

Senator Tom Udall
Statement for the Record
Senate Judiciary Committee hearing on:
Examining a Constitutional Amendment to Restore Democracy to the American People
June 3, 2014

Good morning Chairman Leahy, Ranking Member Grassley, and members of the Committee. Thank you for holding this important hearing on the constitutional amendment that Senator Bennet and I introduced last June.

Like you Mr. Chairman, I don't take amending the Constitution lightly. In *The Federalist* No. 49, James Madison argued that our founding document should be amended only on "great and extraordinary occasions." I agree, but I also believe we have reached one of those occasions.

The integrity of our elections, and ultimately our governance, depends on a vigorous debate in which American citizens truly have a voice. Unfortunately, our elections no longer focus on the needs and interests of individual voters, but are instead shaped by multi-million dollar ad campaigns funded by special interest groups and billionaires with seemingly limitless resources.

According to a joint study by Brookings and the American Enterprise Institute, outside groups spent \$457 million to influence Senate and House races in 2012. In the 2008 election, before *Citizens United*, groups spent \$43.7 million. In 1992, they spent \$6.2 million on congressional elections. There is an obvious trend here, and it's deeply troubling.

I have long been an advocate for reforming our campaign finance system, but the need has never been greater than it is today. In January 2010, the Supreme Court issued its opinion in *Citizens United v. FEC*. Two months later, the DC Circuit Court of Appeals decided the *SpeechNow v. FEC* case. These two cases opened the door to Super PACs. Millions of dollars now pour into negative and misleading campaign ads, often without disclosing the true source of the donations.

Four years after *Citizens United*, the damage continues. In April, a narrow majority of the Court issued its latest misguided decision in *McCutcheon v. FEC*. That case struck down the aggregate contribution limits an individual can make in each election cycle. Most Americans don't have unlimited dollars to spend on elections around the country. They only get their one vote. They can support one candidate – the one who represents their district or state. But for the wealthy, and the super wealthy, *McCutcheon* says they get so much more. That decision gave them a green light to donate to an unlimited number of candidates. Now a billionaire in one state gets to influence the elections in 49 other states.

Under *McCutcheon*, one donor can dole out \$3.6 million every two years directly to candidates and parties. To put that into perspective, an average American working full-time, making minimum wage, would have to work 239 years to make that much money. Our campaign finance system is completely out of balance, and it is time to fix it.

What was more troubling about the *McCutcheon* decision, however, was that Chief Justice Roberts said that preventing quid pro quo corruption – bribery – is the only sufficient

justification for Congress to pass campaign finance laws. Under this extremely narrow definition the Court has laid the groundwork to strike down nearly all remaining regulations. We are likely to see new challenges against laws that limit the amount an individual may contribute to a candidate, as well as laws prohibiting contributions to candidates from corporations.

Senator John McCain said after *McCutcheon* that, “there will be scandals involving corrupt public officials and unlimited, anonymous campaign contributions that will force the system to be reformed once again.” I’m afraid my friend will prove to be correct; our elections are headed back to the pre-Watergate era.

It is now crystal clear that an amendment to the Constitution is necessary to allow meaningful campaign finance rules.

But this problem didn’t start in 2010 with the *Citizens United* decision. Our campaign finance system was hardly a model of democracy before these recent opinions. We have been on this dangerous path for a long time. *Citizens United* and *McCutcheon* may have picked up the pace, but the Court laid the groundwork many years ago.

We can go all the way back to 1976. That year, the Court held in *Buckley v. Valeo* that restricting campaign spending, as well as limiting independent expenditures, violates the First Amendment right to free speech. In effect, the Court said that money and speech are the same thing.

This is a flawed premise, but the Court has continued to rely on it to issue more disastrous opinions, such as *Citizens United* and *McCutcheon*. The damage is clear. Elections have become more about the quantity of cash, and less about the quality of ideas. More about special interests, and less about public service.

We cannot truly fix this broken system until we undo the flawed, inherently undemocratic premise that spending money on elections is the same thing as exercising free speech. That can only be achieved in two ways. The Court could overturn *Buckley* and the subsequent decisions based on it – which seems highly unlikely given its current ideological makeup. Or we amend the Constitution to not only overturn the previous bad Court decisions, but to also prevent future ones. Until then, we will fall short of the real reform that is needed.

That is why Senator Bennet and I, along with several members of this committee, introduced S.J. Res. 19 last June. This amendment is similar to bipartisan proposals in previous Congresses. It would restore the authority of Congress – stripped by the Court – to regulate the raising and spending of money for federal political campaigns, including independent expenditures, and it would allow states to do so at their level. It would not dictate any specific policies or regulations. But, it would allow Congress to pass sensible campaign finance reform legislation that withstands constitutional challenges.

