Remarks by Trevor Potter
Symposium on Corporate Political Spending
The Conference Board
New York, New York
October 20, 2011

I am most grateful to the Conference Board and the Committee for the invitation to speak today. I was asked to put the subject of the Committee's report – corporate political spending – in a broader context. As it happens, that is easy for me to do because I returned yesterday from China, where I had been invited by the Carter Center to speak to officials of the Chinese Communist Party about political transparency, and to discuss practices of openness and disclosure in the U.S. system.

While I was there, I attended a session at a think tank where a young professor asked me about spending by corporations in U.S. campaigns. I explained *Citizens United* and some of the resulting issues. And he said, "What about the shareholders? Are they consulted? What if they don't like how their money is spent?"

So, straight from the People's Republic of China and the Communist Party, questions about democracy, and shareholder democracy, in the U.S.!

This caused me to think about the broader context in which today's discussion occurs. The Committee recommendations properly focus on questions of corporate political practices in today's world – a world created both by the Supreme Court decision in *Citizens United* and by financial turmoil of the last few years, the current Occupy Wall Street movement, and polls showing both a distrust of Corporate America <u>and</u> a lack of confidence in our institutions of government. So, it is logical to think the particular circumstances in which we meet present unique challenges.

As you know, the President of the United States has been critical of the *Citizens United* decision. Let me quote a Presidential statement: "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes." More recently he said, "Every special interest is entitled to justice, but none is entitled to a vote in Congress, to a voice on the bench . . . there can be no effective control of corporations while their political activity remains."

Now, before we get into another debate about whether President Obama is moving from the center to protect his base, and is practicing the politics of division in attacking corporations, let me clarify that those statements were by President Roosevelt – and not even Franklin Roosevelt, but the Republican Theodore Roosevelt, in 1905 and 1910, respectively. This was the same President Roosevelt whose call for the disclosure of all political contributions and expenditures and a ban on corporate political contributions was enacted by Congress in the Tillman Act in 1907. The only reform Roosevelt did not get was government funding of the presidential campaigns of the two main parties. This was in a political environment of great controversy over the power of Wall Street "Trusts" (large corporations). As often happens, this was two-sided: the Trusts sought to elect and defeat candidates, and the Republican Party sought to obtain contributions from them. President McKinley's campaign manager, Mark Hanna, even levied an informal .25% "tax" on the capital base of major corporations to raise funds for the Presidential election.

Thus, for more than 100 years, the issue we are discussing today – political participation by corporations – has been the subject of debate, both in the country at large, and in corporations. The fact that we live and work and decide political issues in the midst of a market economy, in which the government plays a substantial role with direct affects on market participants, creates enormous pressures for industries and corporations to influence government decisions: on taxation, trade policies, subsidies, and regulation. Logically, corporations look not only to influence sitting members of the executive and legislative branches, but to determine who those people are – which party has control, who sits as Chair of relevant committees, who is President.

At the same time, we are a democracy, where the right to vote belongs only to individual citizens. And we have built a great free market economy through the corporate structure, where shareholders own the corporations and vote for Boards of Directors. In these circumstances, there is pressure from voters, and shareholders, for transparency of corporate political activities, and limitations on that activity in the area of candidate elections, where individual citizens are supreme.

For 100 years, or longer, the tensions inherent in this system have been present, and the law on the subject has ebbed and flowed as one side – and then the other – has had the upper hand in the legislatures and the courts.

The 1907 and 1910 disclosure legislation, along with the ban on corporate contributions, was succeeded, with time and changing circumstances, with subsequent legislation. In 1947, a Republican Congress responded to large Labor Union expenditures on behalf of Democrats, especially the re-elections of Franklin Roosevelt, by extending the ban on contributions from corporations to unions, and by prohibiting both from making independent political expenditures.

By 1972, much of this regulatory structure had fallen into disrepair and disuse, and the Nixon administration pressured prominent corporations to make contributions to the President's re-election committee, or to the RNC. Campaign costs between 1956 and 1968 had risen 500%, largely because of increasing media expenses, and the Nixon campaign intended to spend large sums of money. Forgotten were the laws on the books about corporate contributions, which were "honored more in the breach than in the observance" as one executive testified before the Senate after these events unfolded. Forgotten too was that these old statutes had criminal penalties.

