise from proposals to ban political expenditures by corporations (and presumably unions) that receive government contracts and grants. Will all recipients of government funding in its many forms be banned from making political expenditures? There is a proposal to require separate corporate accounts for political expenditures. This seems to fly in the face of the Court's decision that spending only through a political action committee or a "separate segregated fund" is not the same as spending by a corporation or union and is not a constitutionally acceptable substitute for the exercise of corporate or union political speech.

Each proposal should be evaluated as to its legal, constitutional and practical implications.

4. What are the issues presented by trade associations or third parties through whom corporations could give money to evade any present or future disclosure or corporate governance-related legislation?

While this question refers to trade associations, presumably all types of associations are implicated. Groups that are incorporated and receive corporate and union support include associations that support or oppose environmental causes, abortion rights, gun ownership, trades and professions, and many other business and social interests. Treating certain types of associations or entities differently will potentially raise both First Amendment and equal protection concerns. *Citizens United* is only one of many cases that treat all types of speakers the same way. Independent spending for political communications may not be prohibited or limited whether the speaker is an individual, committee, political party, not-for-profit corporation, business corporation or union. Accordingly, burdens uniquely placed on certain groups like trade associations, and not on other entities will raise suspicions and claims of unjustified burdens on speech as well as improper discrimination. Current law and FEC regulations require the disclosure by any independent spender of donations that are received for the purpose of financing a reportable political communication. This requirement applies across the board as it should. Any additional requirements, assuming they are not improperly burdensome, should also apply across the board. By the same token, there are profound practical and legal considerations if a law were to require a private organization to disclose publicly all of its supporters regardless of whether the disclosure is related to specific political campaign activity.

5. What are the First Amendment issues implicated by Citizens United?

I have submitted to the Subcommittee a recent article I have authored entitled "*Citizens United v. FEC*: Independent Political Advertising by Corporations in Support of or in Opposition to Candidates May Not Be Prohibited," published by LexisNexis. The article summarizes the history of campaign finance legislation, the Supreme Court's jurisprudence in this area of First Amendment rights, and the practical implications of the *Citizens United* decision.

As the title of my article suggests, the Supreme Court concluded that money spent by corporations to disseminate views on candidates may not be prohibited. Such spending also may not be subject to a limit. The Court's decision did not occur in a vacuum. Over the past 34 years, the Court made similar conclusions with regards to spending by wealthy individuals, political action committees, political parties and even not for profit corporations. The spending at issue in all these examples is undertaken by the speaker independently of any political candidate or political party. The communication constitutes the speaker's own message. While such spending by corporations and unions was prohibited under federal law with respect to elections for the House, Senate and president, 26 states and the District of Columbia had no prohibitions. Similarly, while contributions from corporations and unions are prohibited under federal law, 28 states permit corporate contributions and a greater number of states permit union contributions to political parties and candidates running for state or local office. The Court noted that the pervasiveness of state laws and the absence of corruption caused by independent spending undermine any government claims that prohibitions or limits on such corporate spending were necessary to prevent corruption. In contrast, the giving of money or goods and services to a candidate raises the risk of a quid pro quo. For that reason, the Court has upheld reasonable limits on contributions to candidates and committees.

Again, thank you for the opportunity to appear today. I look forward to any questions you may have.

Jan Witold Baran
WILEY REIN LLP
Washington, DC

202.719.7330
jbaran@wileyrein.com

Attached: "*Citizens United v. FEC*: Independent Political Advertising by Corporations in Support of or in Opposition to Candidates May Not Be Prohibited," by Jan Baran, published by LexisNexis Emerging Issues Analysis, February 2010.

LexisNexis® Emerging Issues Analysis

Jan Baran on *Citizens United v. FEC*: Independent Political Advertising by Corporations in Support of or In Opposition to Candidates May Not Be Prohibited