Many of my Republican colleagues and conservative groups claim that our amendment is a partisan election year stunt to rally progressive voters. This ignores the facts.

Since 2010, Americans from across the political spectrum have come out overwhelmingly in support of an amendment. People For the American Way recently summed up the grassroots support for amending the Constitution:

Since the landmark *Citizens United* decision, 16 states and over 550 municipalities, including large cities like New York, Los Angeles, Chicago and Philadelphia, have gone on record supporting congressional passage of a constitutional amendment to be sent to the states for ratification. Transcending political leaning or geographic location, voters in states and municipalities that have placed amendment questions on the ballot have routinely supported these initiatives by large margins.

Our Republican colleagues also ignore the fact that this movement started decades ago – by a Republican. Many of our predecessors from both parties understood the danger. They knew the corrosive effect that money from sources across the political spectrum has on our electoral system. They spent years championing the cause.

In 1983 – the 98th Congress – Senator Ted Stevens, a Republican icon from Alaska, introduced an amendment to overturn *Buckley*. Senator Stevens already saw the deteriorating effect unlimited campaign expenditures was having on Congress. In a speech on the Senate floor on the day he introduced the amendment, Senator Stevens said:

I, for one, would like to see the time come when there would be a limitation on the expenditures and the upward pressure on candidates, so that those who are seeking reelection, those who are seeking to challenge incumbents, or those who are seeking to fill a vacancy would not have this pressure that is brought about by the necessity to raise ever-increasing amounts to campaign for Federal office.

Senator Stevens recognized over thirty years ago that we were in an arms race – that the drive for money would only get worse and Congress's ability to function would suffer.

This was only the beginning of the movement to amend the Constitution. In every Congress from the 99th to the 108th, Senator Fritz Hollings introduced bipartisan constitutional amendments similar to mine. Senators Schumer and Cochran continued the effort in the 109th Congress.

That was all before the *Citizens United* and *McCutcheon* decisions, before things went from bad to worse. The out of control spending since those decisions has further poisoned our elections. But no matter how bad things get, an amendment can only succeed if Republicans join us in this effort, as they have in the past. I know the political climate of an election year makes it even more difficult, but I'm hopeful that we can work together and reach consensus on a bipartisan constitutional amendment.

Many critics argue that such an amendment would repeal or amend the First Amendment's free speech protections. But it does the exact opposite – our amendment is an effort to restore the First Amendment so that it applies equally to all Americans. Right now, a narrow majority of the Supreme Court believe that money and speech are the same thing. That leads to an unacceptable

conclusion – that the wealthiest Americans have greater speech rights than everyone else. Our access to constitutional rights shouldn't be based on our net worth.

They also claim that if Congress can regulate campaign finance spending, it “could” pass sweeping laws that will gut the First Amendment. “Could” is the key word here – the critics like to make radical claims about what Congress “could” do.

Take Senator Ted Cruz's op-ed in the Wall Street Journal on June 1. Senator Cruz states that under this amendment:

Congress *could* prohibit the National Rifle Association from distributing voter guides letting citizens know politicians' records on the Second Amendment. Congress *could* prohibit the Sierra Club from running political ads criticizing politicians for their environmental policies. Congress *could* penalize pro-life (or pro-choice) groups for spending money to urge their views of abortion. Congress *could* prohibit labor unions from organizing workers (an in-kind expenditure) to go door to door urging voters to turn out. Congress *could* criminalize pastors making efforts to get their parishioners to vote. Congress *could* punish bloggers expending any resources to criticize the president. Congress *could* ban books, movies (watch out Michael Moore) and radio programs. [emphasis added]

Spreading fear is one way to argue against this constitutional amendment, but such hyperbole is easily rebutted with facts. The fact is we already know what kinds of laws Congress *would* pass if its authority is restored.

Norm Ornstein, one of the nation's leading scholars on these issues, laid out the history of campaign finance reform at a recent Senate Rules Committee hearing:

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. ... Corruption in the administration of Ulysses S. Grant led to more calls for reform, culminating in the Pendleton Act in 1883, which resulted in the end of the patronage system and assessments. The end of the spoils system led to the rise in influence of corporations, which filled the vacuum in party and campaign funding. A backlash against huge corporate and business contributions, including allegations of outsized corporate influence on President Theodore Roosevelt, led Roosevelt to lead a new reform movement in 1905 and 1906; that led to the Tillman Act of 1907. The Tillman Act made it illegal for “any national bank, or any corporation organized by authority of any laws of Congress” to make a contribution relating to any election for federal office. In 1910, the Federal Corrupt Practices Act required national party committees and congressional campaign committees to disclose their contributions and expenditures after each election.

