TESTIMONY ON CORPORATE MONEY AND DARK MONEY IN CAMPAIGNS

AND THE NEED FOR THE DISCLOSE ACT

SENATE DEMOCRATS PANEL ON REFORM

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NORMAN J. ORNSTEIN

Senator Whitehouse, thank you for the opportunity to testify today on the scourge of big money and the collapse of any boundaries around the role of money in politics since the infamous Citizens United decision dismantling one of the major reform achievements of the past several decades, the Bipartisan Campaign Reform Act, or BCRA. It is no coincidence that Mitch McConnell, who is as responsible for the damage to our political process and our policies as anyone, has given another middle finger to reform by hijacking the call letters for reform, BCRA, to use to identify his ill-conceived and mean-spirited health policy plan.

Today, I would like to focus on three things. The first is the deeply troubling state of our politics and the role big money is playing to make it worse. The second is the role of corporations, unleashed in politics by both Citizens United and McCutcheon, and possibly being made worse by the intended actions of McConnell and his allies. The third is the role that foreign money—and that includes corporations that no longer have a distinctly American identity or interest, or that are subsidiaries of foreign companies—will play in the years ahead. In my testimony, I will draw on a couple of things I have written on the subject, my previous testimony in front of the Senate Rules Committee on campaign finance, and an article I wrote on corporations for the National Journal and the Atlantic.

The battle over the distorting and corrupting role of money is not a new question in American politics. Concerns about corruption-- the understanding that money in campaigns can be a corrosive force, both from well-heeled individuals and groups seeking influence in government and from government actors shaking down individuals and groups to raise money-- were present quite early in our country's history.

The concerns were real. Periodically, scandals would engulf the system, leading to a backlash and a drive for reform. The scandals occurred, of course, because a wide open system, where anything goes, provided ample room for that corruption. Government has power-- power to provide jobs, via a spoils system; power to provide opportunities for individuals and interests to make huge sums of money via government contracts, tax breaks, regulations or rights of way, and in many other ways. And it is a two way street: the power of government can be used to extract money from those seeking favor or afraid of punishment. This is not a problem unique to America; it is a cancer afflicting societies across the globe, a danger to free governance and systemic legitimacy everywhere.

The history of American politics and political money shows that for at least 150 years, and arguably for more, concerns about corruption and the appearance of corruption often triggered by scandal, led to efforts to balance First Amendment freedoms by putting modest and reasonable restrictions on

campaign fundraising and contributions, to push for more disclosure as a disinfectant, to find ways to limit the overweaning influence of monied interests, including corporations and labor unions. Attempts to prohibit parties from shaking down government employees for contributions began in 1837. Historian John Lawrence has noted, Abraham Lincoln warned that concentrated capital had become “enthroned” in the political system and he worried about an era of “corruption in high places … until the Republic is destroyed.” The first actual restriction on campaign funding came after the Civil War, with an 1867 provision prohibiting the solicitation of contributions from naval yard government employees. The very modest change did not have any appreciable impact on the overall system.

Throughout our history we have seen a recurring set of cycles: corruption increases, peaks, a scandal emerges, some restrictions are enacted, then over time, the role of big money returns and increases, resulting in more corruption, more scandal, and another set of reforms. It was that kind of cycle that led to one of the most important and effective reforms in our history, the Bipartisan Campaign Reform Act known more widely as McCain-Feingold. The law was drafted carefully, using data and expert testimony, mindful of both the First Amendment and previous Court ruling; it was a banner moment when the Supreme Court affirmed it. And it worked to sharply reduce the impact of dark money and unlimited contributions while actually making parties more vibrant at the grass roots.

For those of us who helped craft the law, and who believe strongly in a republican form of democracy, it is especially painful to realize that it was the unexpected arc of John O’Connor’s Alzheimers that had Sandra Day O’Connor leave the Court prematurely. If not for that, BCRA would be intact and our campaigns and elections would be cleaner, more open and more reflective of the broader desires of Americans.