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On January 21, 2010, the Supreme Court of the United States issued its widely anticipated ruling in *Citizens United v. Federal Election Commission*. __ U.S. __, 175 L. Ed. 2d 753, 2010 U.S. LEXIS 766 (2010). The incorporated not-for-profit organization, Citizens United, wished to distribute and advertise a 90 minute video it had produced entitled "Hillary, The Movie." The case implicated both federal campaign finance laws and the First Amendment of the Constitution. The documentary was sponsored and produced by a corporation with corporate funds, and Hillary Clinton at the time was a candidate for the Democratic Party nomination for President. Even though "Hillary, The Movie" was produced independently of any candidate or political party, federal law (and the law in 24 states) generally prohibited corporate financed messages that urged the public to vote for or against a candidate. Many laws also banned similar messages from labor unions. While the Court had previously upheld a First Amendment right of individuals, political committees, and political parties to make unlimited "independent expenditures" it had denied such a right to corporations in the 1990 case of *Austin v. Michigan Chamber of Commerce*. Thus, *Citizens United* became the vehicle by which the Court revisited its First Amendment jurisprudence and somewhat dramatically reversed *Austin* and part of another campaign finance case in order to reestablish a principal that independent political speech, even that of corporations and unions, may not be banned.

In order to appreciate the Court's ruling in this 5-4 decision, it is helpful to summarize the following: 1) the basic terms used in campaign finance law, 2) the history of campaign finance regulation, and 3) prior Supreme Court determinations. For the legal practitioner, the final portion of this article addresses the practical implications of the *Citizens United* decision and some issues that remain outstanding.

What are Contributions, Expenditures, Independent Expenditures and Electioneering Communications?

Campaign finance laws regulate the receipt and spending of money in connection with election campaigns. Over the course of several decades, specific terms have been used to identify certain financial aspects of campaigns. Perhaps the most frequently used term is "contribution." A contribution is variously defined in federal or state laws but, in

essence, refers to "something of value" that is given to or made available to a candidate or political committee. A contribution includes cash as well as checks, credit and loans as well as tangible goods and services such as office space, furniture, transportation or compensated workers. The laws often define "expenditures" in a similar fashion, i.e., money or something of value that is disbursed by or for the benefit of a candidate or committee. Expenditures that are incurred by third parties for the benefit of a candidate or committee and at their request or with their approval or participation are usually referred to as contributions in-kind. Expenditures that are not coordinated with a candidate or committee are considered "independent" and not contributions.

Since the case of *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 1690, 48 L. Ed. 2d 190 (1976) (which will be discussed below), expenditures for public communications which contain language that expressly advocates the election or defeat of a clearly identified candidate are called "independent expenditures." As the definition states, a message must contain "express advocacy" in order to qualify as an independent expenditure. In 2002, Congress (and subsequently 13 states) inserted into campaign finance laws the term "electioneering communication" which refers to messages that merely "refer" to a candidate or political party. Federal law banned such messages if distributed 30 days before a primary election or 60 days before a general election via the media of television, radio, satellite or cable. Some state laws apply the term more broadly or to longer pre-election periods. In any event, an electioneering communication encompasses content that is broader than an independent expenditure which contains express advocacy only. Significantly, both electioneering communications and independent expenditures are not contributions because they must be undertaken without collaboration with a candidate or political party.

The History of Campaign Finance Laws

The Tillman Act of 1907 is considered the first major federal campaign finance law. It prohibited for the first time contributions by corporations to political parties. In 1947 the Taft Hartley Act expanded the statute to both prohibit expenditures as well as contributions to parties or candidates and to include labor unions within the prohibition. In the aftermath of the so-called Watergate scandal of the early 1970's, Congress enacted extensive campaign finance regulation which included public financing of presidential campaigns, financial reporting by campaigns and committees, limits on contributions, limits on expenditures including independent expenditures, and the creation of a civil enforcement agency, the Federal Election Commission (FEC). The limits on expenditures were declared unconstitutional in *Buckley*, but otherwise the reforms generally were upheld. In 2002 Con-

gress passed and President George W. Bush signed the Bipartisan Campaign Reform Act (BCRA) which popularly is often called the McCain-Feingold law in recognition of the Senate sponsors of the bill. BCRA tightened the prohibition on corporate and union donations to national political parties and instituted the first ban on electioneering communications sponsored or financed by corporations or unions.

Supreme Court Rulings on Contributions and Expenditures

Prior to the Watergate reforms, the Supreme Court rarely addressed campaign finance laws. When it did so, the cases almost always involved unions and whether their expenditures were subject to the federal ban. Invariably the Court concluded that the spending at issue, such as money spent on candidate endorsements to union members, *United States v. CIO*, 335 U.S. 106, 68 S. Ct. 1349, 92 L. Ed. 1849 (1948), or for the administrative costs of operating a political action committee *Pipefitters v. United States*, 407 U.S. 385, 92 S. Ct. 2247, 33 L. Ed. 2d 11 (1972) was not banned thereby avoiding any ruling on whether the bans violated the First Amendment freedom of speech.