The result of this flood of money, much of it corporate, and much of it in cash, was the Watergate scandal – especially when the currency found on the Watergate burglars could be traced back to corporate contributions placed in campaign and White House safes.

The result was criminal charges, a crisis of legitimacy for the Nixon Presidency, and a campaign finance scandal of enormous proportions. Corporations were found to have given money in return for specific government actions – increases in milk price supports, the dropping of anti-trust actions. It is usually forgotten now how many major corporations were found to have violated the law:

> ITT, American Airlines, Braniff, Ashland Oil, Goodyear Tire & Rubber, Gulf, Philips, Greyhound – those were just a few of the well-known corporations caught up in the Watergate campaign financing scandal: 31 executives ended up being charged with criminal campaign violations, and many plead guilty.

The result was a high watermark for political reformers: the 1971, 1974 and 1976 federal election laws, which restated the corporate and labor bans on contributions and expenditures; regulated full disclosure by candidates, parties and independent political committees; established Federal Election Commission, and created a public funding system for Presidential Campaigns.

As history shows, though, the pendulum swings in politics and regulation, and the further from the front pages a scandal recedes, the greater the power of countervailing forces becomes. By the 1990s, there was a push by political parties for more money, and an arms race developed to raise and spend money – individual, corporate and labor, <u>outside</u> of the federal contribution limits and reporting system.

This became known as "soft money" and was spent for "non-federal" party building activities such as office buildings and then "issue ads." Over time, the pressure of political competition gave us "sham issue ads" that featured federal candidates and said "Cong. Jones has never met a tax increase he didn't like. Call Cong. Jones and tell him to stop raising your taxes." And even "Bill Yellowtail took a swipe at his wife. Call him" and tell him to stop: a Montana ad where the only "issue" appears to be a candidate's behavior. And these ads were paid for by more and more brazen fundraising actions by the leaders of the House and Senate of both parties – and the President of the United States. Don't forget the White House coffees!

Both the President and Congressional leadership understood it was difficult for corporations to say no to a request for a contribution when the office holder wielded official government power over regulated industries – and over corporations that either sought specific government action – or hoped to avoid it.

The result of all of this was a new series of Reform Laws – largely the 2002 McCain-Feingold legislation. These did two things.

First, and largely still intact, the law:

- prohibited corporations and unions from contributing <u>any</u> sums – for <u>any</u> purpose - to national political parties and federal candidates. "Soft money" was no more.
- federal candidates and office holders and political party officials were prohibited from soliciting impermissible political funds from corporations and unions.

The second aspect of the law prohibited corporations or unions from paying for "sham issue ads" – the "call Jones and tell him to stop raising your taxes" ads in the middle of the election. The basis for this prohibition was that corporations and unions were prohibited from making expenditures to elect or defeat candidates, and that is what these ads effectively were. These restrictions, on what were termed "Electioneering Communications," were McCain-Feingold's attempt to re-invigorate the 1947 restrictions on corporate and labor expenditures in federal elections.

The Supreme Court upheld all of these provisions by a vote of 5-4 in the 2003 *McConnell* challenge to McCain-Feingold. Justice O'Connor was the key vote. Parenthetically, I should note that she was the only Justice who had ever run for public office, served in a state legislature, or raised campaign funds. I am convinced her personal experience – which no one on the current Court has – influenced her understanding of campaign finance issues and the nature of the potential corruption.

Several years later, once Justice O'Connor had left the Court and been replaced by Justice Alito, the Court voted 5-4 to overrule *McConnell* and hold that corporate and union independent political spending could not be prohibited by the government because of the first amendment. This did not affect the ban on corporation contributions to candidates and party committees, but only permitted independent corporate political communications – such as taking out ads to speak directly to the public.

Crucially, this corporate speech need not be direct – the corporation may take out an ad in newspapers or on television and say "Paid for by the XYZ corporation," but it need not. Instead, it may give its corporate funds to a trade association – a 501(c)6 in tax law terms, or a social welfare organization (a 501(c)4), or a Super Pac – an independent expenditure committee – or a

527, another type of political organization. In those cases, the corporation's name does not appear on the advertising, but rather the name of the group that collected the money – the Chamber of Commerce, the Sierra Club, the NRA – or new groups with no public profile at all, like "Americans for a Better Country."