But O’Connor’s departure meant the Court was tilted in a more sharply ideological way, and that reality—along with Chief Justice Robert’s ignoring his flat pledge at his confirmation to respect stare decisis and have the Court rule narrowly on controversial issues to move away from divisive 5-4 decisions—resulted in a total reversal of reform in both Citizens United and the McCutcheon decision that followed.

Citizens United gets the most attention, but McCutcheon is at least as troubling, because of Roberts's sweeping conclusions about corruption and the appearance of corruption in the decision. The chief justice took the shaky logic used by Justice Anthony Kennedy in the Citizens United decision—that money given "independently" of campaigns could not involve corruption or its appearance—and applied it in an even more comprehensive fashion to money given directly to candidates and campaigns. Thanks to McCutcheon, only quid pro quo corruption is sufficient to trigger any restrictions on campaign contributions—meaning, direct bribery of the Abscam or American Hustle variety, presumably captured on videotape for the world to see. The appearance of corruption? Forget about it. Restrictions on elected officials soliciting big money? Forget about them, too.

To anyone who has actually been around the lawmaking process or the political process more generally, this is mind-boggling. It makes legal what has for generations been illegal or at least immoral. It returns lawmaking to the kind of favor-trading bazaar that was common in the Gilded Age. And now I fear, with

the rigid ideologue Neil Gorsuch joining the rigid ideologue Sam Alito who replaced O'Connor, that things will get even worse.

That is especially true as we reflect on the role of corporations in campaigns and in a global economy. lito's stirring defense of corporations in Hobby Lobby, of course, builds on that applied by Justice Anthony Kennedy in Citizens United, which was itself amplified by a paean to corporations delivered in a separate opinion and partial dissent by Justice Antonin Scalia—in which he asserted, remarkably, how much the Framers (other than Thomas Jefferson) loved corporations. In both cases, a corporate charter—the idea that these are separate, artificial entities created for narrow and specific purposes—is ignored, dismissed or downplayed in the desire to equate corporations with individuals in granting rights. To Alito, corporations are collections of individuals, and deserve all the protections the individuals in the collective have. Of course, missing from his collective are the employees of the corporation.

Here is the textbook legal definition of a corporation: An association of individuals, created by law or under authority of law, having a continuous existence independent of the existences of its members, and powers and liabilities distinct from those of its members.

Why are for-profit corporations set up? The characterization tells us: to make profits. And the corporate charter has multiple benefits that go way beyond those of individuals. There are major tax benefits unavailable to individuals. There are stringent legal protections from liability unavailable to individuals. For decades, the Supreme Court recognized that reality, and put limits on the ability of for-profit corporations to overwhelm or disproportionately influence elections. Kennedy blew that history apart in Citizens United, and Alito amplified it in Hobby Lobby. When Alito writes about humanitarian and other altruistic objectives, the fact is that for-profit corporations with shareholders justify charitable giving and other altruism to their shareholders as actions that are good for them in their goal of maximizing profits.

Alito tried to make a deep distinction for closely held corporations; reading his decision, one might think that these are mom-and-pop operations, small family businesses. Of course, as many observers have pointed out, Cargill, Mars, Koch Industries and other closely-held corporations have tens of thousands of employees (in Cargill's case, 133,000) and many billions in business and profit. Hobby Lobby is a huge business. Give the Hobby Lobby owners' family credit for their deep religious convictions. But if profit-making were truly subordinated to those convictions, which are strongly pro-life, Hobby Lobby would provide paid maternity leave for employees who shun contraception and abortion to have babies. It doesn't.

But for the majority on the Roberts Court, through a series of rulings that favor corporations over labor or other interests, it is clear that corporations are king, superior to individual Americans—with all the special treatment in taxes and protection from legal liability that are unavailable to us individuals, and now all the extra benefits that come with individual citizenship. Call it the new Crony Capitalism.

Individual Americans have many motives and objectives, some selfish or self-centered or parochial, some more broad-based and altruistic, some focused on family or heritage, some on region, some on the country as a whole, some short-term and some more long-term. But all are based on being American

and built around America's national interest. Companies, Alito notwithstanding, have one central motive, profits.