In *Buckley v. Valeo*, the Court had to review the reforms and confront the constitutional issues directly. The court applied strict constitutional scrutiny to restrictions on campaign money, equating financing with speech. In doing so it required the government to establish a compelling justification for any restriction on money. The government argued that the justification was the prevention of corruption or the appearance of corruption. When applied to campaign contributions, the Court concluded that a limit on the amount that an individual or group could donate to a candidate or committee was a reasonable manner of preventing potential corruption. However, the Court held that the same was not true of expenditures. Accordingly, the Court struck down the federal laws that limited the amount that a candidate could spend on his or her own campaign, that limited the amount that a candidate's campaign could spend and that limited to $1000 the amount that an individual could spend on an independent expenditure. These limits did not prevent corruption and therefore, the Court concluded, violated the First Amendment.

In cases subsequent to *Buckley*, the Court struck down limits on independent expenditures by political committees, by certain not-for-profit ideological corporations, and by political parties. The Court also recognized that corporations could not be prohibited from spending money on communications that urge the public to vote for or against ballot issues. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). But in the 1990 *Austin* decision, the Court concluded that a Michigan statute that prohibited independent expenditures by corporations was constitutional.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990). Surprisingly, the Court did not reason that the ban was necessary to prevent corruption. Instead, the Court determined that a ban was justified because it prevented distortion of the political process resulting from the aggregation of wealth that can be achieved through the corporate form. In *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the Court extended the effect of *Austin* by upholding the BCRA ban on corporate or union electioneering communications. However, the ban was deemed unconstitutional as applied to "issue advertising" in the case of *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007).

Thus the stage was set for Citizens United and "Hillary, The Movie."

The Holdings in *Citizens United*

Because Citizens United was a corporation and received funding from other corporations, it was subject to the federal ban on corporate contributions and expenditures. "Hillary, The Movie" was a communication that referred to a candidate and was to be distributed as a video on demand via a cable system within 30 days prior to the 2008 Democratic primary elections. Therefore, it was an electioneering communication. Moreover, the content was in the words of the Court "pejorative" and the lower court determined that it constituted "express advocacy" of Senator Clinton's defeat. Thus the documentary arguably was an independent expenditure. Either as an electioneering communication or as an independent expenditure the video was prohibited by federal law.

After initial briefing and argument in March 2009, the Court ordered additional briefing and additional oral argument in September on the question of whether it was necessary to overrule the *Austin* case and the holding in *McConnell* regarding corporate independent political speech. In its decision, the Court in fact overruled those cases. The Court concluded that *Austin* was wrongly reasoned and that the "antidistortion rationale" was in conflict with *Buckley* and *Bellotti* and, more important, irreconcilable with the First Amendment which was intended to restrain government from banning speech just because it was being exercised by an association with a corporate form. As a result, corporations (and presumably unions) may engage in independent speech in the same way as individuals, committees, and political parties. Prohibitions and limits on such speech, whether independent expenditures or electioneering communications, violate the First Amendment.

Citizens United also challenged the disclosure and disclaimer statutes. These laws required the filing of reports regarding electioneering expenditures with the FEC and notices on advertising identifying the sponsoring organization and related information. The Court upheld the provisions on the same grounds that *Buckley* upheld more general election-related disclosures by candidates, political parties and independent spenders. Unlike prohibitions, disclosures and disclaimers did not prohibit speech, were subject to less restrictive constitutional scrutiny than expenditures, and served a public informational interest.

The Practical Consequences of *Citizens United* on Corporate Political Activities

While the *Citizens United* decision may be significant with respect to the Supreme Court's First Amendment jurisprudence, its practical significance is less certain. Although corporations and unions had been subject to a ban on "express advocacy," both types of entities have financed political advertising that avoid the so-called "magic words." Also, many ads escaped the prior ban on electioneering communications because they qualified as issue advertising. In recent federal elections incorporated entities and unions have spent tens of millions of dollars. Therefore, it remains to be seen whether the Court's decision will directly lead to more spending or to different content in political advertising or a combination of both.