Scandal continued to spur reform efforts and reform. The Teapot Dome scandal resulted in the Federal Corrupt Practices Act of 1925, which expanded disclosure and adjusted the spending limits upward. Reports of abuse of federal employees working for the re-

election of Speaker of the House Alben Barkley in 1938 led to passage of the Hatch Act in 1939, a revision of the 1883 Pendleton Act, which prohibited partisan political activity by most federal employees and also banned solicitation of contributions from workers on federal public works programs.

Labor's increasing political activity during the presidency of Franklin D. Roosevelt led to several efforts to limit labor's contributions, like those of corporations. In 1947 the Republican Congress made a ban on labor contributions to campaigns permanent, as part of the Taft-Hartley Act.

The Watergate scandal spurred the Federal Election Campaign Act of 1974, which was substantially revised by the landmark *Buckley v. Valeo* decision in 1976. The Bipartisan Campaign Reform Act of 2002 was spurred by scandals over soft money fundraising and the misuse of the funds from corporations and unions for electioneering communications.

These reforms were not radical – they were narrowly tailored responses to restore Americans' faith in the political system after a lack of regulations led to scandals or corruption. While conservatives will present a list of far-reaching laws that Congress "could" pass, a long history demonstrates that Congress will use its authority to enact modest reforms. And let's not forget, any law must pass both houses of Congress and get signed by the president – that is a significant check against any radical legislation getting passed.

Critics also fail to acknowledge that our amendment does not give Congress free rein to pass any and all campaign finance laws. When the Court interprets any amendment to the Constitution, it generally reads in a reasonableness requirement. This means that even if Congress does abuse its authority, and pass the extreme laws conservatives suggest, they can still be overturned as unreasonable. But more importantly, members of Congress who pass extreme laws can be held accountable by their constituents. The same can't be said for Supreme Court justices willing to strike down sensible regulations by a narrow majority.

Another argument against the amendment is that it is intended to protect incumbents. This again misses the point. Under the system as it exists, the pressure to raise money discourages many qualified Americans from ever running for office. When faced with the prospect of needing to raise 10, 15, or 20 million dollars for a Senate seat, many of our country's best leaders simply opt to stay in other careers.

And if you're lucky enough to raise the mountain of cash needed to get elected, that is just the beginning. Senator Hollings recognized the deterioration of our legislative branch due to the increasing influence of money on our elections. In a Huffington Post piece, he wrote:

"Money has not only destroyed bi-partisanship but corrupted the Senate. Not the senators, but the system. In 1966 when I came to the Senate, Mike Mansfield, the Leader, had a roll call every Monday morning at 9:00 o'clock in order to be assured of a quorum to do business. And he kept us in until 5:00 o'clock Friday so that we got a week's work in . . . Today, there's no real work on Mondays and Fridays, but we fly out to California early Friday morning for a luncheon

fundraiser, a Friday evening fundraiser, making individual money appointments on Saturday and a fundraising breakfast on Monday morning, flying back for perhaps a roll call Monday evening.”

I agree with his assessment, and also remember when fundraising wasn't the priority it is today. My father was elected to Congress in 1954, when I was in first grade. Back then, the legislative branch was a Citizens' Congress. Members were in Washington for six months, and then they went home for six months and worked at their profession. But during those six months in session, Congress focused on legislating.

Unfortunately, our current campaign finance system has locked members of Congress into an endless campaign cycle. Elected officials spend far too much time raising money for campaigns, and not enough time carefully considering legislation or listening to constituents. The drive to raise money is constant, and allowing vast new amounts of special interest money into the system will only increase the pressure. This causes a deterioration of Congress's ability to function, including its ability to adequately represent and respond to its constituents. As the money raised and spent on campaigns by special interests continues to climb, members of Congress will have to devote more time trying to keep up in the fundraising race. It is no wonder that, as the pursuit of campaign money has come to dominate politics, the American people have become increasingly dissatisfied with Congress' performance.

Money has poisoned our political system. And the Supreme Court has wrongly equated that money with speech, leaving us with one option for real reform. We must work towards a constitutional amendment that will restore integrity to our elections and legislative process. We, as Americans, believe in government “of the people, by the people, for the people.” Generations of Americans before us have spoken out, worked tirelessly, and even given up their lives so that we might have the chance to have such a government. We cannot sit by as that ideal is lost.

Free and fair elections are a founding principle of our democracy. They should not be for sale to the highest bidder.

Thank you again for holding this hearing.