Testimony of Fred Wertheimer

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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.

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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.

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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.