Corporations and unions are no longer subject to bans on independent spending for campaign advertising but these and other political activities continue to be highly regulated. The following is a partial list of current legal considerations when corporations or unions engage in campaign politics:

1. No Contributions. Contributions by corporations are still banned under federal law and under the laws of 22 states. Accordingly, a corporation still may not donate corporate money to candidates in these jurisdictions nor coordinate their political spending with candidates. For this reason, political action committees (PACs) remain the only legal vehicle by which a corporation may contribute to candidates from the proceeds of voluntary individual donations that are donated to the PAC by stockholders and management.

2. No Coordinated Spending. The type of spending protected under the First Amendment by the *Citizens United* decision must be independent of candidates or political parties. This means that the spending may not be coordinated with these persons or entities. The FEC rules on "coordination" are extensive and detailed and subject to revision.

See 11 C.F.R. Part 109. Any applicable coordination rules must be followed when spending is subject to contribution bans or limits.

3. Reports Must Be Filed. Independent expenditures and electioneering communications are subject to disclosure laws. Reports disclosing such spending must be filed with applicable government agencies.

4. Donors May Have to Be Reported and Disclosed. Money that is donated to a corporation for the purpose of financing independent expenditures or electioneering communications may be subject to disclosure. This provision is most applicable to not-for-profit corporations that may rely on voluntary donations. Fundraising practices should be reviewed for compliance with any law that requires disclosure of contributors to organizations that finance political advertising.

5. Advertising Must Contain Disclaimers. Specific notices or disclaimers are required on political advertising. Both campaign finance and, where applicable, communications laws should be consulted to ensure complete compliance.

6. Tax Laws May Apply. Tax laws still govern corporations that have been granted tax exemptions. Various exemptions impose conditions on political activities. For example, charities and religious organizations are barred from intervening in any political campaigns. Accordingly, they may not finance independent expenditures or electioneering communications without risking their exempt status. Other entities, such as unions or trade associations, must have purposes other than influencing elections as their primary purpose in order to preserve their tax status. If a trade association spends a majority of its money on independent expenditures and political contributions it risks losing its exempt status. An incorporated association whose primary purpose is to influence elections may qualify for exemption under section 527 of the Internal Revenue as a "political organization." It then is subject to filing financial disclosure reports with the IRS as well as potential campaign finance reports each of which are publicly available.

7. Public Companies May Have Disclosure Policies. Business corporations may be subject to company policies as well as shareholder resolutions regarding political activities. Many public corporations have adopted policies voluntarily or in response to shareholder requests and obligate the company to disclose their political contributions. Such policies may also apply to independent expenditures and electioneering communications and therefore should be reviewed and perhaps updated.

8. Monitor Legislation. The *Citizens United* decision will prompt legislative proposals in Congress and in state legislatures. Future bills and enactments may increase disclosure requirements or attempt to impose additional regulatory burdens on independent political spending and therefore should be monitored closely.

9. Foreign Corporations and Their Subsidiaries are Still Subject to Spending Bans. The status of foreign corporations and U.S. subsidiaries of foreign corporations was not at issue in the *Citizens United* case. Those persons are regulated by a separate provision of federal law which prohibits foreign nationals and foreign money from making any contributions or expenditures in connection with any election in the U.S. whether federal, state or local. Under restrictive rules a U.S. subsidiary may sponsor a political action committee.

See Jan Witold Baran's Emerging Issues Analysis accompanying Citizens United v. FEC on lexis.com at 175 L. Ed. 2d 753 (2010)

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About the Author. Jan Witold Baran, named by Washingtonian magazine as a "Top Campaign & Elections Lawyer" and one of the "Top 50 Lawyers" in Washington, DC, advises clients on all aspects of political law including federal, state and local campaign finance laws, government ethics requirements and lobbying laws. He has argued four cases before the U.S. Supreme Court and has regularly appeared as a television and radio commentator, particularly with FOX News and NPR. During the 2000 Florida recount he served as a legal analyst for ABC News and abcnews.com. He is the author of the book, The Election Law Primer for Corporations, published by the American Bar Association and he co-chairs the Practising Law Institute's annual Corporate Political Activities conference. Recognizing Mr. Baran among the top tier of practitioners in his field, Chambers USA recently called him "one of the best election lawyers in the U.S. with the most comprehensive knowledge of the law at both state and federal level."