This raises the crucial question of transparency and disclosure of political speech and spending. Transparency has been a basic principal of laws regulating political spending for more than century, and has usually had bipartisan support. Republicans opposed to McCain-Feingold often called for a "disclosure only" system for contributions and expenditures.

The law before Citizens United required disclosure of:

- all contributions to, and expenditures by, candidates, party committees, and PACs;
- disclosure of "Independent Expenditures", ads expressly advocating a candidate's election or defeat or its "functional equivalent"
- disclosure of "electioneering communications" – the McCain-Feingold term for ads <u>mentioning</u> candidates and run before the primary or during the general election.

Citizens United struck down the ban on corporation funding of independent expenditures and Electioneering Communications, but upheld the <u>disclosure</u> provisions – 8-1, with all but Justice Thomas upholding the broad electioneering disclosure provisions of McCain-Feingold. As Justice Kennedy said"

> "Modern technology makes disclosure rapid and informative. A Campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today…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. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests… This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

The Court's constitutional endorsement of the requirements for disclosure of political spending is significant, as is its catalogue of the benefits to shareholders and voters. However, in light of recent events, we have to ask "what were they smoking" when they confidently said that, as of "today", a system exists that "pairs corporate independent expenditures with effective disclosure?"

We read regularly about new groups that are created for the purpose of engaging in political advertising without disclosing their donors. Even the Colbert Report shows how to create a new 501(c) 4 providing donor secrecy in under four minutes! What is going on here? The short answer is that there is an ongoing legal battle between disclosure and non-disclosure advocates, over the wording and meaning of specific federal statutes and regulations.

The McCain-Feingold requirement of disclosure of all donors by entities paying for federal Electioneering Communications has been interpreted by anti-disclosure FEC Commissioners as saying that only the names of donors who <u>designated</u> their money for such communication need to be disclosed. Now three of the six FEC Commissioners make the extreme argument that only these donors who designated their money for the <u>specific ad</u> being run need be disclosed. And since it takes four votes on the FEC to take any action, the agency is effectively deadlocked: it is even split 3-3 on whether to open a rulemaking on whether and how to change its regulations and disclosure requirements in light of *Citizens United*. What I believe to be the FEC's erroneous statutory interpretation is currently being challenged in Court, but the issue may well not be decided before the 2012 elections.

The 2010 experiences of the Target Corporation. It gave $250,000 in corporate funds to a Minnesota political committee which then publicly disclosed its contributors in state reports. The Committee was created to support a candidate who turned out to be objectionable to many of Target's employees, customers and shareholders, and the company faced shareholder resolutions and a consumer boycott. All of this raised a number of issues, which are addressed extensively in the Conference Board report issued today.

At first blush, the Target experience would seem to argue that savvy corporate lawyers should seek to <u>hide</u> corporate political expenditures – recommending that corporations only contribute funds to C4s and C6s that do not publicly disclosure their donors.

However, as I have indicated, there is currently an ongoing legal battle about when such tax exempt groups have to disclosure their donors when they make political expenditures and Electioneering Communications. We do not know how these regulatory, court and legislative battles will ultimately come out. And even corporate secrets do not always remain secret, as we see in the age of leaks on the Internet.

Further, the Target example argues that corporations can harm their brand and relations with key constituencies if they do not think through these issues in advance: As the Committee's Report notes, issues that corporations should address proactively today are:

- the existence of a well-thought out corporate policy on political activity
- the role of the Board in establishing the policy and monitoring ongoing activity

- internal auditing to ensure the policy is adhered to
- the levels of transparency that are either legally required, or beyond legal norms but in the interest of the corporation
- what example does Corporate America want to set? Outside tax exempt organizations may or may not currently be required to disclose their donors when they run political advertising, but should corporations proactively disclose when they donate money used for these purposes? How does the disclosure or secrecy of these monies comport with corporation values?

These are all questions that corporations have faced in one form or another for many years. The issue is more crucial today, though, given the changes in law created by the Citizens United decision.

Thank you.