That is not at odds with America's national interest. When GM's CEO Charles Wilson said to Congress in 1953, "..what was good for the country was good for General Motors and vice versa," he had a point. Corporations and corporate leaders, for many decades, took the long view, and saw a strong American society as key to their own prosperity. But General Motors, in the global economy, is now a global company, even though it is still based in the US and not yet tempted by inversion. Is what is good for a company with huge interests in dozens of countries necessarily good for America? Will it think first—or at all—about the prosperity and needs of the United States? Maybe—but can we say the same thing about "American" companies renouncing their corporate citizenship? When these companies get involved with politics—and you can be sure before long that the Supreme Court will extend the "speech rights" of corporations to include direct contributions to candidates—will they be thinking of America, or of what America can do to protect their interests in other countries? If the money comes from the "American" subsidiary of the foreign owned company, will it only be reflecting the desires and interests of that American entity or will it reflect the interests of its parent? If a company with gambling interests in Las Vegas earns most of its money in Macao and gets involved deeply in American campaign finance, will it be most interested in promoting its interest in Macao—which might be counter to America's interest in its foreign relations with China?

When President Obama, in the aftermath of Citizens United, warned at his State of the Union message that the ruling could mean lots of foreign corporations putting money into US campaigns, Samuel Alito visibly mouthed, "Not true." Of course, Alito was wrong. Foreign interests, especially given the increased role and prevalence of "dark money," with the donors concealed, often by laundering the money through multiple non-profit entities, can find lots of ways to put resources into American campaigns in the new Wild West created by this Court. And now, defining foreign interests is going to become much harder.

All of this also has to be considered in the context of the growing inequality in the country, and the increased imperial attitude and detachment from reality of America's oligarchs. Prime among them is multi-billionaire Stephen Schwarzman, chairman of The Blackstone Group, famous for likening President Obama's suggestion that it might make sense to raise the highly preferential tax rate on carried interest to "Hitler invading Poland." The New Yorker's James Surowiecki noted that Schwarzman, who has called for increasing taxes on the poor, recently opined that Americans "always like to blame somebody other than themselves for a failure."

Tech entrepreneur Nick Hanauer warned his fellow plutocrats in Politico Magazine that this imperiousness, among those who "live in our gated bubble worlds," is helping create a dangerous and destabilizing dynamic—that the kind of inequality we are seeing can never be sustained. A world in which corporations are kings, their employees are not considered as a part of their collectives, and individuals are not their equals, where the ratio of CEO compensation to average employee pay continues to skyrocket way beyond any level in American history, where money is the only significant quality the Supreme Court sees as speech, and where billionaires who are making out like bandits and doing better than ever feel that they are the victims, is not one where broad faith in American democracy can be sustained.

What can Congress do? Here is what I suggested in testimony in 2014. The recommendations remain firm, but the context, after an election where it is entirely possible that Russian interference swayed not just the presidential outcome but the Senate majority, is much more grim. First, despite the steeply uphill battle to enact any reasonable laws these days, it should make every effort to pass the new DISCLOSE Act. Second, the Senate should hold probing hearings on the dysfunctional Federal Election Commission and look to reform it to make it into a reasonably functional body that acts to enforce the law and not to thwart it. Third, for every hearing in the House highlighting the purported "scandal" at the IRS, the Senate should hold a hearing on the real meaning of social welfare organizations and the need to clarify in IRS regulations what the law specifically intends. Fourth, the Senate should pass a rule amending its ethics code to make it a violation for senators or senior staffers to solicit the large contributions for party committees now allowed under McCutcheon. Fifth, Congress should begin serious consideration of a broader reform of the campaign finance system, one that would empower small donors as a counterweight to the oligarchs, having it ready for the day when, as John McCain has predicted, the next huge scandal creates a new momentum for reform. Before that happens, I fear that deep damage will be done to the fabric of the American political system.